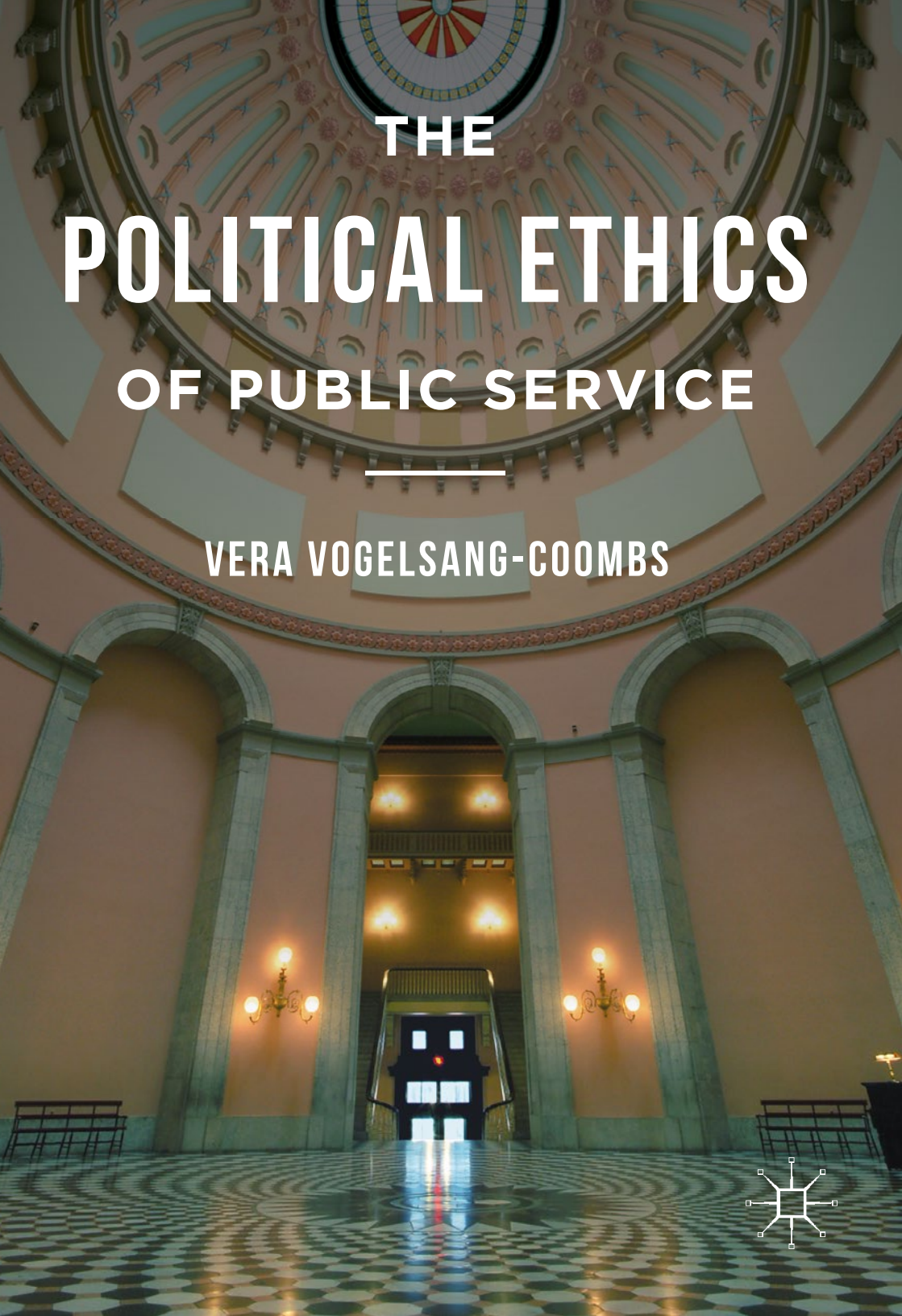

THE POLITICAL ETHICS OF PUBLIC SERVICE

VERA VOGELSANG-COOMBS

The Political Ethics of Public Service

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The Political Ethics of Public Service

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Dedication

To
Steven L. Coombs

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PART I

Introduction

CHAPTER 1

Case Study of Cuyahoga County, Ohio: The American Way of Ethics

[According to Friedrich Nietzsche,] morality is neither absolute nor rational nor natural… the world has known many moral systems, each of which advances claims of universality; all moral systems are therefore particular, serving a specific purpose for their propagators or creators, and enforcing a certain regime that disciplines human beings for social life by narrowing our perspectives and limiting our horizons.

Robert C. Holub, Introduction to Beyond Good and Evil

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I, for instance, want to live, in order to satisfy all my capacities for life, and not simply my capacity for reasoning, that is, not simply one-twentieth of my capacity for life … yet it is life, and it is not simply extracting of square roots.

Fyodor Dostoevsky, Notes from Underground

On November 3, 2009, the voters of Cuyahoga County, the most populous and urbanized county in Ohio, adopted a home-rule charter to modernize government. This reform replaced the commission form of county government established in 1810. The Cuyahoga County charter government authorized an eleven-member, district-based, county council and an elected county executive, and all but one of the eight independently elected constitutional (row) officers under the older commission form were eliminated. This 2009 reorganization created a county structure that resembled the

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familiar strong mayor-council form of municipal government even though counties do not have municipal authority under Ohio law. Shortly after becoming operational on January 1, 2011, the new county council, as mandated by the charter, enacted a strict ethics ordinance. This ordinance blended Ohio's ethics laws with the recommendations put forth by more than one thousand citizen-volunteers who participated in thirteen advisory workgroups during the governmental transition.

The voters' decision to reform Cuyahoga County's government was a response to the special circumstances spawned by a massive public corruption investigation of county elected officials. Specifically, on July 28, 2008, more than two hundred agents of the Federal Bureau of Investigation (FBI) and Internal Revenue Service executed warrants to search the homes and offices of two county commissioners, the elected county sheriff, the elected county auditor, the elected sanitary engineer, two county judges and their aides, and several top administrative officials. In addition, the federal agents raided the offices of prominent business executives for evidence of bribes given to county officials in exchange for securing lucrative contracts. The federal government's investigations—the biggest in the history of the FBI—resulted in the prosecution and conviction of more than fifty public officials.[1]

Specifically, the first county elected official to resign and be convicted was the Cuyahoga County sheriff. The sheriff, a former pipe fitter, who held office for more than 30 years, pled guilty for theft in office and for ordering his employees to sell tickets to his political fund-raisers while they were on duty at the County's Justice Center. He also broke Ohio's ethics law by hiring his son as a special deputy. Given the sheriff's advanced age and serious illnesses, he received a fine and a sentence of 1 year of house arrest, along with the order to pay restitution of $130,000. A decision of the Ohio Elections Commission caused additional public outrage because it permitted the sheriff to use leftover campaign funds that he illegally raised to pay the restitution.[2] In contrast, a federal jury found the Cuyahoga County Commission president, who was also the chair of the county Democratic Party, guilty of thirty-one bribery and racketeering charges, and he received a sentence of 28 years in federal prison. The county auditor was convicted

[1] Willeke, Susan. "Presentation." Speech, The Ohio Ethics Commission, 2011 Columbus Seminar, Columbus, OH, March 2011.

[2] Vera Vogelsang-Coombs and Lawrence F. Keller, "The Government and Governance of Ohio: Party Politics and the Dismantling of Public Administration," *Administration and Society* 47, no. 4 (May 2015).

on twenty-two corruption charges, and was sentenced to nearly 22 years in federal prison. The auditor's lighter sentence reflected a plea bargain that included his agreement to testify against others, including the commission president, about patronage hiring, reduced property assessments for cronies, the fixing of court cases, and the acceptance of bribes.

During the monumental public corruption investigations, *THE PLAIN DEALER*, the metropolitan newspaper of Cuyahoga County, ran continuous stories about the scandals under the banner of the "County in Crisis." Furthermore, the federal investigations motivated the local business chamber to organize a political movement aimed at modernizing the structure of Cuyahoga County's government. The chamber's leaders sponsored an intensive marketing campaign designed to shape public opinion against retaining the commission form of government, portrayed by The Plain Dealer's frequent editorials as a breeding ground for corruption. Part of the logic behind the aggressive marketing campaign was to avoid the political inertia that stalled a previous attempt to reform the government of Cuyahoga County. In 1996, a charter commission produced a comprehensive reform proposal, but it received no political support and never appeared on the ballot. By 2009, the voters were ready to eliminate the influence peddling, nepotism, and favoritism associated with Cuyahoga's scandals, as they overwhelmingly adopted the reform proposal for a charter government (66 % said "Yes" in the referendum). The extensive federal investigations and the intense media coverage of the "County in Crisis" created the political climate for change that the voters endorsed.[3]

Three months after taking office, the new county council adopted a comprehensive ethics ordinance that extended the scope of Ohio's strict ethics laws to include all county elected officials and employees, as well as lobbyists and vendors, and mandated annual ethics training for all of them. In addition, this ordinance required vendors to participate in procurement training and established a whistleblowing policy that was stricter than that of the state. The county council also established an independent office, the Agency of Inspector General, responsible for rooting out waste, fraud, and abuse in county operations, and for enforcing the ethics ordinance.[4]

[3] Ibid., 355.

[4] See Cuyahoga County, OH, Council Ordinance No. 02-012-004. May 22, 2012.

The American Way of Ethics: The Problem

The Cuyahoga County reorganization illustrates the problem associated with the American way of ethics. The American way of ethics entails an "ethics moment" in which external pressures for cleaning up corruption in government become overwhelming. An ethics moment functions as a "moment of madness" in which an unlikely political change suddenly becomes possible.[5] Nevertheless, organizations (and individuals) "stumble into ethics."[6] If elected officials ignore an ethics moment, then the stability of their representative governments is in peril. The reason is that citizens feel betrayed and disaffected by the scandals. In fact, the incumbent Cuyahoga County commissioners attempted to ignore the ethics moment produced by the federal corruption investigations. To thwart political change, the incumbent commissioners (whose offices were eliminated under the reform proposal) placed directly onto the same ballot as the charter government referendum an alternative for establishing a charter commission to study whether to reorganize Cuyahoga County's government. The commissioners also mobilized a political coalition of prominent local elected official supporters to campaign against the adoption of the charter government.

According to Donald Menzel, ethics moments in organizations with a shady history of ethical governance do not disappear suddenly.[7] Thus, it is no surprise to find that citizens felt betrayed once the publicity surrounding the federal investigations made them aware of the extensive wrongdoing in Cuyahoga County. According to two psychologists interviewed by *THE PLAIN DEALER*, the Cuyahoga County crisis led to citizens' feeling "ripped off by government" that, in turn, fostered "a sense of skepticism and distrust, a sense of anxiety and uneasiness about who is running the show, and an alienation from government."[8] Fueled by the barrage of media stories about the "County in Crisis," this alienation prompted Cuyahoga's ethics moment such that the voters in 2009 decisively rejected the commissioners' charter commission alternative; 72 % said "No" in the referendum.[9]

[5] Aristide R. Zolberg, "Moments of Madness," *Politics and Society* 2, no. 2 (March 1972).

[6] Donald C. Menzel, "Understanding Ethics and Governance," in *Ethics Moments in Government: Cases and Controversies* (Boca Raton, FL: CRC Press, 2010), 8.

[7] Ibid., 4.

[8] Cited in Diane Suchetka, "Cuyahoga County's Corruption Scandal Affects Our Collective Psyche," *The Plain Dealer* (Cleveland, OH), September 28, 2010, accessed June 3, 2013, http://www.cleveland.com/healthfit/index.ssf/2010/09/cuyahoga_countys_corruption_sc.html.

[9] Vogelsang-Coombs and Keller, "The Government and Governance," 356.

In the American way of ethics, conspicuous ethics consumption follows an ethics moment. Conspicuous ethics consumption is designed to restore public confidence in a tainted government. As in Cuyahoga County, ethics consumption involves the adoption of ethics codes, policies, and procedures; the establishment of ethics officers and ethics enforcement agencies; the implementation of on-the-job ethics audits, training, and educational programs; and the installation of ethics (whistleblower) hotlines. Ethics consumption is experienced in American government in all branches and at all levels. In fact, forty-one American states have ethics enforcement commissions, of which some have more than one ethics enforcement agency; the remaining nine states chose to regulate the ethical conduct of public servants through constitutional officers, such as the state attorney general or the secretary of state.[10] At the federal level, the Office of Government Ethics works with more than 5,000 ethics officers in 132 executive branch agencies; together they oversee approximately three million civilian officials and employees.[11] In addition, there are seventy-two statutorily based inspectors general throughout the federal government, who conduct audits and investigations to combat "waste, fraud, and abuse."[12] Furthermore, the US Congress has ethics offices in both chambers: the Office of Congressional Ethics, which is a non-partisan independent body covering the 435 elected members of the US House of Representatives, and the Select Committee on Ethics, which covers the 100 elected members of the US Senate. The US Judicial Conference upholds the codes of conduct for US judges and judicial employees,[13] while each of the fifty states has its own commissions on judicial conduct.[14]

[10] National Conference of State Legislatures (NCSL), "Oversight/Ethics Commissions and Committees," NCSL, last modified 2015, accessed June 20, 2015, http://www.ncsl.org/research/ethics/oversight-ethics-commissions-and-committees.aspx.

[11] "Mission and Responsibilities," OGE, accessed June 20, 2015, http://www.oge.gov/About/Mission-and-Responsibilities/Mission—Responsibilities/.

[12] "The Inspectors General," CIGIE, last modified July 14, 2014, accessed June 20, 2015, https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf.

[13] "Code of Conduct for U.S. Judges," United States Courts, accessed June 20, 2015, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

The justices of the U.S. Supreme Court are not covered under the Code of Judicial Conduct for U.S. Judges.

[14] National Center for State Courts (NCSC), "Membership of Judicial Conduct Commissions," NCSC, last modified 2013, accessed June 20, 2015, http://www.ncsc.org/~/media/files/pdf/topics/center%20for%20judicial%20ethics/composition.ashx.

Furthermore, in the American way of ethics, ethics moments and conspicuous ethics consumption are not limited to the public sector. For instance, an ethics moment in non profit management emerged from the abuses of tax-exempt status, excessive executive compensation, and inappropriate use of charitable funds at the United Way of America in the 1990s. In 2002, the Enron scandal not only led to this firm's bankruptcy but also produced an ethics moment for corporate America by leading to the collapse of the prominent accounting firm Arthur Andersen. This corporate ethics moment uncovered the bilking of securities investors, fraudulent financial activity, conflicts of interest, and boardroom failures (that included the neglect of an existing company ethics code). In response, the Congress enacted the Sarbanes-Oxley Act (SOX).[15] SOX established the Public Company Accounting Oversight Board, with the mission to restore public confidence in the auditing and accounting industry, and the Financial Accounting Standards Board, with the mission to restore public confidence in the securities industry. Overall, SOX instituted more than three hundred regulations that set strict standards for public boards, executive leadership teams, and public accounting firms. SOX also imposed severe criminal penalties on corporate chief executive officers (CEOs) and chief financial officers for violations of financial controls, inaccurate reporting of financial information, and conflicts of interest.[16] In effect, the SOX legislation created a full employment act for ethics consultants, especially lawyers and experts in business ethics, nonprofit ethics, public sector ethics, and medical ethics. In other words, the American way of ethics has become a big business in the USA.

[15] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, § 116, 2002 Stat. 745 (July 30, 2002).

[16] In its 2006 survey of 200 companies, Financial Executives International, a professional association of controllers, found that the total average SOX compliance costs ran at $1.7 million for firms with centralized operations and $4.0 million for firms with decentralized operations, 18,070 hours of internal people and 3,382 hours of external people (apart from the independent auditors), and auditor attestation fees of $1.2 million (apart from the annual fees for financial audits). Moreover, 78 % of survey participants believed that the costs of compliance exceeded the benefits, but another 60 % said the compliance had resulted in greater investor confidence in financial reports.

Janet Russell, "FEI Survey: Management Drives Sarbanes-Oxley Compliance Costs Down by 23 %, But Auditor Fees Virtually Unchanged," FEI, last modified May 16, 2007, http://www.financialexecutives.org/KenticoCMS/News—Publications/Press-Room/2007-press-releases/FEI-Survey—Management-Drives-Sarbanes-Oxley-Compl.aspx.

Ethics moments and the conspicuous ethics consumption associated with the American way of ethics are costly, politically as well as financially. Underpinning Cuyahoga County's sudden political change is the reality that both the unreformed and reformed governments are immersed in partisan politics. Most of the newly elected Cuyahoga County council officials under the new charter government resembled the previous office-holders under the old commission form. In fact, most new county council members held elective offices in municipalities within Cuyahoga County or at the state level, and all won their elections as the endorsed candidates of the two major political parties. Moreover, the reformers claimed that the charter government would allow for new blood to be injected into the political system of Cuyahoga County, but this did not happen. Third-party candidates had difficulty getting onto the ballot for the seats on the county council and the county executive's office because Ohio's election law requires a much higher threshold for the certification of their signatures. The law required 50 signatures for candidates from either of the two major political parties to get onto the ballot, whereas it required 4,556 signatures (or 5 % of the large Cuyahoga electorate) for third-party candidates. Thus, the partisan politics of Cuyahoga County was statutorily reinforced.[17]

Additionally, the reorganization did not alter the root cause of Cuyahoga County's corruption—one-party (Democratic) dominance: eight endorsed Democrats won eleven seats on the county council, and the endorsed Democrat won the office of county executive.[18,19] Nevertheless, Cuyahoga's new charter government gave extensive economic development authority to the county executive, and also gave economic development interests, such as developers, greater access to county resources than under the unreformed commission government.[20] In effect, the reorganization of Cuyahoga County's government expanded the power of the dominant political party and the political capital of newly elected partisan officials. Moreover, the Cuyahoga County executive became the second most powerful political

[17] Vogelsang-Coombs and Keller, "The Government and Governance."

[18] Ibid.

[19] Three of the eleven new county council members elected in 2010 were Republicans. The last time a Republican was elected to the Cuyahoga County Commission was James Petro in 1991, and he served one four-year term. In 1994, Petro was elected Auditor of Ohio.

[20] Ibid.

Under Ohio law, counties without home-rule charters cannot enact legislation, but they do have control over extensive financial resources.

executive in Ohio after the governor. In the end, the ethics reform changed only the elected officials who controlled Cuyahoga County, as is typical of most governmental reorganizations.[21] Consequently, the Cuyahoga County reform hinges on the ethical conduct of the officeholders because few structural barriers impede the two major political parties.[22]

In effect, the American way of ethics has a bias toward the survival of political institutions: while the visible form of Cuyahoga County's government changed, the underlying partisan-driven governance patterns survived. This is no surprise since the two-party system *is* the organizing mechanism of the government and governance of Ohio, and in most American states. Furthermore, Ohio's election law grants the two major parties the powers to nominate and endorse candidates in primary elections, and to fill vacant legislative, county, and municipal offices.[23] Given that Cuyahoga County's electorate is overwhelmingly Democratic, the Democratic Party organization, chaired by the Cuyahoga County Commission president, used these partisan powers extensively. In other words, the choice of institutional structures and procedural arrangements in the reformed Cuyahoga County had significant partisan political implications that the charter government reformers did not appreciate. This is not to suggest that Cuyahoga's public officials should have ignored the widespread corruption. As C.A.J. Coady argues, if government is corrupt, as shown in the federal investigations, then the accommodation and maintenance of the status quo are unacceptable.[24] In the short term, the charter government produced some benefits, including the public perception that new Cuyahoga County was cleaner than its predecessor, as well as the completion of several major downtown economic development projects. However, the reorganization gave the politically

[21] Vera Vogelsang-Coombs and Marvin J. Cummins, "Reorganizations and Reforms: Promises, Promises," *Review of Public Personnel Administration* 2, no. 2 (Spring 1982).

James G. March and Johan P. Olsen, "Organizing Political Life: What Administrative Reorganization Tells Us about Government," *American Political Science Review* 77, no. 2 (1983).

Harold Seidman, *Politics, Position, and Power: The Dynamics of Federal Organization*, 5th ed. (New York, NY: Oxford University Press, 1998).

[22] Vogelsang-Coombs and Keller, "The Government and Governance," 359.

[23] David E. Sturrock, John C. Green, and Dick Kimmins, "Ohio Elections and Political Parties in the 1990s," in *Ohio Politics*, ed. Alexander P. Lamis and Brian Usher, revised & updated ed. (Kent, OH: Kent State University Press, 2007).

[24] C. A. J. Coady, "Dirty Hands," In *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Cambridge, MA: Blackwell Publishers, 1993), 422.

ambitious Democratic county executive a stepping-stone to run for governor, and he stepped down after one term to campaign for gubernatorial office. The crucial point is that the reformed government did little to change how Cuyahoga County governed its citizens. Despite the public's moral outrage and condemnation, the American way of ethics allowed the underlying system of partisan governance to drive the institutional redesign of Cuyahoga County. Thus, it is no surprise that the second individual elected to the position of Cuyahoga County was a Democratic Party regular, a term-limited state legislator, and a former Speaker of the Ohio House of Representatives. *Plus ça change, plus c'est la même chose.*

The American way of ethics, as illustrated in this case study, is pervasive in US government and governance. As the Holub epigraph to this chapter suggests, the American way of ethics mobilizes ethical biases serving the power purposes of their propagators while narrowing their scope of political possibilities. This book offers the political ethics of public service as an alternative to the quick ethics fixes that end up reinforcing the status quo. As will be shown, the political ethics of public service offers a governance approach that balances continuity and change in the American democratic republic. Besides securing the constitutional freedoms of citizens, the political ethics of public service endows Americans with a future of ethical progress and great possibilities.

CHAPTER 2

Introduction

The Political Ethics of Public Service: The New American Way of Ethics

> *The term "politics" is usually thought of as the phenomenon of "partisanship" in a particular setting. Actually, of course, it comprehends the whole living and acting process of governance, of which parties are only one feature, however, important. And, of course, we quite sensibly refer to "campus politics," "departmental politics," "church politics," and many more. "Politics" is to be usefully defined as "the business of recognizing, treating, balancing, or resolving the different interests and functions of individuals and groups. More particularly, it is this business at the level of sovereignty; it is governance.*
>
> *Paul Appleby, "Making Sense of Things in General"*

The Political Ethics of Public Service is based on my 30 years of experience as a political scientist in the field of public administration. Besides integrating the practice of American politics into public service ethics, this book provides a defense of politics in public service ethics. Defending politics in public service ethics is necessary because an anti-political and problematic approach to public service ethics, which I call "the American way of ethics," currently prevails in the field of public administration.

This book focuses on career public servants. The reason is that career public servants collectively outnumber the other institutional actors in American government, that is, the elected officials in the executive and legislative branches of American government as well as the judges in the

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judiciary. There are approximately 25 million career public servants as compared with 0.5 million elected officials and their political appointees who hold their offices for a short term.[1] Given their lifetime appointments, career public servants exercise enormous power in how political institutions are sustained. In this way, they give meaning to the practices of normative democracy.[2] However, collectively, career public servants appear as a massive and unresponsive bureaucracy, which leads to partisan-driven allegations that government is not working because it is out of control.[3] The allegations of "a bureaucracy problem" are a recurring political controversy that often results in the quick fixes and remedies associated with "the American way of ethics."

"The American way of ethics" is problematical because it is an apolitical ethos. It assumes that public servants are a special class of public-spirited citizens whose official conduct is then corrupted by American politics. Given this corrosive effect of politics, career public servants are forced to be saints or scoundrels to uphold or abandon their special public service ethos. Thus, they are left with "Hobson's choice"—to experience the torment of martyrdom or to resign.

In contrast, the view offered here is that career public servants must be a part of, rather than isolated from, American politics, to be effective on the job. As indicated by the Appleby epigraph, conflict and politics are both "normal" in that they inhere in the course of everyday life. The involvement of career public servants in politics makes life better for ordinary Americans.[4] Yet, career public servants subscribe to the view that politics contaminates their work.[5] *The Political Ethics of Public Service* argues that, instead of corrupting career public servants, the interplay of politics and ethics is necessary for protecting the democratic freedoms of Americans.

[1] U.S. Department of Commerce Bureau of the Census, *1992 Census of Governments: Popularly Elected Officials*, by U.S. Census Bureau, report no. GC92(1)-2 (Washington, DC: Administrative and Publications Services Division, 1995), v-vi, PDF.

[2] Douglas F. Morgan et al., *Foundations of Public Service*, 2nd ed. (Armonk, NY: M.E. Sharpe, 2013), 4.

[3] Herbert Kaufman, "The Fear of Bureaucracy: A Raging Pandemic," *Public Administration Review* 41, no. 1 (January/February 1981).

Vera Vogelsang-Coombs and Marvin J. Cummins, "Reorganizations and Reforms: Promises, Promises," *Review of Public Personnel Administration* 2, no. 2 (Spring 1982).

[4] Michael W. Spicer, "The Virtues of Politics in Fearful Times," *International Journal of Organization Theory and Behavior* 17, no. 1 (2014): 86.

[5] Camilla Stivers, *Governance in Dark Times: Practical Philosophy for Public Service* (Washington, DC: Georgetown University Press, 2008), 27.

Although untidy, contentious, and imperfect, politics is inherently a moral activity and a proven practice to govern pluralist US society under immense cross-pressures through conciliation rather than coercion. My intent is to show that politics strengthens the political ethics of public service while stabilizing and nurturing an ever-changing American society. As Bernard Crick eloquently states, politics should "be valued almost as a pearl beyond price in the history of the human condition."[6]

Like Crick, this book defines political ethics as constitutional ethics. Political ethics is a realistic form of both ethics and politics.[7] With this in mind, *The Political Ethics of Public Service* offers career public servants a much-needed constitutionally centered approach to public service ethics instead of the prevailing anti-political American way of ethics. The underlying premise is that career public servants are accountable to the constitutional regime as a whole. My constitutionally centered approach to American public service ethics draws inspiration from two giants in the field of political science and public administration—Frederick Mosher and John Rohr.

In his seminal work *Democracy and the Public Service*, Mosher concentrates on the relationship between American public service and normative democracy.[8] For Mosher, normative democracy derives from Abraham Lincoln's Gettysburg Address in which the president described the US nation as "conceived in Liberty" and "dedicated to the proposition that all men are created" and the American government as "of the people, by the people, and for the people."[9] Hence, Mosher focuses on how the American constitutional (regime) values of liberty and equality guide the design and the operation of collective (democratic) decision-making in the political institutions of American public service. Mosher also focuses on the special role of appointed administrative officers, that is, career public servants, whose tremendous influence on American society is shaped by their backgrounds, educations, orientations, and values. Given that career public servants are not elected and, therefore, are removed from the direct accountability of the people, Mosher is rightfully concerned about how they can operate consistently with normative democracy. For him, the

[6] Bernard Crick, *In Defence of Politics*, 2nd ed. (Chicago, IL: University of Chicago Press, 1972), 17.

[7] Ibid., 146.

[8] Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (New York, NY: Oxford University Press, 1982), 3.

[9] Quoted in Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (New York, NY: Simon & Schuster, 1992), 261.

question then is how to assure the American people that a large body of non-elected career administrators functioning in the government they have authorized will act as agents in the interests of all of the people.[10]

The answer to Mosher's question about the compatibility of normative democracy and American public service is found in Rohr's influential books *To Run a Constitution* (1986) and *Ethics for Bureaucrats* (1989). Rohr formulates a normative theory of public administrative behavior that is grounded in the Constitution. For Rohr, the Constitution's ideals and text, the historical context of the nation's founding, and the flow of constitutional law provide the political and ethical foundations of American public service, and these sources give meaning to the oath of office in which career public servants promise to defend and protect the Constitution. For these reasons, Rohr argues career public servants collectively comprise an essential institution within the American constitutional regime even though they are not explicitly mentioned in the Constitution's text. Rohr also argues that the constitutional standing of career public servants derives from the Constitution's provisions that make possible the separation of powers and the rule of law, giving them a legal but a constrained source of authority to govern. Thus, career public servants legitimately complement the governing activities of the indirectly elected president and popularly elected officials. Rohr concludes that the constitutionally bounded actions of career public servants function as a "balance-wheel" among the institutional actors in the separated branches of American government that share governing powers. As balance-wheels in constitutional governance, career public servants facilitate legal and community-based change that helps American society to make ethical progress. In effect, Rohr not only dignifies the job of career public servants but also elevates American public service in the life of the nation.

Building on Rohr's normative theory of public administrative behavior, my book aims at helping career public servants internalize and operationalize the Constitution's regime values to protect the democratic freedoms of Americans while civilizing democratic politics. Specifically, *The Political Ethics of Public Service* uses well-known historical cases and contemporary issues to illuminate how career public servants can reconcile normative democracy and public service derived from US constitutionalism and enduring governing traditions.

[10] Mosher, *Democracy and the Public*, 5.

American Politics and Democratic Public Service

As shown in Fig. 2.1, one side of the political ethics of public service is politics. According to Crick, politics is a moral activity of free men and women that functions to preserve a complex community because neither tradition nor arbitrary rule can preserve it without undue coercion.[11] To preserve a complex community, politics provides governing methods that emphasize conciliation rather than violence or coercion so that diverse and conflicting interests can craft compromises based on a common interest to survive.[12] Furthermore, political activity "is inventive, flexible, enjoyable, and human; it can create a sense of community…it does not claim to settle every problem or to make every sad heart glad, but it can help in some way in nearly everything, and where it is strong, it can prevent the vast cruelties and deceits of ideological life."[13]

This book broadly defines American politics in democratic public service. The most familiar definition of American politics is majority rule in legislative assemblies, and it associates with the practical activities of political parties that operate in the electoral arena. Partisan politics help political parties to win public offices so that their members can staff and

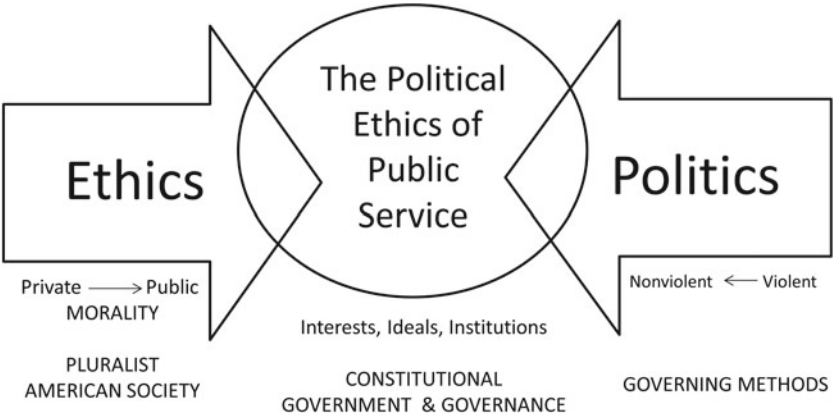

Fig. 2.1 The political ethics of public service

[11] Crick, *In Defence of Politics*, 25, 146.
[12] Ibid., 31.
[13] Ibid., 146.

control the governing institutions of American public service. However, pure partisan politics is governed on prescriptions of practical experience and expediency, rendering moral principles and ethical practices as secondary or irrelevant in the pursuit of power.[14] As Patrick A. Sweeney, a distinguished Democratic legislator who spent more than 30 years in the Ohio General Assembly, once quipped, "I would support the Devil if it meant that I would gain a majority for my party to win and stay in office."[15] In effect, these partisan assessments reflect short-term election cycles and political criteria, such as bipartisanship.[16] Sweeney, also, says that incidents and accidents in public life give partisans unexpected opportunities to formulate strategies to remain in and win new offices.

Partisan politics provides one method for peaceful change in American government and society. Starting with the presidential election of 1800 of Thomas Jefferson over John Adams, the victorious political party in power does not eliminate (or execute) those who oppose it; the party out of power voluntarily obeys the declared will of the majority of the moment.[17] If, however, one political party continuously holds office for too long, then corruption and arrogance are likely to set in, as happened in Cuyahoga County, Ohio. The upshot is that cynicism pervades the general public, and civic morale breaks down.[18] Partisan politics, unsurprisingly, has a negative connotation because it associates corruption with American government.[19]

The Political Ethics of Public Service views ethics and politics as inseparable for two reasons. First, ethical values shape political behavior in all domains of American life, and second, politics is not a necessary evil but "a realistic good."[20] Thus, this book harnesses some elements of practical politics by rejecting conceptions of public service ethics that disqualify the experiences of practical politics. Instead, my conception of political ethics

[14] Leslie Lipson, *The Great Issues of Politics: An Introduction to Political Science*, 10th ed. (Upper Saddle River, NJ: Prentice-Hall, 1997), 22.

[15] Sweeney shared his comments with students enrolled in Cleveland State University's (CSU) Columbus Seminar on March 1, 2013. Sweeney and the author team-teach this Seminar at CSU's Levin College of Urban Affairs.

[16] Charles E. Lindblom, *The Policy-Making Process*, 2nd ed. (Englewood Cliffs, NJ: Prentice-Hall, 1984).

[17] Lipson, *The Great Issues of Politics*, 250.

[18] Ibid., 251.

[19] Paul H. Appleby, "Making Sense of Things in General," *Public Administration Review* 22, no. 4 (December 1962).

[20] Crick, *In Defence of Politics*, 146.

integrates activities of practical politics because in ethics, "the concrete situation is everything."[21] In place of the hypothetical examples of moral philosophers, this book uses concrete examples drawn from practical politics to highlight political behaviors neglected in ideal ethics theories. These non-ideal circumstances "dwell in a world of ethical judgment different from both the detailed regulations and the noble aspirations that constitute most codes and many conceptions of ethics."[22]

Besides partisan politics, American politics has two other institutional forms examined in this book—administrative politics and judicial politics. Administrative politics is due to a clash of governance perspectives inside the bureaus of the executive branches of government. In bureaucratic governance, career public servants compete for scarce resources and political power among themselves and compete with elected chief executives, political appointees, the professions, and interest groups, such as public employee labor unions.[23] In practice, administrative politics provides a check on partisan politics. Judicial politics includes the decisions of the federal and state courts as well as the political behavior of key officers of the court, such as public prosecutors. Judicial politics socializes conflicts and controversies extant in pluralist American society through the use of rhetorical argument and contestation (adversarial) procedures.[24] Whereas judicial politics restrains the other types of politics, partisan and administrative politics countervail judicial politics. All types of politics inform the constitutionally centered American way of ethics presented in this book.

My broader definition of American politics also derives from the human element: politics is the product of human nature and human action. To understand the human side of American politics, career public servants must confront two conflicting ideas about politics and human nature in general.[25] One idea conceives of human nature as predetermined by the environment and the institutions in it. Under this conception, politics supports tyranny and violent methods of governing. The other idea conceives of human nature as social action based on the intellect, values,

[21] Isaiah Berlin, "The Pursuit of the Ideal," in *The Crooked Timber of Humanity: Chapters in the History of Ideas*, ed. Henry Hardy (New York, NY: Alfred A. Knopf, 1991), 19.

[22] Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), 10.

[23] Mosher, *Democracy and the Public*.

[24] Michael W. Spicer, *In Defense of Politics in Public Administration: A Value Pluralist Perspective* (Tuscaloosa, AL: University of Alabama Press, 2010).

[25] Lipson, *The Great Issues of Politics*, 3.

and choices of people, whose actions are neither predictable nor determined. Under the second conception of politics, the work of career public servants falls into the sphere of purposeful behavior through which their political choices enable Americans to enjoy better lives.[26] The different conceptions of human nature and politics matter because they shape whether people see themselves as the creatures or the creators of American governing institutions; that is, either "as flotsam adrift upon the stream of events or as the regulators able to direct their flow."[27]

With American politics conceived as social conduct, then politics is everywhere and a normal course of life. As signified by the Appleby epigraph, American politics encompasses a wide range of social conduct. On the one hand, politics allows individuals to show and express freely their uniqueness as humans and gives them a chance to do something meaningful in society.[28] On the other hand, the many dimensions of human nature are found in American politics, good and evil.[29] Furthermore, Harold Lasswell argues that politics is the arena of the irrational because political conflicts bring out into the open "the venom and vanity, the narcissism and aggression, of the contending parties."[30] If American politics is conceived as social conduct, then the objective techniques of (political) science, says Leslie Lipson, cannot fully explain the human side of politics. Due to its subjective aspect, politics requires interpretation that entails much more than the compilation and analysis of empirical or technical data because, without interpretation, the facts of politics have no significance.[31] Due to its irrational aspect, politics rejects pure logical thinking. According to Lasswell:

> Logical procedures exclude from the mind the most important data about the self …[because they are] impatient of the seemingly trivial, and this impatience with the seemingly trivial is the rationally acceptable guise of self-scrutiny in which the impulse to avoid rigorous self-scrutiny gets accepted.[32]

[26] Ibid., 5.
[27] Ibid., 3.
[28] Stivers, *Governance in Dark Times*, 132.
[29] Lipson, *The Great Issues of Politics*, 24.
[30] Harold D. Lasswell, *Psychopathology and Politics* (New York, NY: Viking Press, 1960), 184, accessed May 8, 2015, http://www.loc.gov/rr/program/bib/elections/election1864.html.
[31] Lipson, *The Great Issues of Politics*, 12.
[32] Lasswell, *Psychopathology and Politics*, 32–3.

Under the conception of politics as social conduct, political institutions, power, and procedures, though important, play a secondary role to values, emotions, and priorities.[33]

Finally, this book recognizes the role that democratic politics plays in balancing change and continuity in American government—and American society. Every governmental administration, says Lipson, faces recurring substantive political issues.[34] Although these political issues are permanent, politics offers substantive choices that permit temporary settlements. For Lipson, the essence of substantive politics is choice, and choice involves substituting one value preference for another, thereby accommodating changing societal conditions. However, political values are not given.[35] Consequently, choosing among values is of the greatest importance to substantive politics. Given that changes occur in the context in which these great issues are addressed, then change is as constant as are the issues.[36]

The Political Ethics of Public Service addresses three of the permanent substantive issues of politics identified by Lipson.[37] The first substantive political issue focuses on the coverage of citizenship, whether it is inclusive or exclusive. This coverage determines who is free or not free in American society under different interpretations of constitutional law at different moments. The second substantive political issue focuses on the source of governmental authority, whether it originates in the people and promotes democratic freedoms under limited government or originates in government and undermines democratic freedoms due to authoritarian governing methods. The third substantive political issue focuses on the structure of governmental authority, whether it is concentrated and generates arbitrary rule resulting in selective law enforcement and the unequal treatment of citizens in their routine encounters with government, or dispersed through the separation of powers and checks and balances resulting in equal treatment of citizens under the rule of law. According to Lipson, "Wherever the great issues are present, there is politics; wherever politics is found, there are great issues. … The history of politics involves trying alternative solutions for the basic permanent problems …[of government] in new combinations."[38]

[33] Lipson, *The Great Issues of Politics*, 24.
Lasswell, *Psychopathology and Politics*, 185.
[34] Lipson, *The Great Issues of Politics*, 3.
[35] Ibid., 20.
[36] Ibid., 14.
[37] Ibid., 15–6.
[38] Ibid., 17.

Democratic Public Service and Ethics

As shown in Fig. 2.1, the ethics side of the political ethics of public service is anchored in the public and private morality of pluralist American society. Morality functions at the individual level to define a person's public and private way of life. Morality, as defined by James Svara, draws from a person's beliefs about what is right or wrong conduct, based on the individual's upbringing; his or her religious, ethnic, and social commitments; and his or her conscience.[39] Morality gives meaning to the deeply felt convictions that people have about how to conduct their lives within pluralist American society and how they should behave as decent (civilized) humans.

In practice, the ethical conduct of public servants links the private and public morality of pluralist American society and the world of American politics through their substantive political choices. As discussed earlier, the constitutionally centered approach to democratic public service uses the regime values and the ethical narrative to guide the practices of career public servants. This constitutional approach involves a search for the political and ethical ends and means of government. The choice of ends for governmental action involves a preference for one set of political values over another. However, political values are not given because they are determined through electoral politics and the democratic processes of governmental institutions. In these democratic processes, political values are disputed, tested, and evaluated.

However, the laws of politics are not the laws of logic. For example, in pure thought, ideas about the regime values of liberty and equality can be developed beyond the point of human control; yet, if either one were fully developed, it would destroy the other.[40] Therefore, political values, such as liberty and equality, are held in tension because pure liberty and perfect equality cannot be achieved in practice. Despite the tensions, these political values give policy, law, and practice their meaning.[41] Consequently, *The Political Ethics of Public Service* treats the regime values of liberty and equality as the guiding purposes of American public service, with the proviso for career public servants to mix and balance them through constitutional means to achieve political compromises and temporary settlements.[42]

[39] James H. Svara, *The Ethics Primer for Public Administrators in Public and Nonprofit Organizations*, 2nd ed. (Sudbury, MA: Jones and Bartlett Publishers, 2007), 23–4.

[40] Lipson, *The Great Issues of Politics*, 21.

[41] Morgan et al., *Foundations of Public Service*, 17.

[42] Ibid., 8.

Given that American public service is rife with political disagreements over contending constitutional values and conflicting public purposes, career public servants may be compelled to give up their moral well-being for the sake of their public (constitutional) obligations. Sometimes they may face difficult or urgent situations involving heavy demands to carry out their public responsibilities in ways that may offend them personally. These hardships make the job of career public servants morally and politically challenging, requiring them to have the ethical courage to exercise strong moral and political leadership. As William Galston argues, public servants lacking the ethical courage to exercise strong moral and political leadership "will bring themselves and others to grief."[43] Thus, *The Political Ethics of Public Service* takes a firm stand for career public servants not to abandon their responsibility to defend and nurture the American constitutional polity even if it involves their risking pain, rejection, and sacrifice.

A Framework for the Political Ethics of Public Service

As shown in Fig. 2.2, three "I" settings influence the political ethics of American public service—the ethical *i*nquiry of career public servants, the great political *i*deas of the American constitutional polity, and the political *i*nstitutions of democratic public service. The next three sections provide an overview of the ethical challenges and the distinct politics associated with each setting.

The Ethical Inquiry of Career Public Servants

The ethical inquiry of career public servants, the first "I" setting, is the organizing theme of Part II of this book. To reconcile normative democracy and public service, career public servants must do much more than mindlessly adhere to formal ethics codes or complacently accept the orders of elected officials or their political superiors. Leading an ethical life in democratic public service, says Camilla Stivers, has never implied blind obedience to orders from on high for three reasons.[44] First, administrative orders require interpretation whether the source is a political superior or

[43] William A. Galston, "Toughness as a Political Virtue," *Social Theory & Practice* 17, no. 2 (1991): 175.

[44] Stivers, *Governance in Dark Times*, 27.

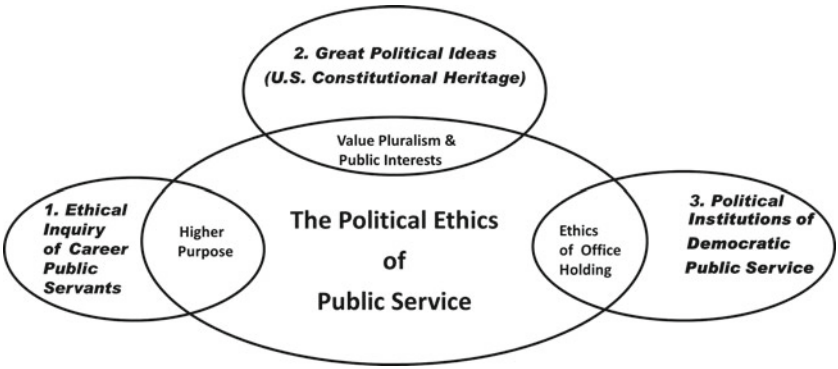

Fig. 2.2 The three "I" settings of the political ethics of public service: inquiry, ideas, and institutions

the law. Second, public service requires career public servants to decide why and how particular laws are relevant to specific cases and situations in their purviews. Third, career public servants must account for their substantive political choices by using public interest-centered justifications drawn from the American constitutional heritage.

To lead an ethical life in public service, career public servants must be willing to engage in ethical inquiry. Inquiring career public servants use their intellect to think critically about their substantive political choices in addressing different types of situations they encounter on the job. Ethical thought, according to Isaiah Berlin, involves "the systematic examination of the relations of human beings to each other, the conceptions, interests, and ideals from which human ways of treating one another spring, and the systems of value of which such ends of life are based."[45] This means that the ethical inquiry of career public servants embraces insights drawn from learning and experience as well as feats of imagination and leaps of intuition.[46] These insights foster their creative growth and the ethical development. Besides that, the ethical inquiry of career public servants gives priority to human freedom because of its emphasis on "the self's relationship to itself as well as to others in particular situations.[47]

[45] Berlin, "The Pursuit of the Ideal," in *The Crooked Timber of Humanity*, 1–2.
[46] Lipson, *The Great Issues of Politics*, 12.
[47] Stivers, *Governance in Dark Times*, 147.

However, beneath the situations faced by career public servants on the job is their character or their personal sense of self. Difficult situations encountered by career public servants may challenge their sense of self because their feelings, such as fear and courage, as well as the strengths and weaknesses of their characters, shape how they interpret and respond as humans.[48] The interplay of feelings, character traits, and types of situations may support or undermine the ethical life of career public servants.[49] Thus, in their ethical inquiry, they cannot exclude an examination of how their feelings and character traits affect their behavior on the job. Consequently, taking into account the work of experimental psychologists is useful in the ethical inquiry of career public servants.

For example, John Doris (2002) has shown that people who possess the trait of honesty or compassion to behave truthfully or benevolently will do so when it is easy to do but not in difficult circumstances. Doris' findings are consistent with Stanley Milgram's (1963) experiment in which ordinary people willingly obeyed orders from "an authority" to administer electric shocks to screaming "victims," despite their beliefs that it was wrong to do so. Doris' findings signify that people's characters were neither virtuous nor vicious: although the subjects in these experiments knew what the right thing to do was, they failed to do it.[50] Doris concludes that people's characters are context specific, unstable, and inconsistent, rather than robust, and often influenced by trivial aspects of situations. Nevertheless, Doris' findings allow "for the possibility of temporally stable, situation-particular 'local' traits."[51]

By clarifying how they respond emotionally, career public servants, through their ethical inquiry, can develop temporally stable, local character traits to address particular on-the-job situations. As Stivers argues, philosophically reflexive public servants are engaged in "an unending, caring quest, a commitment to the practice of thinking in a systematic way about important questions without the promise of settling them once and for all, a testing of ideas in practice, a search for the results of the results."[52]

Thus, the ethical inquiry of public servants requires thinking and judgment because people see and choose to do things based on their different

[48] Lipson, *The Great Issues of Politics*, 1.

[49] Stivers, *Governance in Dark Times*, 13.

[50] John M. Doris, *Lack of Character: Personality and Moral Behavior* (New York, NY: Cambridge University Press, 2002), 18.

[51] Ibid., 25.

[52] Stivers, *Governance in Dark Times*, 127.

perspectives, and their interactions are unforeseeable. Thus, philosophical methods support the critical thinking of career public servants so that they can detach themselves from their positions and predispositions as well as their emotions to deepen understanding about themselves as civilized humans. Understanding is an intellectual process because to choose to do good means that career public servants have an idea of what good means.[53] Moral understanding influences political judgment. Political judgment is different from the knee-jerk reactions to difficult situations or the technical-computational morality associated with the prevailing American way of ethics. A central assumption of this book is that moral judgment without political understanding is as dangerous as political judgment without moral understanding. Both are necessary because this combination helps career public servants balance their self-interests and public interests, contending constitutional ideals, and the competing governance perspectives of office holding. In other words, public servants put their judgments at risk if their choices are one-dimensional in that they base them purely on ethical principles without reference to politics or, alternatively, on pure power assessments without reference to ethical principles. The combination of moral understanding and political judgment gives career public servants clarity about which substantive political values they prefer to operationalize and why those values are appropriate in particular situations. Essentially, philosophical reflexivity gives career public servants inner moral checks to ground the external checks on their official conduct.

Thus, the methods of moral philosophy strengthen the ethical inquiry of career public servants by helping them choose to do good as they frame their substantive political choices. In effect, career public servants gain a purpose higher than doing what is expedient or staying out of trouble in the "gotcha ethics" environment of the prevailing American way of ethics. This higher purpose enables them to exercise ethical courage supporting the democratic freedoms of citizens as they govern in the contemporary "dark" environment of anti-politics and citizen pessimism toward American public service. Despite the ethical dilemmas and political dangers inherent in democratic public service, ethically courageous career public servants are likely to experience the satisfaction of making the lives of Americans better, especially for those with the least freedom.

[53] Lipson, *The Great Issues of Politics*, 2.

Great Political Ideas of the American Constitutional System

Part III of this book is organized around the second "I" setting of the political ethics of public service—the American constitutional system and its history of ideas. Underpinning the American constitutional system is a set of great political ideas that informed the good government philosophy of the American founders. Normative political ideas have a place in the political ethics of public service for two reasons. First, the great political ideas, drawn from the political philosophies of John Locke and Charles-Louis Montesquieu, informed the good government philosophy that the American founders embedded in the US Constitution. Second, great political ideas help career public servants develop "a robust conception of political possibilities."[54]

Given their independent but constitutionally constrained source of governing authority, career public servants, says Rohr, should learn from the Constitution's great political ideas.[55] On the one hand, learning from the Constitution helps career public servants to think systematically about constitutional ideals and their meaning for their duty to advance the public interest.[56] On the other hand, the Constitution contains contending political values and competing ideas about the public interest, and this recognition introduces career public servants to Berlin's (1991) concept of value pluralism. Value pluralism means that many political values shape conceptions of the public interest and good government, but some are incompatible and irreconcilable. By recognizing the significance of value pluralism, career public servants will understand that no universal allocation of political values exists in pluralist US society.[57] The inability to reconcile core political values, such as liberty and equality, not only makes political conflict inevitable in American society but also introduces the possibility of violence and tragedy into the lives of Americans.[58]

Thus, career public servants will find it helpful to use the constitutionally centered approach of political ethics to balance incommensurable regime values. In striving to balance the values of liberty and equality in their

[54] William A. Galston, "Realism in Political Theory," *European Journal of Political Theory* 9, no. 4 (2010): 385.

[55] John A. Rohr, *To Run a Constitution* (Lawrence, KS: University of Kansas Press, 1986), 259.

[56] John A. Rohr, *Ethics for Bureaucrats: An Essay on Law and Values*, 2nd ed. (New York, NY: Marcel Dekker, 1989).

[57] Spicer, *In Defense of Politics*, 49.

[58] Isaiah Berlin, *Four Essays on Liberty* (Oxford, UK: Oxford University Press, 1969), 169.

substantive political choices, career public servants confront two of the great political issues mentioned earlier: first, the coverage of citizenship—which shapes different interpretations of political freedom—and, second, the role of government in shaping the USA as a politically free society. On the one hand, political freedom requires a curb on governmental power because political freedom, as Crick argues, is the privacy of people from public actions.[59] The American founders used legal constraints (constitutionalism), such as checks and balances, to restrict government and guarantee human freedom. In effect, they used constitutionalism to control politics. Yet, constitutionally driven choices are not politically neutral and have political implications, as shown in the constitutional buttressing of slavery. On the other hand, a different interpretation reverses the causation: the politics of human freedom determines what is legal and who is free.[60] Lipson's point is that the Constitution would collapse without constitutional politics. In other words, the politics of human freedom changes constitutional law as much as constitutional law shapes human freedom in American society.

Under the politics of freedom, Americans have the choice of pursuing or abandoning violence to resolve their inevitable conflicts over different conceptions of human freedom. The founders believed that Americans would coexist peacefully because their constitutional system provides a method of cooperation and competition to facilitate non-violent political change in American government and society. However, as Lipson argues, the prevention of violence in American society requires all individuals and groups in society to receive equal treatment based on a common (constitutional) standard of justice; and government's role is to respect and enforce their basic substantive political rights.[61] If citizens perceive governmental actions as universally just or feel they can achieve justice through the flexible adaptation of government, then American society maintains law and order. Otherwise, says Lipson, might prevails, whether the mighty is a majority trampling on the rights of a minority or a resolute minority intimidating an unorganized majority. "Once this happens, …[American society] is drawn into a spiraling sequence of conspiratorial coercion, mob reaction, and police repression."[62] Those who feel that

[59] Crick, *In Defence of Politics*, 146.
[60] Lipson, *The Great Issues of Politics*, 239.
[61] Ibid., 253.
[62] Ibid., 253.

government is unresponsive to their legitimate claims for justice may be disposed to use "extraconstitutional means" to attack it violently.[63]

To complicate matters further, wealthy and well-organized interest groups dominate American politics. If the salient interests of these well-heeled interest groups conflict with official interpretations of constitutional governance or political compromises regarding those issues, then active interest groups may be politically motivated to challenge governmental authorities to prevent the enforcement of existing legal and administrative arrangements. At the same time, these active interests are likely to generate political reactions from groups with opposing substantive interests. Consequently, career public servants may find themselves in a precarious position to prevent violence between those who seek changes in constitutional arrangements and those equally determined not to alter them.[64]

Furthermore, career public servants may use the great political ideas as yardsticks to measure the gap between what exists and what ought to exist.[65] For example, the most vulnerable members of American society—the poor, the unorganized, and future generations—are not well represented in congressional politics.[66] Therefore, the constitutionally centered approach of political ethics expands the role of career public servants beyond keeping the peace among active interest groups. Accordingly, *The Political Ethics of Public Service* guides career public servants to care for unrepresented groups and underrepresented public interests. The argument is that career public servants engaged in constitutionally centered political ethics are more likely than their apolitical counterparts under the prevailing American way of ethics to protect and extend the democratic freedoms of Americans. Constitutionally minded career public servants play an important part in the politics of human freedom by negotiating the rights and privileges of American citizens. Yet, negotiating the terms of rights and privileges of free citizens is a work in progress and, therefore, is never fully realized.[67]

[63] Ibid., 253.

[64] Gary Jeffrey Jacobsohn, "Constitutional Identity," *Review of Politics* 68 (2006).

[65] Lipson, *The Great Issues of Politics*, 20.

[66] Norton E. Long, "Bureaucracy and Constitutionalism," in *The Polity*, ed. Charles Press (Chicago, IL: Rand McNally, 1952).

Rohr, *To Run a Constitution*.

[67] Morgan et al., *Foundations of Public Service*, 6.

The Political Institutions of Democratic Public Service

The third "I" setting of the political ethics of public service recognizes the contending governance perspectives and the peculiar ethical dilemmas of office holding within the political institutions of democratic public service. Political institutions are dynamic organizations that provide the "operating arms" of government.[68] According to Hugh Heclo, political institutions transmit moral values, rules, and obligations across generations.[69] Besides guiding people in managing their public affairs, political institutions vest collective life with a shared meaning and purpose. The political institutions examined in Part IV of this book are the public bureaucracies (or agencies) of the executive branches of government and their civil service systems, including the subsystems of the professional career services and the collective employment services. I use the term bureaucratic governance to refer to the body of career public servants who use the bureaucratic authority of these political institutions. While the term governance is most often associated with the activities of elected officials, such as contracting out the delivery of public services, collaboration with the private and nonprofit sectors, and citizen engagement, it is appropriate for career public servants who work in the public bureaucracies.[70] One reason, as Charles Goodsell argues, is that career public servants in the executive branch bureaus work extensively with citizens and administer public budgets. Another reason is that career public servants use the authority vested in executive branch bureaus to implement their substantive political choices.

Internally, the size, structure, and types of roles of public offices within the agency contexts of bureaucratic governance affect "the sorts of duty, responsibility, power, and permissions that …[career public servants have] or ought to have."[71] Consequently, competing ideals, ethics codes, and accountability relationships limit and delimit the behavior of career public servants within bureaucratic governance. Sometimes, career public servants may use ethics codes to shield themselves from moral responsibility or as political weapons to defend themselves against partisan political intrusions

[68] Charles T. Goodsell, *The New Case for Bureaucracy* (Thousand Oaks, CA: CQ Press/Sage, 2015), 28.

[69] Hugh Heclo, *On Thinking Institutionally* (Boulder, CO: Paradigm Publishers, 2008), 14, 38.

[70] Goodsell, *The New Case for Bureaucracy*, 125–6.

[71] C. A. J. Coady, "Dirty Hands," in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Cambridge, MA: Blackwell Publishers, 1993), 423.

that undermine their technical expertise, institutional knowledge, and professional discretion in administering public policies and managing public programs. In these situations, the institutional integrity of public bureaucracies may be subverted.[72] The competing bureaucratic governance perspectives generate power struggles over the survival and control of the political institutions within democratic public service.[73]

Furthermore, democratic public service is a "sublimated political process."[74] As a sublimated political process, career public servants collectively channel the inevitable value disagreements and conflicts inherent in American politics into administrative problems for resolution through institutional channels. However, these institutional channels may delay political decision-making, in part, because they require tradeoffs with running executive branch bureaus, which are nonmarket organizations, in a businesslike manner, with an emphasis on operational efficiency and effectiveness.[75] On encountering delayed decision-making or administrative gridlock, elected officials, perceiving career public servants as unresponsive to their political direction, impose idealized private sector reforms on executive branch bureaus; these institutional reforms aim at making the public bureaucracies to function more like businesses with unilateral decisions that produce timely and efficient actions. This institutional tension raises an issue first recognized by the constitutional framers—how to confer enough power for American government to operate energetically without becoming paralyzed or tyrannical.[76]

The institutional challenges of democratic public service as a sublimated political process extend to the daily encounters career public servants have with citizens. The most significant challenge for career public servants is to balance the tension between maintaining order and the rule of law in democratic society.[77] Reconciling this tension requires career public servants to examine the third great political issue discussed earlier—the role of government in relation to maximizing or restraining the freedom of

[72] Rosemary O'Leary, *The Ethics of Dissent: Managing Guerrilla Government* (Washington, DC: CQ Press., 2006).

[73] Harold Seidman, *Politics, Position, and Power: The Dynamics of Federal Organization*, 5th ed. (New York, NY: Oxford University Press, 1998).

[74] Morgan et al., *Foundations of Public Service*, 5.

[75] Ibid., 6.

[76] Ibid., 6.

[77] Jerome H. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society* (New York, NY: Wiley & Sons, 1966).

citizens. The question arises as to whether the authority of career public servants in bureaucratic governance should be increased to prevent disorder and chaos in US society or restrained under constitutional checks and balances to protect the civil liberties of Americans. Thus, career public servants must assess under what situations it is appropriate or inappropriate for them to restrict the rights of citizens to make life choices freely in American society.

Under the Constitution, the rule of law confers and limits the power of bureaucratic authorities because no career public servant can act without a clear source of legal authority that permits such action.[78] The rule of law also establishes a minimum constitutional standard from which to scrutinize the behavior of bureaucratic authorities on substantive and procedural grounds. If career public servants as bureaucratic authorities engage in or tolerate administrative practices that undermine the rule of law, then they tip the balance between order and liberty in favor of the former. This imbalance may turn everyday encounters between government and citizens into extraordinary, even emergency, situations that not only threaten but also harm individuals, especially minorities.

Given that career public servants as bureaucratic authorities shape the lives of citizens, it is necessary for them to reinforce the rule of law in their agencies so that their power over citizens is not absolute. Therefore, career public servants must understand how they may enable or disable the infusion of democratic principles and practices in bureaucratic governance. This understanding recognizes the sovereign power of the American people. Specifically, the Fifth and Fourteenth Amendments to the Constitution give the American people ownership claims over governments at all levels. This constitutional characteristic establishes the ethic of citizenship, which, according to Stivers, requires career public servants to act "*as* citizens" and "*with* citizens, viewed as equals" in the common endeavor of democratic governance (emphasis in the original).[79] If career public servants behave inconsistently with the rule of law in their encounters with citizens, then their use of bureaucratic authority subjugates rather than serves citizens. Besides modifying their own unlawful practices, career public servants, especially at the upper levels, may use this understanding to design political choices that help their agencies reverse the decline in constitutional processes and the erosion of ethical norms.

[78] Morgan et al., *Foundations of Public Service*, 9.

[79] Camilla Stivers, "Citizenship Ethics in Public Administration," *Public Administration Public Policy* 86 (2001): 595, 599.

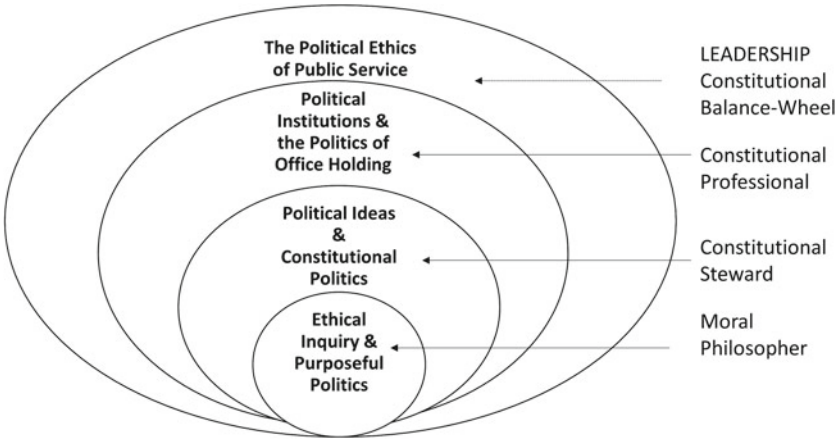

Fig. 2.3 The political ethics of public service: leadership

In short, the three settings provide meaning to the substance and procedures of the political ethics of public service (see Fig. 2.3). Given that each setting creates a distinct style of ethical politics, the political ethics of public service is a multidimensional ethos. Moreover, the conditions of political ethics elevate what is required of career public servants, thereby creating a higher ethical standard for public service than for private life. This higher standard is not simply a function of laws adopted to restrict the conduct of career public servants but also derives from the institutional obligations and emotional ties that bind together American citizens in a politically free, democratic society. This higher standard requires career public servants to use political-ethical governing methods derived from the Constitution that all citizens can respect. As shown in Fig. 2.3, the higher standard of political ethics translates into three leadership roles drawn from each "I" setting of democratic public service—a moral philosopher, a constitutional steward, and a constitutional professional. Collectively, these leadership roles operationalize Rohr's concept of career public servants as constitutional balance-wheels. Thus, the political ethics of public service not only addresses the adverse effects of the current American way of ethics but also opens new political possibilities for public servants to act ethically and govern responsibly in a way that makes tangible the affective social consensus underlying the American democratic republic.

The Plan of This Book

The Political Ethics of Public Service is divided into five parts. As key components, each part discusses the implications for today's career public servants and has guidelines that they can use to put the political ethics of public service into practice. I reject the idea that an algorithm exists for public service ethics. Nor am I recommending rote adherence to law, duties, and other external checks. This book provides guidelines that career public servants can use to develop their capacity for moral reasoning and political judgment in the three "I" settings of the political ethics of public service. The application of moral reasoning to broaden political judgment is a skill that career public servants can learn and hone with practice.

Part I introduces the problematic American way of ethics in the case analysis of Cuyahoga County, Ohio (Chap. 1). The case study is followed by this introduction to the political ethics of public service as a constitutionally centered approach that reconciles normative democracy and democratic politics (Chap. 2).

The three chapters in Part II focus on how career public servants may use their ethical inquiry to balance public and private morality in handling different situations. Chapter 3 analyzes the role of public servants' personal loyalties and private consciences in shaping their moral understanding and political judgment in urgent or emergency situations. I offer guidelines, drawn from moral philosophy, to help career public servants engage in a self-appraisal technique to review and reorder their personal loyalties, official (constitutional) obligations, and inner conflicts when deciding their purposes and courses of action. Next, the chapter explores thick-thin moral expressions drawn from the private and public morality of pluralist American society and guides public servants in using their consciences to account for morally objectionable, though necessary, political-ethical choices to fulfill courageously their constitutional duties under difficult situations. Illustrating how loyalties, thick-thin moral expressions, and conscience work together, I use the Gettysburg Address to show how President Lincoln rhetorically resolved his crisis of conscience during the Civil War by honestly probing his conscience to mediate the multiple viewpoints associated with his personal loyalties, constitutional obligations, and universal standards of morality. Ultimately, Lincoln not only defended the American constitutional union but also extended democratic freedoms to formerly enslaved black Americans. Against the backdrop of Lincoln's exemplary leadership, the chapter discusses the implications for today's public servants.

Chapter 4 organizes the ethical inquiry of career public servants around an assessment of their choices when they are not facing a crisis of conscience in a life-and-death situation. Its aim is to increase the awareness of public servants about how narrow and enlightened interpretations of their self-interest inhere in their interpretations of everyday situations. This chapter explains how career public servants may use philosophical methods to move beyond first-order reasons drawn from everyday morality or ethical abstractions to discern why their particular choices are right or wrong. These philosophical methods, including the standard of logical reasonableness, help career public servants trace their chain of decisions in a common workplace dilemma so that they can identify second-order or higher moral reasons and proximate causes to justify the most general ethical choices for human actions. Besides improving the quality of their ethical judgments, philosophically reflexive public servants gain a higher purpose than that which they can draw from the standards of everyday morality or the prevailing anti-political American way of ethics. The chapter's methodology gives career public servants an antidote to the power of the problematic American way of ethics to demonize and trivialize public service.

Acknowledging that a gap exists between knowing the right thing and following through to do it, and that to close this gap, career public servants must decide if they are willing to bear the costs of acting on their second-order ethical choices, Chap. 5 clarifies the costs and contexts of political ethics by extending Albert Hirschman's (1970) construct of loyalty. Specifically, the chapter offers public servants a framework they may use to assess the interplay of exit, voice, and loyalty in their public and private lives. Two case studies of love-hate relationships are examined to draw attention to the proximate causes underpinning the explosive combination of exit and voice that resulted in workplace tragedies. Chapter 5 also analyzes the interplay of voice and loyalty. This analysis pays particular attention to the special case of loyalty to public goods resulting in perverse and politically correct societal behaviors. The last part of Chap. 5 notes how public servants may convert the perverse loyalty to public goods into support of significant public purposes, such as universal K–12 public education, by reducing the costs of exercising ethical voice.

The three chapters in Part III analyze the US Constitution as both a political device and a political activity. As a political device, the Constitution's normative ideas provide "self-sufficient truths" in the short run, but political activity changes its meaning in the long run.[80] Thus, the focus in

[80] Crick, *In Defence of Politics*, 153.

Part III is on how the Constitution's great political ideas of liberty and equality have been interpreted under the ebb and flow of constitutional law since the founding of the USA and the associated politics of amending it over time to create a freer society.

In Chap. 6, I establish constitutional thinking—an understanding of and engagement with the ideas, values, and philosophies informing the Constitution's history and the foundation of American government—as vital for career public servants to govern as constitutional stewards. The chapter further explains the three components of constitutional thinking: the Constitution itself, its development and design (constitutionalization), and the means by which career public servants may achieve the goals of government without threatening the democratic freedoms of citizens (constitutionalism). To provide a foundation for such thinking while emphasizing the guiding principle of government's protection of individual rights and equality, I trace the evolution of the Constitution's fundamental principles from the political theories of Locke and Montesquieu, the Declaration of Independence, and the Articles of Confederation.

Chapter 7 analyzes constitutional politics, as an element of constitutional stewardship to help public servants both defend and extend the democratic freedoms of Americans. After identifying two of the features of constitutional politics (federalism and constitutional law), the chapter considers the explosive dynamic of each by reviewing the historic debates over homeland security and slavery. Specifically, I demonstrate the significant, long-lasting impact of the constitutional politics of antebellum America that culminated in extreme interpretations of constitutional favoring slavery and secession. Political reactions to these interpretations have shaped constitutional thinking and constitutional politics after the Civil War and well into the twenty-first century.

Continuing to survey the Constitution's political and legal history, Chap. 8 explores constitutional changes from the Emancipation Proclamation and American Reconstruction in the nineteenth century through the Civil Rights Movement in the twentieth century and the same-sex marriage debate in the twenty-first century. This historical analysis illustrates how, by returning to the nation's foundational ideals, public servants, as constitutional stewards, have expanded the Constitution's protections of liberty and equality to marginalized groups. I then include a decision-making framework, employing self-reflection and reliance on constitutional values and principles, as a practical tool for career public servants to use in assessing the ethical efficacy of decisions and practices

within their sphere of operations. The chapter argues that employing such constitutional thinking allows career public servants to uphold the Constitution's regime values while contributing to positive political-ethical change in pluralist American society.

The three chapters in Part IV concentrate on helping career public servants balance liberty and authority in bureaucratic governance. In Chap. 9, I review the ideals, ethics standards, and accountability relationships of office holding within the political institutions of democratic public service as integral parts of career public servants and their political superiors' governing together under American constitutionalism. I then describe the clashes of governing perspectives and administrative politics that create estrangement between career public servants, their political superiors, and the public. The chapter next analyzes the institutional challenges to democratic public service and the political-ethical dilemmas peculiar to bureaucratic governance. This analysis also highlights the partisan-driven reforms designed to dismantle democratic public service in the name of modernizing American government. These reforms, if disconnected from constitutional processes, may morph into institutional pathologies that threaten the democratic freedoms of citizens in their routine encounters with government.

Chapter 10 covers the impact of institutional pathologies derived from the professionalization and unionization of the civil service systems extant in executive branch bureaus. This chapter focuses on the institutional pathologies that breed toxic bureaucratic subcultures tolerating administrative abuses in the routine encounters between citizens and government. First, I examine the local law enforcement practice of racial profiling as an example of pathological bureaucratic governance, then delve into racial profiling's institutional roots that engender unlawful actions, especially toward citizens of color. After discussing some ways to strengthen the rule of law and representative (citizen-based) political institutions as a check and balance on bureaucratic authorities, I consider the implications of the analysis of racial profiling for today's career public servants.

Chapter 11 discusses how the elimination of abusive administrative practices in bureaucratic governance requires a comprehensive institutional approach to restore the balance between bureaucratic authority and the liberty of citizens. Thus, I advocate for career public servants to lead as constitutional professionals. After outlining the elements of constitutional professionalism, the chapter offers suggestions for improving bureaucratic governance through the implementation of internal and

external controls provided by strengthening representative political institutions, such as criminal and civil grand juries. I further argue for restoring the constitutional system of checks and balances in bureaucratic governance by encouraging more rigorous legislative and citizen-based oversight and greater diversification of American public service through the adoption of norms of representative bureaucracy and discursive public administrative practices. The last part of Chap. 11 provides guidelines to help public servants apply constitutional regime values and normative public administrative behaviors into their day-to-day practices.

In the book's concluding section, I advocate the political ethics of public service as a better ethos for pluralist American society than the prevailing apolitical American way of ethics, qualifying constitutionally centered democratic public service as a bastion of public trust. Subsequently, I argue that the three leadership roles of political ethics—a moral philosopher, a constitutional steward, and a constitutional professional—provide the path for career public servants to function as the constitutional balance-wheels of American government. My formulation of constitutional balance-wheels operationalizes Rohr's normative theory of public administrative behavior. The concluding section then focuses on the education of career public servants for normative democracy and public service. Specifically, I propose a leadership education program to acclimate career public servants to the intellectual, psychological, and ethical challenges they face on the job so that they are prepared to exercise strong moral and political leadership in the conflict-laden environment of American politics.

Overall, constitutionally centered public service civilizes democratic politics; civilized democratic politics, in turn, strengthens the political ethics of public service. Besides preserving American self-government based on the universal values of human equality and political liberty, the political ethics of public service catalyzes ethical progress in pluralist US society, endowing Americans with a future of great political possibilities. Thus, constitutionally centered democratic public service deserves the respect of Americans rather than their scorn.

PART II

The Ethical Inquiry of Career Public Servants: Balancing Public and Private Morality in Governing Methods

CHAPTER 3

"What Am I to Be?": Personal Loyalty, Thick-Thin Morality, and the Crisis of Conscience

Men, upon too many occasions, do not give their own understandings fair play; but, yielding to some untoward bias, they entangle themselves in words and confound themselves in subtleties.

Publius (Alexander Hamilton), Federalist Paper #31

Politics is the world of moral attrition.

J. Patrick Dobel (1999), Public Integrity

The first "I" setting of the political ethics of public service is the ethical *i*nquiry of career public servants as autonomous moral agents. The central argument of this book is that moral understanding without political judgment is as dangerous as political judgment without moral understanding. Both moral understanding and political judgment are necessary in public service for career public servants to exercise the ethical courage and the strong moral and political leadership necessary to defend and nurture the American constitutional polity. The theme woven throughout the three chapters of Part II is that the private—and inner—lives of career public servants matter in public service. Individual dispositions and personal loyalties, along with the dynamics of social roles, give them powerful mental models or mindsets that shape their moral identity and their ethical behavior. In other words, career public servants are human beings who do not give up their personal morality upon entering American public service. Besides probing into how their

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personal morality influences their on-the-job behavior, it is necessary for them to gain awareness of how difficult situations affect their virtue, character traits, and emotions.

In my view, the ethical inquiry of career public servants probes the following three questions that define their moral identities: (1) What am I to be? (2) What will I do? (3) Will I do it? The three chapters in Part II focus on each question in sequence. In exploring these questions, career public servants will find moral philosophy useful. As Stivers argues, public servants may use moral philosophy to see things anew, deepen their moral understanding, and facilitate a public dialogue with the people around them.[1] By doing so, they not only clarify the purpose of their layered moral lives in public service but also build their capacity to develop fresh political-ethical actions. In this way, career public servants take on the role of a moral philosopher in their ethical inquiry.

However, the political setting of public service shapes the understanding and judgment of career public servants. On the job, they place their personal moral views and predispositions, along with their aspirations and the obligations of their office, into the crucible of democratic politics and public service. On the one hand, "publicity, calumny, distortion, and insult" characterize the world of public servants.[2] On the other hand, public service is rife with political disagreements and power struggles over incommensurable regime (constitutional) values and conflicting public purposes.[3] In practice, public service may place heavy demands on public servants to carry out their office in ways that may offend their personal morality.

Thus, career public servants face the "dirty hands" dilemma that Michael Walzer describes as follows:

> Here is the moral politician: it is by his dirty hands that we know him. If he were a moral man and nothing else, his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean.[4]

[1] Camilla Stivers, *Governance in Dark Times: Practical Philosophy for Public Service* (Washington, DC: Georgetown University Press, 2008), 9.

[2] Bernard Crick, *In Defence of Politics*, 2nd ed. (Chicago, IL: University of Chicago Press, 1972), 158.

[3] Michael W. Spicer, *In Defense of Politics in Public Administration: A Value Pluralist Perspective* (Tuscaloosa, AL: University of Alabama Press, 2010).

[4] Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy & Public Affairs* 2, no. 2 (1973): 168.

By extension, this metaphor implies that career public servants, like non-career public servants (elected officials), have to dirty their hands to do their jobs, which I interpret as fulfilling their constitutional duties. If, however, career public servants put their moral cleanliness above upholding their constitutional duties, then they may not have the ethical courage or the moral and political strength for public service. In public service, "the heat in the ethical kitchen grows greater with each level of power."[5] Given that every public servant experiences some heat, those who cannot take it must get out of the ethical kitchen because they are unfit for public service.

Furthermore, as indicated by the chapter's second epigraph, "[p]olitics is the world of moral attrition."[6] The interplay of politics and morality creates a conflict-laden world where career public servants may have to sacrifice their personal well-being for the sake of public responsibility. As Stephen K. Bailey notes, public service is not for the faint of heart.[7] Bailey observes that the ethics ladder gets wobblier the higher the position of public servants. Thus, their perceptions of situations, shifting political circumstances, and on-the-job dilemmas determine where they draw the wobbly line between the private and public morality. In circumstances surrounding life-and-death situations in public life, career public servants may have to engage in morally objectionable actions, causing them to experience a crisis of conscience.

In this chapter, I explore the first question—"What am I to be?" Specifically, this chapter analyzes the role of personal loyalties and private conscience in shaping the moral understanding and political judgment of career public servants. Thus, career public servants should begin their ethical inquiry to understand how their personal dispositions give them their moral outlook as human beings. In doing so, they operationalize the Socratic maxim—"to know thyself." Moral philosophy is especially useful to public servants when they face a crisis of conscience on the job. Against the backdrop of moral philosophy, this chapter conceives the crisis of conscience as a process of self-appraisal in which career public servants review and reorder their personal loyalties, unify their divided consciences

[5] Stephen K. Bailey, "Ethics and the Public Service," *Public Administration Review* 24, no. 4 (1964): 239.

[6] J. Patrick Dobel, *Public Integrity* (Baltimore, MD: Johns Hopkins University Press, 1999), ix.

[7] Bailey, "Ethics and the Public," 238.

in difficult circumstances, and respond by initiating or avoiding action. In this way, their ethical inquiry helps career public servants discover why they may favor one alternative over another and what motivates them to accept uncomfortable, distasteful, and painful ones.

As a learning process, their ethical inquiry is mentally demanding because it requires them to lift the veil clouding their judgment.[8] By doing so, they can learn how, as the Hamilton epigraph suggests, they entangle themselves in words and subtleties that may confuse them and mask their moral dispositions and biases. The culmination of this learning process helps career public servants recognize the bases and biases driving their consciences as well as shaping their motivations and behavior when on-the-job emergencies require them to dirty their hands.

My purpose in this chapter is to give career public servants political-ethical frameworks based on philosophical methods to deepen their moral understanding and guide their political judgment in difficult situations. These frameworks are grounded in Walzer's (1994) political theory of pluralism and philosophical conceptions of thick-thin morality.[9] Accordingly, the chapter is organized as follows. First, I discuss the interplay of moral understanding and political judgment in public service. Next, I clarify the nature and limits of the conflicting personal loyalties and obligations of career public servants. After that, I present how they may use thick and thin moral expressions drawn from the private and public morality of American society to communicate their conflicting loyalties and obligations. Immediately following is an analysis of how career public servants may use their private conscience to account for morally objectionable, though necessary, political-ethical choices to fulfill their constitutional duties. To illustrate the interplay of personal loyalty, thick-thin morality, and private conscience, this chapter examines President Lincoln's Gettysburg Address and how he resolved his crisis of conscience to provide constitutionally centered moral and political leadership during the Civil War. In the final section, I discuss the implications of Lincoln's ethical inquiry and the resolution of his crisis of conscience for today's career public servants.

[8] Stuart Hampshire, "Public and Private Morality," in *Public and Private Morality*, ed. Stuart Hampshire et al. (London, UK: Cambridge University Press, 1978).

[9] Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (South Bend, IN: University of Notre Dame Press, 1994).

Moral Understanding and Political Judgment

In the prevailing American way of ethics, ethics and morality are often used interchangeably but they are different. However, any conception of morality is a proposition not subject to proof or disproof. As Mark Lilla argues morality—or an ethos—is a way of life that cannot be created from abstract reasoning or with legal precision.[10] Thus, the ethical inquiry of career public servants examines appeals to their inner lives—their emotions, intuitions, passions—and their everyday experiences, all of which shape their moral outlooks about themselves in relation to the world around them. In essence, morality gives meaning to the deeply felt convictions career public servants have about how they should live their lives as human beings. In other words, the moral mindsets of public servants define who they are and the purpose of their lives.

Beyond this, the moral conduct of career public servants is political because they use their moral mindsets on the job. By applying the logic of moral philosophy, they link the morality of their personal dispositions and the world of political action as revealed in their on-the-job experiences, thereby giving "political force to moral principle."[11] The essence of politics in public service is choosing among competing moral and political values to preserve American society and the constitutional union. Given the human side of American politics (discussed in Chapter 2), the political choices of career public servants not only have implications for their on-the-job actions but also shape their sense of self and their pursuit of meaning.[12]

Morality and ethics function at different levels of action, the former at the individual level and the latter at the group or societal level. According to Bernard Williams, morality is the "local species of the ethical."[13] Williams does not mean local in a geographic sense; instead, he focuses on the "unities of ethical experience between groups of people who are less than the population of a state—the more familiar pluralist picture—but also on groups that cross its boundaries" forming a "constituency of

[10] Mark Lilla, "Ethos, 'Ethics,' and Public Service," *The Public Interest* 63 (1981).

[11] Abraham Kaplan, *American Ethics and Public Policy* (New York, NY: Oxford University Press, 1963), 106.

[12] Stivers, *Governance in Dark Times*, 146, 66.

[13] Bernard Williams, "Postscript," in *Moral Luck*, ed. Daniel Statman (Albany, NY: State University of New York Press, 1993), 252.

persons" who may not live contiguously.[14] On applying morality to the whole of humankind, then, morality becomes ethics, and ethics is a political philosophy that defines a way of life in a society.[15]

In my view, career public servants, as human beings, hold a range of moral views about right and wrong behavior based on their personal upbringings and consciences as well as their interests and life experiences. In practice, every moral action career public servants take involves an interpretation. By definition, interpretation involves selectivity. According to H. Richard Niebuhr, people draw their interpretations from their conscious minds as well as deeply buried memories, emotions, and intuitions, some of which are beyond their immediate control.[16] People also run the gamut of human emotions, biases, and loyalties. Through their interpretive moral responses, career public servants reveal what they feel makes their lives worth living.[17] On clarifying their moral dispositions in their ethical inquiries, they uncover what motivates them as humans. Motivation is the complex psychological force that calls forth the feelings and passions of humans in relation to their perceptions of external events and about their personal relationships.[18] Political motivation, though formulated as preferences and creeds in rational forms, grows out of irrationalities, including private prejudices and hidden preoccupations.[19] Given their motivations, career public servants select or avoid political action in difficult or easy situations.

To uncover their moral dispositions, career public servants cannot resort to the rational computational morality of the prevailing American way of ethics. For Stuart Hampshire, rational computational morality involves "dull, destructive political righteousness" and "mechanical, quantitative thinking" presented in "leaden and abstract prose" that, by subverting the

[14] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton, NJ: Princeton University Press, 2005), 50.

[15] Isaiah Berlin, "The Pursuit of the Ideal," in *The Crooked Timber of Humanity: Chapters in the History of Ideas*, ed. Henry Hardy (New York, NY: Alfred A. Knopf, 1991), 2.

[16] H. Richard Niebuhr, *The Responsible Self* (New York, NY: Harper & Row, 1963), 33.

[17] Hampshire, "Public and Private Morality," in *Public and Private Morality*, 8.

[18] Evan Berman et al., *Human Resource Management in Public Service: Paradoxes, Processes, and Problems*, 4th ed. (Thousand Oaks, CA: Sage Publishers, 2013).

[19] Harold D. Lasswell, *Psychopathology and Politics* (New York, NY: Viking Press, 1960), 153, accessed May 8, 2015, http://www.loc.gov/rr/program/bib/elections/election1864.html.

consciences of its users, can lead to extreme cruelty in politics.[20] Instead, their ethical inquiry should turn to non-computational morality that, for Hampshire, "involves various imaginations, unconscious memories and habits, rituals and manners, which have lent substance and content to men's moral ideas, and which have partly formed their various ways of life."[21] For Stivers, non-computational morality in public service centers the ethical inquiry of career public servants on "living within the truth."[22] She conceives of truth in politics and public life as "com[ing] out of living, out of conversation, out of action. It is not lying hidden in nature. … It questions all official constructions of reality. It depends on human capacities for political dialogue, on a plurality of viewpoints, and on inextinguishable human freedom."[23] By living within the truth of politics, career public servants do not neglect or glorify the virtues of their consciences but use their consciences to develop broad-based moral knowledge for the purpose of sharing it with others; out of this assessment emerges their wider—and better—selves. A major advantage of living within the truth of politics is moral explicitness. Moral explicitness requires a review of arguments and counter-arguments in the formation of political judgments as well as open scrutiny so that misleading information and confusing reasons can be noticed and corrected.[24]

The premise of this chapter is that career public servants have the intellect and the willingness to discover their moral dispositions, choose the kind of person they want to be, and identify their political-ethical purpose on the job. Underpinning this reflection is the interplay between thinking and judging. According to Stivers, thinking "asserts the claims of conscience" and prepares public servants to exercise judgment by engaging

[20] Hampshire, "Public and Private Morality," in *Public and Private Morality*, 4.

The term rational computational morality is drawn from Hampshire's analysis of the American involvement in Vietnam. For Hampshire (1978, 4), the computational rationality of the leaders in the US Department of Defense (DOD) involved cost-benefit analyses that justified extreme cruelty toward the Vietnamese people. He (1978, 17) argues that the simplicity of the cost-benefit calculations, which later were proved wrong, subverted the consciences of the DOD leaders because their mechanical mindsets did not perceive the moral significance of the taking of human life only in relation to its association with other losses. Thus, rational-computational rationality is, for Hampshire (1978, 23), a term of reproach because it is the wrong model of decision making, especially in life and death situations.

[21] Ibid., 22.

[22] Stivers, *Governance in Dark Times*, 49.

[23] Ibid, 51.

[24] Hampshire, "Public and Private Morality," in *Public and Private Morality*, 37.

them in silent talk to examine the basis of "what appears to me."[25] In her view, this interior conversation has two parts. The first part determines if career public servants have the internal agreement from their consciences to do something and would remain in agreement if they were standing in someone else's shoes; the second part hears what others, including their peers, supervisors, and citizens, have to say so that they can test the soundness of their views. This type of thinking and judgment is different from the mechanical judgments associated with the rational computational morality that is characteristic of the problematic American way of ethics. Instead of judging thoughtlessly based on blind adherence to existing rules (or what Stivers calls "the Eichmann legacy"), the ethical inquiry of career public servants involves their formation of judgments based on moral imagination and careful deliberation. This combination leads career public servants to reappraise difficult or emergency situations, offer valid arguments to persuade others of the validity of their choices, and invite others to accept or reject their reasons.[26] Stivers' point is that this type of understanding and judging is to pursue meaning; this appraisal is not done for the sake of instrumental or defensive purposes. Consequently, the pursuit of meaning requires career public servants to use their ethical inquiry to understand the dynamics of their personal loyalties.

Clarifying the Nature and Limits of Personal Loyalty

Loyalty, according to Eric Felton, is "the vexing virtue."[27] For Simon Keller, loyalty is an essential but fallible part of human experience.[28] Loyalty involves a partial attitude that does not necessarily require justification based on universal normative principles. If people are personally loyal to something in everyday life, then they favor it because it has a special meaning to them; they care about it for its own sake and feel legitimated to act as their loyalty demands.[29] The flip side of loyalty is disloyalty, and disloyalty may lead to transgressions involving treachery, betrayal, and treason.[30] Thus, inherent in the personal loyalties of career public servants is an interpersonal power dimension.

[25] Stivers, *Governance in Dark Times*, 61.
[26] Ibid., 65–6.
[27] Eric Felton, *Loyalty: The Vexing Virtue* (New York, NY: Simon & Schuster, 2011).
[28] Simon Keller, *The Limits of Loyalty* (New York, NY: Cambridge University Press, 2010).
[29] Ibid., 220.
[30] Jill W. Graham and Michael Keeley, "Hirschman's Loyalty Construct," *Employee Responsibilities and Rights Journal* 5, no. 3 (1992).

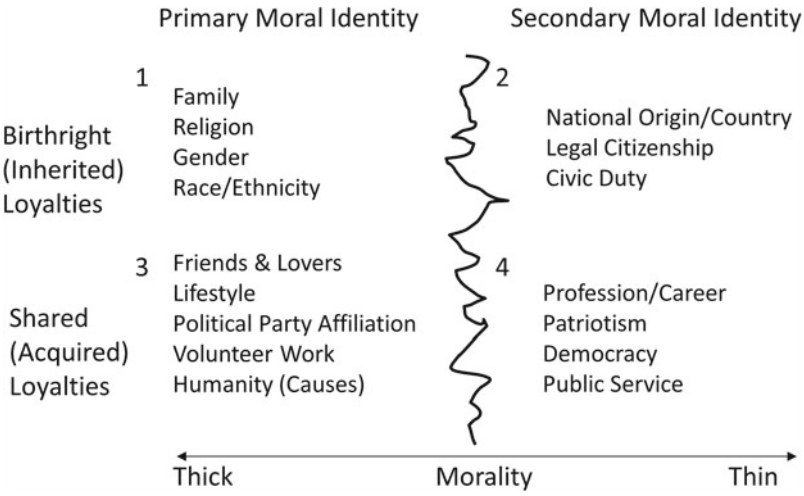

Fig. 3.1 Sources of personal loyalty

The power of loyalty is two-fold. First, loyalty functions as a social experience centered on the "self" in relation to others. Through conduct based on feelings of personal loyalty or disloyalty, people are capable of overtly or covertly exercising power over others.[31] Second, people build their personal loyalties on the habits of moral conduct they gain in everyday living. According to Michael Oakeshott, people acquire habits of moral conduct "not by constructing a way of living upon rules or precepts learned by heart and subsequently practiced, but by living with people who habitually behave in a certain manner."[32] For Oakeshott, people acquire these habits in the same way they acquire their native language.[33] The acquisition of language sets people apart from others by giving them their distinct human identity. Similarly, the acquisition of habits of personal loyalty sets people apart by giving them their ethos—the overall pattern of their moral lives.

The moral identity of career public servants, as human beings first, consists of bundles of personal loyalties drawn from two sources. As shown in Fig. 3.1, I have arranged the sources into two types—birthright (or inherited) loyalties and shared (or acquired) loyalties. The first row of Fig. 3.1 lists the

[31] Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Books, 1991), 295.
[32] Ibid., 468.
[33] Ibid., 468.

sources of personal loyalty attached to people at birth and that connect them by blood. Cell 1 of Fig. 3.1 specifies the inherited loyalties giving people their foremost commitments—to their family and religious affiliations, racial or ethnic heritage, and their gender. Cell 2 of Fig. 3.1 specifies the inherited loyalties that come from the legal rights and privileges attached to people at birth. Persons born in the USA have legal standing as American citizens. Accordingly, they are expected to live up to their civic duties derived from the American constitutional heritage and the regime values of the American people as a nation

The second row of Fig. 3.1 lists the habits of moral conduct derived from shared loyalties and relationships formed in civil society or public life. These shared loyalties are the ones most people voluntarily choose, acquire as a result of education or training, or conceive in response to their life experiences. As shown in Cell 3, people may attach themselves to a group of friends or lovers early in life, to a particular lifestyle as a result of their upbringing, or to a political party due to their parents' affiliation. Findings from the political socialization suggest these childhood loyalties persist over their lifetimes.[34] Finally, the love for humanity often underpins the motivation for people to volunteer to work for a particular social cause either early in life or later in adulthood. Cell 4 specifies less intimate shared loyalties. For example, parents and teachers may instill into children the patriotic commitment of loyal American citizens to fulfill their civic duties and to serve their country.[35] As adults, people may voluntarily commit to public service standards for a variety of reasons, including as a professional calling or an occupation necessary to maintain a livelihood. The love of democracy and the preservation of American self-government, prompting citizen participation in democratic politics and military service, are an acquired loyalty for most people.

The aggregation of birthright and shared habits of loyalty gives career public servants as human beings a broader sense of "selfhood."[36] Conceptually, this broader sense of self may be organized into primary and secondary moral identities, as shown in the two columns of Fig. 3.1. In particular, cells 1 and 3 of Fig. 3.1 indicate the loyalties that give

[34] Virginia Sapiro, "Not Your Parents' Political Socialization: Introduction for a New Generation," *Annual Review of Political Science* 7 (2004).

[35] Constance A. Flanagan, "Volunteerism, Leadership, Political Socialization and Civic Engagement," in *Handbook of Adolescent Psychology*, ed. Richard M. Lerner and Laurence Steinberg, 2nd ed. (New York, NY: Wiley & Sons, 2004).

[36] Walzer, *Thick and Thin: Moral*, 85.

people their primary moral identity; cells 2 and 4 indicate the loyalties that give people their secondary moral identity. The squiggly line in the center of Fig. 3.1 connotes that the boundaries between the primary identity and secondary identity are not fixed. Moreover, the birthright and shared loyalties bundled into the primary moral identity of people may be deeply embedded in their unconscious minds; if so, then they are likely to have difficulty changing them. In contrast, people may be willing to relax or compromise their birthright or shared habits of loyalty bundled into their secondary moral identity. Distinguishing between primary and secondary identities does not mean that people have two separate moralities. Instead, this distinction connotes that people coalesce their bundles of primary and secondary loyalties into an ordered sense of self. Williams characterizes this ordered sense of self as a federation, and the federated self gives career public servants as complex human beings their moral identity.[37]

Thick-Thin Morality and Personal Loyalty

Given this complex moral identity, career public servants hear more than one moral voice and communicate in more than one moral language. Conceptually, this dualism characterizes the third dimension of personal loyalty shown in Fig. 3.1—thick and thin morality. According to Walzer, thick and thin moralities differentiate the justifications people use to legitimate the moral dispositions that impel them to act.[38] On the one hand, thick morality associates with moral maximalism that is densely packed with ethical considerations and hard-to-penetrate (affective) loyalties. Furthermore, the expressions of thick morality reflect membership in small and tightly knit groups in which people decide the moral relevance of those whom they know up close and personally.[39] Nevertheless, the thick moral discourse of small and tightly knit groups is rife with disagreements, conflicts, and compromises.

On the other hand, the justifications for thin morality, says Walzer, are minimally conceived.[40] Thus, people communicate thin moral justifications in abstract or universal terms because their underlying loyalties are

[37] Williams, *In the Beginning Was the Deed*.
[38] Walzer, *Thick and Thin: Moral*, 101.
[39] Richard Rorty, "Justice as a Larger Loyalty," *Ethical Perspectives* 4, no. 2 (1997).
[40] Walzer, *Thick and Thin: Moral*.

imperfectly formed. For Richard Rorty, the expressions of thin morality associate with membership in large and amorphous groups such as global citizenship.[41] Against the backdrop of thin morality, it becomes clear that membership in the democratic political community and the loyalty of patriotism inhere in the secondary moral identity of most Americans. Consequently, thin loyalty involves the interests of individuals who are a part of an amorphous mass, such as "the public" or "the people"—the democratic sovereign of the American constitutional republic. In effect, most Americans may neglect or nullify the interests of "the public" because they are likely to conceive these ill-defined mass of individuals as morally irrelevant. Together, thick and thin morality express the strong and weak loyalties that people have to familiar and peripheral groups (and their interests), respectively.[42] For example, defending home and hearth is an enduring thick morality that draws from the set of birthright loyalties embedded in the primary moral identity of most people. By contrast, defending the homeland, that is, the country and the American people in peacetime, is a thin morality that draws from the set of acquired loyalties embedded in the secondary moral identity of most people (see Fig. 3.1).

Walzer also argues that there is a natural progression to the acquisition of thick and thin morality because morality in life is "thick from the beginning, culturally integrated, and fully resonant."[43] Rorty elaborates: "People know more about their families than their local villages, more about their local villages than their nation, more about their nation than humanity as a whole, and more about being human than simply being alive."[44] The natural progression of thick-thin morality is similar in some respects to the acquisition of a native tongue and a second language. In my view, the thick moral language associated with the primary moral identity is accessible to Americans early in their lives. This means that their use of thick morality is equivalent to their communicating in English as their mother tongue. In contrast, the inchoate loyalties associated with the secondary (thin) moral identity are more difficult for Americans to express because they are equivalent to their speaking in

[41] Rorty, "Justice as a Larger."
[42] Ibid.
[43] Walzer, *Thick and Thin: Moral*, 4.
[44] Rorty, "Justice as a Larger," 141.

English as a foreign (or second) language. Therefore, as Walzer states, "Most people most of the time do not see others, in context, as carriers of value."[45] Consequently, Walzer concludes that most people are not cultural pluralists.

Furthermore, Walzer argues there is a thinning process to morality over time. He says that people hastily construct thin conceptions of their thick moral loyalties by using skeletal versions that allude to their underlying commitments drawn from their primary loyalties. For Walzer, moral minimalism generates overlapping expectations that people have of their "fellows but of strangers, too."[46] Hence, minimalism is not the product of morally persuasive arguments. Instead, it "consists of rules and principles that are reiterated in different times and places, and that are seen to be similar even though they are expressed in different idioms and reflect different histories and different versions of the world."[47] Nevertheless, the thinly conceived (minimal) expressions of thick morality are widely understood. However, during times of personal misfortunes, social crises, or political confrontations, people resort to the justifications related to thin morality, and they rely on thin (minimal) moral language peppered with great intensity tailored to fit their affective needs at momentous occasions.[48] For Walzer, in this case, thin moral language is neither superficial nor shallow because it is "close to the bone" and results in "passionate insistence" when it is denied.[49]

For example, when terrorists attacked the USA on American soil on September 11, the thick and thin moralities of defending one's home and homeland overlapped. During the fearful times after September 11, most Americans personalized the attacks in New York City and at the Pentagon, interpreting them as threats to their homes and their democratic way of life. These interpretations caused them to shift the acquired loyalties of patriotism and national citizenship from their secondary into their primary moral identity. Through thin moral language, such as "Pearl Harbor all over again" or "freedom has been violated," people wrested control over their shattered psyches by engaging in a variety of civic and patriotic

[45] Walzer, *Thick and Thin: Moral*, 17.
[46] Ibid., 17.
[47] Ibid., 17.
[48] Ibid., 4.
[49] Ibid., 6.

actions to renew the American cultural identity.[50] On these momentous occasions, when people are faced with life and death choices, they turn inward to the thick-thin morality of their conscience for guidance.

The Thick-Thin Morality of Conscience

Similar to Stivers', Walzer's conception of thick-thin morality sets aside the traditional view of the role of conscience. According to the traditional view, conscience is a mental activity by which people invoke universal moral ideals to assuage their feelings of guilt or affirm their innocence regarding some type of immoral behavior.[51] In contrast, Walzer conceives of conscience as a special process of self-appraisal.[52] Through this special assessment, people recognize that what they have done (or plan to do) is unforgivable and that they cannot take back their immoral action. This awareness leads them to believe they are essentially bad: whereas words and actions can be taken back, apologized for, or repudiated, people realize that "I can't take back me."[53] This realization pierces through the psychological defense mechanisms of humans and touches them where they are the most sensitive. This emotional sensibility is scary because people recognize they cannot restore and normalize relationships after engaging in unpardonable immoral actions. These emotions offend and divide their consciences. Consequently, people grieve over the loss of their ordered moral selves. To ease their mental anguish, people look inward to their consciences for solace.

According to Walzer, people use their divided consciences to create a "confabulation" of self-critics, and together these inner critics represent contending loyalties associated with their primary and secondary moral identities shown in Fig. 3.2.[54] Although these self-critics surround the

[50] Howard F. Stein, "Days of Awe: September 11, 2001 and Its Cultural Psychodynamics," *Journal for Psychoanalysis of Culture and Society* 8, no. 2 (Fall 2003): 188.

Public actions involved increased blood donations for the injured, the establishment of relief funds for the families of victims and for survivors, and a surge in military enlistments. Moreover, public reactions included overwhelming support for President George W. Bush, who received an approval rating of 90 % and, with congressional authorization, established the Department of Homeland Security dedicated to securing a safer and securer American homeland (Gallup Poll, 2015; DHS, 2015).

[51] Richard J. Regan, *The Moral Dimensions of Politics* (New York, NY: Oxford University Press, 1986), 33.

[52] Walzer, *Thick and Thin: Moral*, 94.

[53] Ibid., 95.

[54] Ibid.

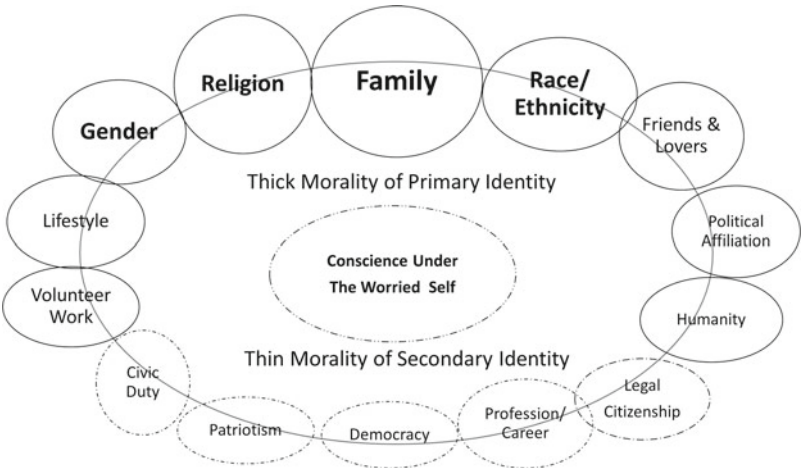

Fig. 3.2 The confabulation of internal moral critics called by the conscience under the worried self

conscience, the conscience does not command them. Instead, the divided conscience serves as "their only listener and answerer, ready to say yes or no (or maybe) to each of them."[55] On hearing the contending voices of their inner critics, people must have the mental strength to absorb all the criticisms without becoming defensive or judgmental. However, people facing moral crises are very vulnerable, and they may not have the fortitude to withstand the barrage of internal attacks. Thus, they use their conscience to search for allies.

In searching for allies, people may either acquiesce to the dictates of their consciences or probe deeply into the causes of their anguish. In Walzer's view, people make a conscious choice between two alternative selves—"the dominated self" and "the worried self" respectively. On the one hand, the dominated self finds an ally by surrendering all moral authority to a higher divine power or to an external sovereign. This acquiescence gives one's inner critic a privileged position to uphold its single universal (thin moral) standard, and this "super critic" silences the moral voices of the other inner critics. Walzer gives the following examples of dominated selves: God-obsessed religious fanatics, ideologically driven political extremists, and repressive

[55] Ibid., 98.

ultra-nationalists.[56] As Walzer argues, "The fanatic, the ideologue, the 'ultra,' the perfectionist cares about nothing but his own work: all these people are *not listening*, deaf not only to outside voices (like yours and mine) but also to inside voices" (emphasis in the original).[57] By acquiescing to a single internal super critic, the dominated self justifies immoral actions based on a thin morality that is immune from social criticism. Thus, thin moral selves dominated by an internal super critic pose a danger not only to themselves but also to the larger society.

On the other hand, the divided conscience constituted as the worried self has the moral strength to engage all the internal critics. In its confabulation of self-critics, the worried self invites each inner moral voice to exert pressure on the conscience to honor a particular set of loyalties bundled as commitments, traditions, qualifications, and entitlements. As depicted in Fig. 3.2, Walzer characterizes this type of confabulation as a pluralist democracy of criticism. At this confabulation, the divided conscience draws out, rather than suppresses, the many moral voices of these inner critics. In this democracy of criticism, the worried self allows the inner critics to speak from "close up" with urgency and passion, and "with compassion and sensitivity to the needs of others."[58] Although encircled by these assertive inner critics, the worried self, nonetheless, recognizes that "I am the whole circle and also its embattled center."[59] For example, these inner critics might urge people to conduct themselves as loyal spouses, good parents, and patriotic Americans while condemning them for failing to protect their families, lapsing from their parents' faiths, or avoiding military service to the country. Given the pervasiveness of ethical dilemmas in everyday life, these inner moral skirmishes occur continuously. If these moral skirmishes escalate into unrestrained internal warfare, then their consciences are so divided that people become distraught and have difficulty rendering even short-term decisions.

To overcome this mental paralysis, the worried self uses the internal pluralist democracy of criticism to search for the moral knowledge shared with other people rather than a single normative ideal to which to ally themselves. This internal pluralist democracy allows people to leverage

[56] Ibid., 99.
[57] Ibid., 100.
[58] Ibid., 95–6.
[59] Ibid., 99.

culturally bestowed and socially constituted moral perspectives drawn from their wider selfhood. It also saves people from the tyranny of the single-issue, self-serving, super critic and the torment of martyrdom. In this way, the worried self gets broad-based moral knowledge that it can use to transform the divided conscience into the many-sided self—"a maximalist whole."[60] On producing this maximalist (thick) whole, the worried self negotiates a truce with its internal army of critics, and this truce enables the conscience's maximalist whole to achieve a new balance of internal power. The achievement of this power balance restores internal moral order so that people are at peace with themselves such that they can bring forth their new and "better" selves.[61] As people find their better selves, they experience vindication and are comfortable going public with their reasons for having done something considered immoral in the larger society. In other words, they externalize the maximalist whole of their better selves.

Walzer equates the external criticism of conscience invited by people's maximalist whole self to a coherent public in complex pluralist democracies.[62] The externalization of conscience in pluralist democracy enables people to share the moral knowledge they used to form their better selves with those who hold competing interpretations of their immoral actions. According to Walzer, pluralist society allows people to act on one identity and then another identity without compromising their many-sided thick (maximalist) selves "much as a democratic state, despite fierce and ongoing political controversy, can pursue one set of policies and then a different set."[63] Walzer elaborates: "The democratic public changes its character without losing its collective identity or agency and listens to and responds to social criticism."[64] By externalizing their restored consciences, people go on the record to elicit media and social reactions. In this way, they may find allies and spaces where they fit into the larger society. By finding this fit, people not only survive but also thrive because they have legitimate societal outlets in which to contribute their many talents and capacities. Furthermore, the continuous production and reproduction of people's thick-sided (or maximalist) better selves are best accommodated in complex pluralist democracy because, as Walzer

[60] Ibid., 97.
[61] Ibid., 103.
[62] Ibid., 98.
[63] Ibid., 99.
[64] Ibid., 100.

posits, "I am not finally this or that—a finished self to whom we can fit a finished set of social arrangements."[65] Thus, Walzer concludes that pluralist democracy, along with its contending arguments and ever-changing public, yields a robust society where many morally thick maximalist selves can find a home.

However, any pluralist democracy has a limit on the number of thick and thin selves it satisfies and also on the range of identities and moral critics to which it responds. This limit gives a particular pluralist democracy its distinguishing features side by side with its distinct history and common language.[66] Given this limit, the potential for deviant identities exists even in a robust pluralist democracy. If an identity is under attack because it is in the minority of a pluralist democracy, then its adherents, perceived as deviants by the larger society, may only find dangerous allies and resort to threatening expressions. For this reason, pluralist democracy must provide strong legal protections to minorities to exercise their moral voices under the shelter of sovereignty. For Walzer, sovereignty is morally necessary but not a sufficient safeguard against bigotry and intolerance in the larger society.[67] The protection of minorities in pluralist democracy also requires a widespread social consensus built on constitutional and procedural notions of morality, such as racial and religious tolerance, cultural autonomy, and individual rights.[68] Although tolerance, autonomy, and rights are thin moral accounts, they gain moral power, says Walzer, because they reach equally into private practice and collective (public) life.[69] Consequently, pluralist democracy built on procedural (thin) notions of legal equality and social equity is the political system that most effectively sustains the greatest number of thick and thin selves.[70]

To illustrate the interplay of personal loyalties, thick-thin morality, and the resolution of the crisis of conscience, I will analyze the context and content of Lincoln's Gettysburg Address next.

[65] Ibid., 103.
[66] Ibid., 102.
[67] Ibid., 103.
[68] Ibid., 103.
[69] Ibid., 101.
[70] Ibid., 103.

Contextualizing Lincoln's Gettysburg Address

In this section, I place Lincoln's Gettysburg Address in the historical context of the Civil War and the prevailing cultural ideas of mid-nineteenth century America. In November 1863, Lincoln went to Pennsylvania even though he was grieving over the death of one son and left his wife to care for another son who was ill. Despite these personal difficulties, Lincoln chose to make the arduous trip to Gettysburg to account morally to the families of the 50,000 men who died or were maimed in the Battle of Gettysburg, the bloodiest in American history. Lincoln was a peaceful man with a passive personality in his private life, and he had limited military experience.[71] However, as the president, Lincoln was a "ruthless" commander-in-chief who pressured a succession of Union generals to deliver an unconditional surrender.[72] My argument is that the Gettysburg Address was a resolution of Lincoln's inner appraisal of his divided conscience and the externalization of his new and better maximalist whole self. Most importantly, Lincoln used the Gettysburg Address as an invitation to his most vocal critics, the grieving families of the fallen soldiers, to assess his moral thinking and to judge his political conduct of the war he did not initiate but waged ruthlessly.

It is important to note that President Lincoln was invited to Gettysburg not as the featured speaker but only to offer brief remarks at the end of a ceremony that opened the town's military cemetery to the public (see Fig. 3.3). At the ceremony, Dr. Edward Everett—a distinguished pastor and orator, as well as the former president of Harvard

[71] David Herbert Donald, *Lincoln* (New York, NY: Simon & Schuster, 1995).

Lincoln was a self-educated lawyer but an inexperienced commander-in-chief as compared with Jefferson Davis, a West Point graduate and former Secretary of War. Lincoln's personal military action was as a part-time militiaman in the Black Hawk War of 1832 under Andrew Jackson's leadership, and it left him with such a negative view of war that in Congress he opposed "the greed and mendacity" of President James Polk's Mexican-American War (Wills, 1992, 179). Given his inexperience, Lincoln relied on a succession of generals to command his military operations, most of whom were ineffective, until he appointed the victorious General Ulysses Grant, "a comparative failure" before and after the Civil War (Ropp, 1962, 179). In contrast, as commander-in-chief for the Confederacy, Jefferson Davis led the top professional military leaders of the time, including the charismatic and seemingly invincible Robert E. Lee (Ropp, 1962, 178).

[72] Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (New York, NY: Simon & Schuster, 1992), 182.

Theodore Ropp, *War in the Modern World*, revised ed. (New York, NY: Collier Books, 1962).

Four score and seven years ago, our fathers brought forth upon this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. [Applause]

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We are met to dedicate a portion of it, as the final-resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But in a larger sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it far above our power to add or detract. [Applause] The world will little note, nor long remember what we say here, but it can never forget what they did here. [Applause] It is for us the living, rather to be dedicated here to the unfinished work they have thus far so nobly carried on. [Applause] It is rather for us to be here dedicated to the great task remaining before us, — that from these honored dead we take increased devotion to the cause for which they here gave the last full measure of devotion, — that we here highly resolve that these dead shall not have died in vain [Applause], that the nation shall, under God, have a new birth of freedom, and that government of the people, by the people, and for the people, shall not perish from the earth." [Long continued applause]

Address delivered on November 19, 1863 at the dedication of the cemetery at Gettysburg .Source: Garry Wills. 1992. "Appendix III. D.1." *Lincoln at Gettysburg: Words that Remade America* (p. 261). New York, NY: Simon and Schuster.

Fig. 3.3 Lincoln's Gettysburg address: Spoken text

College, a former US Secretary of State, and a former US senator—gave a carefully researched 2-hour speech. Everett's speech included classical allusions and an approach akin to that of an investigative reporter.[73] In contrast, President Lincoln, a self-taught lawyer, delivered his two-minute dedication of 262 words slowly with "penetrating clarity" and "the carrying power" of a Hollywood actor.[74] Furthermore, Garry Wills compares Lincoln's Gettysburg Address with the famous funeral oration given by Pericles, the Athenian statesman and general who honored the soldiers killed in the first Peloponnesian War with Sparta in 431–429 BCE. However, unlike Pericles, Lincoln did not know the outcome of the Civil War when he spoke at Gettysburg.

[73] Richard A. Katula, *The Eloquence of Edward Everett, America's Greatest Orator.* (Peter Lang Publishing, NY: Peter Lang Publishing, 2010).

David Herbert Donald, *Lincoln* (New York, NY: Simon & Schuster, 1995).

Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (New York, NY: Simon & Schuster, 1992).

[74] Allen C. Guelzo, *Gettysburg: The Last Invasion* (New York, NY: Alfred A. Knopf, 2013), 482.

Wills, *Lincoln at Gettysburg: The Words*, 36.

At the outbreak of the war, Lincoln mistakenly believed that he could end the Southern domestic rebellion against the USA within 90 days by deploying more than 75,000 troops called up by the governors of twenty-four states.[75] After a string of early Confederate victories, Lincoln adopted his ruthless military strategy. On the one hand, Lincoln's ruthlessness was a predictable consequence of the interplay of military campaigns: the longer a war runs, the more brutal it becomes because each side tries to surpass the opponent's hostilities.[76] This inevitable escalation of hostilities leads to the systematic annihilation of the enemy and a fight to the last man standing.[77] On the other hand, Lincoln's ruthlessness stemmed from his political fear that the longer the Civil War ran, the more likely European powers would recognize and openly support the Confederate States of America as a new nation threatened by the USA.

Moreover, by 1862, Lincoln feared that not only was he losing the war but also the Union might not last another year.[78] In fact, Lincoln faced dissension within the Union Army led by General George McClellan, the Union commander of the Army of the Potomac. McClellan—who graduated second in the West Point class of 1846—disrespected Lincoln—who was inexperienced in military affairs—as the nation's civilian authority over military affairs, characterizing the president as "the *original gorilla*" (McClellan's emphasis).[79] Although McClellan was very popular with his troops, the general performed poorly on the battlefield even though he often had more soldiers than his opponents.[80] Despite McClellan's insubordinate attitude toward Lincoln and his contempt for the entire Republican administration, the president tolerated McClellan's insolence.[81] Lincoln went out of his way to support the general in his cabinet meetings because he felt he had no replacement for McClellan.[82] All the

[75] Allan Nevins, *The War for the Union: The Improvised War* (New York, NY: Scribner & Sons, 1959), 1:29.

[76] Clausewitz cited in Wills, *Lincoln at Gettysburg: The Words*.

[77] Wills, *Lincoln at Gettysburg: The Words*, 181.

[78] Allen C. Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery in America* (New York, NY: Simon & Schuster, 2004), 148.

[79] "West Point: Notable Graduates," *United States Military Academy West Point*, accessed May 24, 2015, http://www.usma.edu/wphistory/SitePages/Notable%20Graduates.aspx.

Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 99.

[80] Guelzo, *Gettysburg: The Last Invasion*, 27.

[81] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 99–100.

[82] John C. Waugh, *Lincoln and McClellan: The Trouble Partnership Between a President and His General* (New York, NY: Palgrave Macmillan, 2010).

same, Lincoln was concerned that McClellan was dangerous because the general failed to keep the president informed about battlefield operations.

Lincoln also feared that McClellan might trigger a coup d'etat with the help of some other Union generals and McClellan's devoted troops. Lincoln was at odds with McClellan because the latter preferred a negotiated peace over the president's directive for an unconditional surrender to end the war quickly.[83] However, in the battle at Antietam Creek in Maryland, the first battle to occur in the North, McClellan cornered the Confederate General Robert E. Lee in 1862 but let him escape to fight the Union again. In the wake of the Union's tactical victory at Antietam, Lincoln removed McClellan as the commander of the Army of the Potomac for deliberately ignoring the president's military order to pursue the Confederate General aggressively. Furthermore, Lincoln's worries about his losing the war intensified after the Battle of Gettysburg in 1863 because George Meade, the victorious Union general who held McClellan's position of commanding the Army of the Potomac, also allowed the charismatic and seemingly invincible Confederate General Lee to get away.[84]

Why did Lincoln participate in the unessential role of a ribbon cutter when he was in the middle of waging an uncertain military campaign? The conventional wisdom is that Lincoln went to Gettysburg for personal and political gain. According to the conventional view, the dedication ceremony gave the president a nineteenth-century "photo-op" to build public support for his 1864 reelection; it also gave him an opportunity to engage in "political fence-mending and intelligence gathering" with the governors of seventeen states or their designees who gathered at Gettysburg.[85] Kent Gramm argues that Lincoln was an immoral politician who used the Gettysburg Address to motivate Northerners to go on fighting the war he as the president should have prevented.[86] My view is different. Similar to William Lee Miller (2002), I view Lincoln not as a scoundrel or a corrupt politician but as living within the truth of his dirty hands over his brutal military campaign. Nor was Lincoln's dedication of the Gettysburg cemetery the backdrop for political theater or a

[83] Guelzo, *Gettysburg: The Last Invasion*, 29–31.

[84] Wills, *Lincoln at Gettysburg: The Words.*

Ropp, *War in the Modern.*

[85] Wills, *Lincoln at Gettysburg: The Words*, 26.

[86] Kent Gramm, *Gettysburg: A Meditation on War and Values* (Bloomington, IN: Indiana University Press, 1994), 258.

prop to support his 1864 reelection campaign. Like Wills (1992) and David Herbert Donald (1995), I argue that the cemetery dedication gave Lincoln a stage from which he could directly face the members of the public most adversely affected by the Battle of Gettysburg so that they could condemn or vindicate his moral and political leadership.

The historical record shows that the families of the fallen soldiers from both sides of the Civil War, as well as veterans of the battle, amassed in Gettysburg.[87] In particular, the families were there to find their fallen relatives either to give them Christian burials on site or to take them back home.[88] In mid-nineteenth century America, the burial of relatives killed in combat was a family responsibility, not a role for the national government.[89] The record also shows that after the battle the small town of Gettysburg with a population of 2500 was overrun with 8000 decomposing bodies of soldiers buried in shallow graves or scattered in the fields, while the rotting bodies of 5000 horses poisoned Gettysburg's streams and crops.[90] Rain, wind, and intense summer heat in 1863 eroded makeshift graves of the fallen soldiers, and the fear of an infectious disease epidemic was unquestionable.[91] Hence, the townspeople of Gettysburg felt pressure not only to cleanse the town of the public health hazards left on the battlefield but also to help the families fulfill their most sacred religious obligations.

Consequently, the citizens of Gettysburg organized a committee to establish a military cemetery specifically for the fallen Union soldiers to have a final resting place. After this citizens' committee succeeded in getting the Pennsylvania governor to appropriate funds to establish this military cemetery on the property where Union soldiers defeated Pickett's Charge, the townspeople began the process of reburial in October 1863.[92] This local citizens' committee was influenced by the rural cemetery movement that swept nineteenth-century America.

[87] Bruce Catton, *Glory Road: The Bloody Route from Fredericksburg to Gettysburg* (Garden City, NY: Doubleday & Co, 1952).

[88] Wills, *Lincoln at Gettysburg: The Words*, 21.

[89] I am grateful to U.S. Park Service Guide John Nicholas for sharing this insight during a tour of the National Military Cemetery at Gettysburg in August 2013.

[90] Wills, *Lincoln at Gettysburg: The Words*, 20.

[91] National Park Service, "Gettysburg National Cemetery, Gettysburg, Pennsylvania," National Park Service, accessed September 23, 2013, http://www.nps.gov/nr/travel/national_cemeteries/pennsylvania/gettysburg_national_cemetery.html.

[92] Ibid.

According to Wills, the members of this social movement believed that cemeteries located outside city limits would give mourners "picturesque" sites where they could contemplate nature as they reflected on the healing truths of death and rebirth.[93] These beliefs drew from the New England–based philosophy of Transcendentalism and were best expressed by Ralph Waldo Emerson. In keeping with its Transcendental roots, the rural cemetery symbolized the spiritual threshold between "life and death, time and eternity, past and future."[94] It is important to note that Lincoln's family, as private citizens, participated in the rural cemetery movement. The Lincoln family not only supported the dedication of the Oak Ridge Cemetery in Springfield, Illinois, but also buried their son there. Also significant is that Mrs. Lincoln laid her assassinated husband to rest at Oak Ridge rather than the national military cemetery in Arlington, Virginia, on land in the outskirts of Washington, DC, that the US government seized from the defeated General Lee.[95]

The Thick-Thin Morality of Lincoln's Gettysburg Address

Although the purpose of the Gettysburg Address was to dedicate a rural cemetery, one sees how Lincoln's concern for the military casualties and the human suffering of the Civil War are manifested in his brief speech (see Fig. 3.3). Against the backdrop of Walzer's framework, I interpret the Gettysburg Address as showing the rhetorical resolution of Lincoln's internal moral conflicts and his crisis of conscience to account for his dirty hands in conducting the Civil War as the nation's commander-in-chief.

Lincoln's Rhetorical Resolution of His Divided Conscience

As a public servant, Lincoln uses his internal pluralist democracy of criticism to examine why as the president he acted in ways he would consider immoral in his private life. To examine his crisis of conscience, Lincoln's worried self allowed, as Walzer suggests, his inner self critics to address his conscience up close and personally, with urgency, passion, compassion, and

[93] Wills, *Lincoln at Gettysburg: The Words*, 65–6.
[94] Ibid., 71.
[95] Ibid. 67.

sensitivity for others.[96] To resolve his crisis of conscience, Lincoln balanced the loyalties represented by his many internal critics to create his new federated better self—his "maximalist whole." As will be shown, Lincoln's new maximalist self leveraged the culturally bestowed and socially constituted moral perspectives he shared with his fellow Americans. For the sake of clarity, quotations drawn from the text of Lincoln's Gettysburg Address are placed in italics to differentiate them from other quotations made by Lincoln and Civil War historians.

The most pervasive moral voice in Lincoln's Gettysburg Address expresses the sacred religious obligations of the military families, a thick moral loyalty. As shown in Fig. 3.2, family and religion are the largest circles, connoting that, for most Americans, family and religion are the two most powerful sources of personal loyalty. Although Lincoln was not a religious man, Mrs. Lincoln noted that her husband "felt religious More than Ever about the time he went to Gettysburg."[97] In the third paragraph of the Gettysburg, one finds evidence of Lincoln's religious sentiments (see Fig. 3.3). Besides using religious language such as "*consecrate*," "*hallow*," and "*devotion*" six times in this paragraph, Lincoln closes it with a reference to "*God*." Given the brevity of his speech, Lincoln magnifies the sacred nature of the occasion by repeating religious phrases when he says, "*we cannot dedicate, we cannot consecrate, we cannot hallow this ground*."[98] Furthermore, in dedicating the Gettysburg cemetery as the eternal resting place of the fallen soldiers, Lincoln draws from Psalm 132:14 of the King James Bible as follows: "This *is* my rest for ever; here will I dwell it; for I have desired it."[99] Accordingly, Lincoln says, "*We are met to dedicate a portion of …[the battlefield], as the final resting place for those who here gave their lives. … It is altogether fitting and proper that we should do this.*" As shown in Fig. 3.3, every sentence with Lincoln's references to the religious obligations of the grief-stricken families received applause, showing the president's sensitivity and compassion for their suffering resonated with them. By voicing his religious feelings in the Gettysburg Address, the president not only consoles his conscience but also provides some comfort to ease the pain of the military families gathered at the cemetery.

[96] Walzer, *Thick and Thin: Moral*, 95–6.
[97] Guelzo, *Gettysburg: The Last Invasion*, 479.
[98] Donald, *Lincoln*, 461.
[99] Psalm 132:14 (King James Version).

Moreover, in closing the Gettysburg Address, Lincoln solemnly pledges to the military families that the sacrifices made by the deceased are not in vain. In practice, Lincoln kept his pledge not to forget the fallen soldiers' deeds on the battlefield or the suffering of their families. As the president, Lincoln actively supported the expansion of government pension benefits for Civil War veterans and the dependents of soldiers killed in action, especially their widows and orphans. In 1862, the Congress passed a general law[100] that was the most liberal military pension compensation package in American history.[101] Before signing the legislation, Lincoln urged the Congress to make the pension legislation color-blind by providing for the widows and dependents of black soldiers, including former slaves, who fought for the Union. By fulfilling his solemn Gettysburg oath made to the military families, Lincoln achieves what Walzer conceives as a moral truce with his most vocal inner and external critics.

A second moral voice Lincoln uses in the Gettysburg Address to reinforce the religious obligations of the military families is that of Transcendentalism.[102] The rural Gettysburg cemetery provided a natural setting for Lincoln's invocation of widely shared Transcendental ideals. The Transcendentalists viewed reality as intrinsically spiritual, "with nature itself a mirror of the human soul."[103] As Romantics, they also emphasized optimism, nature, emotional catharsis, and self-reliance in daily living and the upward progress of the soul in the afterlife. For example, in his poem "Threnody," Emerson wrote about his anguish over the death of his son, Waldo, and his catharsis: "My servant Death, with solving rite/ Pours finite into infinite."[104] For Emerson, the continuous, joyous presence of the late Waldo in his life taught him to stay open to new insights drawn from "Mary's Son/Boy-Rabbi, Israel's paragon" as well as from Nature's "rainbows" and "sunsets."[105] By linking the lessons of his past and present to shape his future life "Built of furtherance and

[100] An Act to Grant Pensions, 12 Stat. 566 (1862).

[101] Claire Prechtel-Kluskens, "'A Reasonable Degree of Promptitude': Civil War 51 Pension Application Processing, 1861–1865," *Prologue Magazine (National Archives)*, last modified 2010, accessed May 11, 2015, http://www.archives.gov/publications/prologue/2010/spring/civilwarpension.html.

[102] Wills, *Lincoln at Gettysburg: The Words*.

[103] Simon Blackburn, *The Oxford Dictionary of Philosophy* (New York, NY: Oxford University Press, 1996), 332.

[104] Ralph Waldo Emerson, "Threnody," in *The Selected Writings of Emerson*, ed. Brooks Atkinson (New York, NY: Modern Library, 1950), 781.

[105] Ibid., 781–2.

pursuing/Not of spent deeds, but of doing," Emerson internalized his suffering, experienced salvation, and recreated himself.[106]

Similar to Emerson, Lincoln, a grieving father, used the Transcendental notion of balancing life and death as well as mortality and immortality in the Gettysburg Address when he says "*those who gave their lives*," rather than lost their lives, with the reverse benefit "*that the nation might live*." He also says that the living in the world "*can never forget what … these honored dead*" did at Gettysburg because their sacrifices have given the nation "*a new birth of freedom*." Additionally, Lincoln invokes the Transcendental images of life and renewal by separating the USA from other nations because her birth is "*conceived in Liberty*." In this way, the president echoes the Constitution's Preamble and the Declaration of Independence. Thus, Lincoln weighs both his and the nation's worries over the lost American lives against the American constitutional heritage and his solemn oath faithfully to "execute the Office of the President of the United States" and "to the best of …[his] Ability to preserve, protect, and defend the Constitution of the United States" (see Article II, Section 1).

Rhetorically, Lincoln resolves the relationship between the dead and the living by optimistically framing the honored sacrifices of the fallen soldiers as endowing a better future for the unified country. By giving the nation "*a new birth of freedom, the honored dead … they here gave the last full measure of devotion*" to sustain the democratic government of the USA. In effect, Lincoln associates the thin moral conceptions of Transcendentalism with the thick morality of family (blood) relationships and sacred religious purposes, his own "religious reverence" for the Constitution, and the upward progress of the collective soul of the American people's nation.[107] As Walzer suggests, thinly conceived expressions of thick morality shared with intense passion tailored to fit momentous occasions are widely understood even if they are spoken in skeletal forms, such as Lincoln's wrapping of the salvific power of the military families around their patriotism to the constitutionally conceived Union.[108] By adroitly blending the thick and thin public and private moralities of nineteenth-century American society in the Gettysburg Address, Lincoln delivers a powerful spiritual message to uplift the grieving families.[109]

[106] Ibid., 783.

[107] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 5.

[108] Walzer, *Thick and Thin: Moral*, 4.

[109] Gramm (1994, 258) provides a different view from mine. He argues that Lincoln should have solved the political problems in antebellum American rather than resort to an

A third moral voice expressed in the Gettysburg Address reflects Lincoln's belief in following the dictates of prudence. According to Allen Guelzo (2004), Lincoln's politics of prudence blended wisdom and perseverance. In eulogizing President Zachary Taylor, Lincoln defined wisdom as trusting God, retaining the confidence of the American people, and providing hope for a better tomorrow. Specifically, he said, "Yet, under all circumstances, trusting to our Maker, and through his wisdom and beneficence, to the great body of our people, we will not despair, nor despond."[110] Guelzo argues that obeying the dictates of prudence was as important to Lincoln as obeying the constitutional obligations of law. Lincoln blends his politics of prudence and the rule of law in the Gettysburg Address when he says, "*It is rather for us the living, to be dedicated here to the great task remaining before us… that the government of the people, by the people, and for the people, shall not perish from this earth.*" With these words, Lincoln acknowledges both the living for persevering through hardships and the honored dead soldiers who "*gave their last full measure of devotion*" for their dedication to the higher purpose that ordinary American citizens can govern themselves.[111] For Lincoln, their forbearance to this noble cause reaffirms the spirit of the American founders and the preservation of the US nation.

In effect, Lincoln's politics of prudence focuses his and the public's attention on the long view of the nation's future. In keeping with his prudent orientation, Lincoln eschewed political popularity and jeopardized his reelection prospects. As commander-in-chief, Lincoln could have received immediate accolades by ending the war after the Union victory at Gettysburg (and also at Vicksburg). However, Lincoln was not a politician who was motivated by personal ambition or public opinion polls.[112] Given his beliefs in both prudence and constitutional law, Lincoln, in the Gettysburg Address, expresses his substantive political choice to persevere in securing the nation's long-term viability instead of short-term personal or political gain.

unpardonable mortal combat. In Gramm's view, the Gettysburg Address failed to provide comfort to the Southern and Northern patriots and the families of the fallen soldiers.

[110] Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings* (Cleveland, OH: World Publishing Company, 1946), 2:89.

[111] Guelzo, *Gettysburg: The Last Invasion*, 480–1.

[112] James Tackach, *Lincoln's Moral Vision: The Second Inaugural Address* (Jackson, MS: University Press of Mississippi, 2002), xviii.

Moreover, Lincoln's politics of prudence also involves deference to providence—"whether one defined *providence* as the work of an active or interventionist God or merely the forces of history, economics, and ideas" (emphasis in the original).[113] In his Farewell Address to the citizens of Springfield, Illinois, on February 11, 1861, Lincoln said:

> I now leave, not knowing when, or whether ever, I will return, with a task before me greater than that which rested upon [George] Washington. Without the assistance of that Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail.[114]

Lincoln uses his belief in providence to cope with his responsibility for the massive Civil War casualties. Like all Americans, Lincoln could not escape the Civil War because its battles were fought on the home front rather than in remote overseas locations. In fact, most Civil War battles were personal because they were waged in the backyards of Southerners and Northerners. The weight of the bloody Civil War on Lincoln's conscience is manifested in the many references to the dead in the Gettysburg Address.

The consensus view among Civil War historians is that Lincoln brooded over the massive casualties and the suffering caused by his ruthless military campaign. Accordingly, they depict Lincoln as haggard, depressed, sleepless, and anxious, constantly assessing whether the killing was worth it and when the long war would cease.[115] In a conversation between Lincoln and Indiana Congressman Daniel Voorhees, the president asked, "Doesn't it seem strange to you that I, who couldn't cut off the head of a chicken, and who was sick at the sight of blood, should be cast into the middle of a great war, with blood flowing all around me?"[116] By brooding over the pain, suffering, and loss endured by the American people during the Civil War, Lincoln allowed an inner moral voice to express harsh criticism of his brutal military campaign, and he used his conscience to probe deeply into the cause of his anguish. Lincoln comforted his worried self by reading the Bible's Old Testament and the Psalms.[117] In Walzer's framework, the solace Lincoln found in the Bible helps him overcome the potential

[113] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 6.
[114] Basler, *Abraham Lincoln: His Speeches*, 4:190.
[115] Tackach, *Lincoln's Moral Vision: The Second*, 113.
[116] Donald, *Lincoln*, 514.
[117] Ibid., 514.

for mental paralysis associated with his crisis of conscience. The president expresses the solace he achieves from reading the Bible in the last sentence of the Gettysburg Address: the brave soldiers died so that the nation under God would not die. On gaining solace, the president has the emotional strength to persevere in what he believes is the correct and prudent course of action for the country's long-term future.

In addition, the Gettysburg Address reveals how Lincoln uses his belief in the politics of prudence to resolve a moral conflict between his constitutional duty to preserve the Union and his personal belief in universal human equality. Guelzo specifies that Lincoln's politically prudent blend of wisdom and perseverance guards against the passions of individuals for the sake of order and guards the guardians for the sake of freedom.[118] In a speech given at Independence Hall in Philadelphia on February 22, 1861, Lincoln said:

> I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence. [Great cheering.]. … I have often inquired of myself what great principle or idea it was that kept this Confederacy so long together. It was not the mere matter of the separation of the colonies from the mother land; but something in that Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time. [Great applause.] It was that which gave the promise that in due time the weights would be lifted from the shoulders of all men, and that *all* should have an equal chance. [Cheers.] (Lincoln's emphasis)[119]

In the Gettysburg Address, Lincoln rhetorically resolves the conflict between his religious reverence for his constitutional duty (a thick morality drawn from his public life) and universal human equality (a thin morality drawn from his private life) in the first sentence. Specifically, he invokes the nation's foundational documents, referencing both the Declaration of Independence and the Constitution. With an explicit reference to the 1776 Declaration, Lincoln opens his speech with "*Four score and seven years ago, our fathers brought forth on this continent, a new nation*" and closes the first sentence by reiterating the Declaration's "*dedication to the proposition that all men are created equal.*" In between these phrases, Lincoln alludes to the Constitution's Preamble by mentioning that the new nation's conception "*in Liberty.*" Thus, Lincoln

[118] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 4.
[119] Basler, *Abraham Lincoln: His Speeches*, 4:240.

masterfully invokes the ideas, spirit, and obligations associated with the American constitutional heritage in the Gettysburg Address. Yet, prominent critics from the *New York World* and the *Chicago Times* missed the subtlety of Lincoln's speech when they panned the Gettysburg Address for the president's apparent disregard of the Constitution.[120]

Despite Lincoln's reference to the Declaration of Independence's "*proposition that all men are created equal*" in the Gettysburg Address, the president, in practice, was not "an egalitarian revolutionary who displaced the Constitution's goal of preserving liberty in favor of the Declaration's pursuit of equality."[121] In his private life, Lincoln hated slavery, and he argued against slavery as an institution on civil libertarian grounds in his public life, but he did not speak for its black victims.[122] It is no surprise that abolitionists viewed Lincoln as "tardy, cold, dull, and indifferent."[123] Guelzo's point is that the spiritual elevation of the Declaration's equality proposition in the Gettysburg Address is a weak base on which to characterize Lincoln as an abolitionist reformer. During his presidency, Lincoln steadfastly maintained that he would not betray his constitutional oath to preserve, protect, and defend the USA. For example, in a private correspondence with Horace Greeley, the editor of the *New York Tribune*, the president wrote on August 22, 1862:

> My paramount object in this struggle *is* to save the Union, and is *not* either to save or destroy slavery. If I could save the Union without freeing *any* slave, I would do it; and if I could do it by freeing *all* the slaves, I would do it; and if I could save it by freeing some and leave others alone, I would also do that. (Lincoln's emphasis)[124]

In 1862, Lincoln chose the third option when he announced the Emancipation Proclamation as a formal military order.

Thus, in practicing the politics of prudence, Lincoln balances responsibility for ethical ends (the elimination of slavery) and responsibility for ethical means (his constitutional oath to protect, defend, and preserve the Union).[125] Against the backdrop of Walzer's framework, one sees

[120] Guelzo, *Gettysburg: The Last Invasion*, 480; Donald, *Lincoln*, 456–6.
[121] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 199.
[122] Ibid., 4, 22.
[123] Ibid., 250.
[124] Basler, *Abraham Lincoln: His Speeches*, 5:388.
[125] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 5.

that Lincoln's balancing of ethical ends (the elimination of slavery) and ethical means (his constitutional duty) reflects his conscientious decision to transform his worried self into his wider and better "maximalist" self. Rather than suppress the inner moral voice reflecting his personal belief in human equality, Lincoln embraces it internally and then publicly. Lincoln reveals the production of his new and better self when he wrote Greeley the following:

> I shall try to correct errors when shown to be errors; and I shall adopt new views so fast as they shall appear to be true views … and I intend no modification of my oft-expressed *personal* wish that all men every where could be free. (Lincoln's emphasis)[126]

Furthermore, Lincoln's Emancipation Proclamation did not exceed his constitutional authority because its scope covered only those slaves in the states and territories that rebelled against the USA (see Chap. 8). As Guelzo argues, "Even for the sake of ending slavery, …[Lincoln] would not permit himself the flimsy excuse that 'I might take an oath to get power, and break the oath in using the power.'"[127] For Lincoln, emancipation was a political goal achieved through prudential means so that worthwhile consequences—the end of slavery—could occur.[128] Guelzo's point is that Lincoln understood that emancipation was not a moral imperative that overruled constitutional law. The significance is that the partial emancipation of the slaves not only restored Lincoln's divided conscience but also was a prudent measure to preserve the Union within the bounds of the president's constitutional authority.[129]

Although Lincoln found his new and better self by reconciling the emancipation of the slaves and the Constitution's rule of law, his prudent politics regarding slavery was risky. On the one hand, Lincoln used the Emancipation Proclamation to allay his fears that Britain and France might intervene in the Civil War on behalf of the Confederate States of America.[130] On the other hand, Lincoln feared that the Emancipation Proclamation might trigger domestic political backlashes. As Walzer suggests, the protection of minorities under thin legal notions of morality is

[126] Basler, *Abraham Lincoln: His Speeches*, 5:389.
[127] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery*, 201.
[128] Ibid., 5.
[129] Ibid., 199.
[130] Ibid., 224–7.

not sufficient to safeguard against bigotry and intolerance in the larger pluralist society.[131] The president issued the Emancipation Proclamation after the Union victory at Antietam, where the bloodiest single-day battle in American history was fought.[132] Attached to the Proclamation Emancipation was the president's executive order to recruit black soldiers for the Union Army. By issuing these emancipation orders, Lincoln risked losing the slave-holding border states from the Union to join the Confederacy. The leaders of the border states objected to Lincoln's actions because they saw them as a pathway for illegally granting black Americans citizenship and encouraging slaves in their jurisdictions to flee to the North.[133]

The president's executive orders also elicited "howling indignation" among the army supporters of General McClellan's negotiated peace policy and from white Northerners who saw the war's sole purpose was to preserve national unity.[134] Apart from the possibility of a McClellan-led mutiny as discussed earlier, the Emancipation Proclamation was very unpopular with white Northern voters. In fact, the president and the Republicans experienced a huge backlash in the midterm congressional elections of November 1862.[135] Moreover, the day after the 1862 elections, Lincoln fired McClellan. Fortunately for Lincoln—and the country—the Union generals did not rebel. Nevertheless, in 1864, McClellan formally opposed the president's reelection by becoming the Democratic presidential nominee on a peace platform, but the general's popularity with

[131] Walzer, *Thick and Thin: Moral*, 103.

[132] "Antietam National Battlefield," *Civil War Trust*, last modified 2014, accessed May 7, 2015, http://www.civilwar.org/civil-war-discovery-trail/sites/antietam-national-battlefield.html.

The Civil War Trust reports that 23,000 soldiers were killed, maimed, or lost in the 12-hour Battle of Antietam.

[133] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery.*

[134] Guelzo, *Gettysburg: The Last Invasion*, 25.

[135] Jamie L. Carson et al., "The Impact of National Tides and District-Level Effects on Electoral Outcomes: The U.S. Congressional Elections of 1862–1863," *American Journal of Political Science* 45, no. 4 (2001).

The Republicans lost 23 seats in the House and the Democrats won 28 seats, shifting more than one quarter of the lower chamber's representatives. Thus, the Republicans went from controlling 59 % of the seats to 46.2 % of the seats in the House of Representatives. They maintained control of the lower chamber only by forming a coalition with the pro-war, pro-Emancipation Unconditional Union Party in the border states (Carson et al., 2001, 887–888). Lincoln viewed these election results as referenda on his administration (Guelzo, 2004).

his troops did not translate into an election victory. Ultimately, Lincoln captured 70 % of the popular votes cast by Union soldiers in the field, and he won reelection in a landslide by receiving 212 votes out of 233 cast in the Electoral College.[136] In keeping with his politics of prudence and perseverance, Lincoln interpreted his landslide election victory as signaling decisive Northern support "for pressing the war to its last bitter drop."[137]

Going Public: The Moral Accountability of Lincoln's Unified Conscience

According to Walzer (1994), once people unify their divided consciences, they feel comfortable going public with their new and reordered better (morally thick maximalist) selves. By externalizing their newly unified consciences, people share the moral knowledge they have used to form their better selves with those who hold competing interpretations of their questionable actions to receive their condemnation or vindication. Thus, against the backdrop of Walzer's framework, it is no mystery why Lincoln accepted his limited speaking role at the dedication of the Gettysburg's cemetery. On achieving his new maximalist self, Lincoln's unified conscience gave him the emotional strength to explain and justify his morally questionable conduct to the public most directly and adversely affected by his political decisions—the veterans and the bereaved families of the fallen soldiers.

In the Gettysburg Address, Lincoln also faces the American people collectively. Besides expressing the passion, compassion, and urgency of his new maximalist self, Lincoln, in crafting his speech, shows respect for his audience's capacity to follow his moral thinking.[138] The Gettysburg Address acknowledges the military families—and the American people—for recognizing "something transcendental after all in the rainbow promise of …[democratic self-government], something worth dying to protect,

[136] Oscar Osburn Winther, "The Soldier Vote in the Election of 1864," *New York History* 25, no. 4 (October 1944).

Library of Congress, "Presidential Election of 1864: A Resource Guide," *Library of Congress*, last modified September 30, 2014, accessed May 8, 2015, http://www.loc.gov/rr/program/bib/elections/election1864.html.

[137] Guelzo, *Gettysburg: The Last Invasion*, 464.

[138] William Lee Miller, *Lincoln's Virtues: An Ethical Biography* (New York, NY: Knopf, 2002).

something worth communicating to the living."[139] As the president says, "*Now we are engaged in a great civil war, testing whether …[the USA], or any nation so conceived [in Liberty] or so dedicated [to the proposition that all men are created equal], can long endure*." In effect, Lincoln expresses his belief that, by supporting the Civil War, the soldiers and their grieving families, along with the American people, have successfully passed the test of their faith in the nation's foundational ideals and constitutional propositions. Ultimately, the Gettysburg Address is Lincoln's testimony to lay citizens for their extraordinary efforts to uphold the integrity of the nation's constitutional foundations, showing the world that the American experiment of democratic government is not an absurdity.[140] Lincoln's respectful appeal to the audience's patriotism and the universal human equality exemplify his moral leadership "without the bane of moralism."[141]

Overall, the Gettysburg Address is Lincoln's statement of the rightness of his course of action to uphold his constitutional duty to defend and preserve the nation. In justifying his morally questionable behavior, Lincoln does not abandon his personal morality to become either a saint or a scoundrel. In speaking to the American people, the president does not deceive the public to cover up his dirty hands; nor does he shirk blame for the grim means he used to keep the country whole. In the Gettysburg Address, Lincoln avoids self-righteousness to cleanse himself of his responsibility for the massive carnage of the Civil War. Unlike Everett's oration, Lincoln does not reference slavery in the Gettysburg Address, and he does not condemn the Confederates for starting the war. Instead, Lincoln honors all the dead soldiers by using generalizing articles such as "*a great civil war*," "*any nation*," and "*a great battle-field*" rather than proper nouns.[142]

All in all, the audience at Gettysburg gave Lincoln feedback that they understood and validated his moral reasoning and vindicated his political leadership. One reason why they accepted Lincoln's Gettysburg Address is that his thinking and judgment emphasized what was in the long-term best interest of the American people. Another reason is that the president's "public thinking" was correct because his inner moral voices were similar to the deep (thick) moral convictions of those attending the Gettysburg cemetery dedication—and most nineteenth-century

[139] Guelzo, *Gettysburg: The Last Invasion*, 478.
[140] Ibid., 480.
[141] Miller, *Lincoln's Virtues: An Ethical*, 297.
[142] Wills, *Lincoln at Gettysburg: The Words*, 58.

Americans. Still another reason is that Lincoln masterfully used moral minimalism in the Gettysburg Address to express the thick moralities of most Americans. As Walzer argues, moral minimalism of thick moralities generates overlapping commitments people are willing to make for those in their immediate environment and for anyone who is not a part of their particular way of life.[143] Consequently, the Gettysburg audience comprised both Northerners and Southerners, despite holding different worldviews, grasped the moral significance of Lincoln's Address in renewing what it meant to be an American.

The externalization of conscience enabled Lincoln to elicit media and social reactions drawn from pluralist American society to evaluate his moral thinking and political judgment. Beyond his immediate audience, Lincoln's Gettysburg Address reached the general public. With a few exceptions noted earlier, Lincoln earned positive reactions from the media covering the Gettysburg ceremony, including the *Chicago Tribune*, the *Washington Chronicle*, and *Harper's Weekly*.[144] Recognizing the magnitude of Lincoln's Gettysburg Address, Everett, the keynote speaker at the cemetery dedication, wrote the president the following note: "I should be glad if I could flatter myself that I came as near to the central idea of the occasion, in two hours, as you did in two minutes."[145]

In summary, Lincoln's sponsors asked him to deliver a spiritual message of healing and renewal to "disinfect" and "sweeten" the polluted air of Gettysburg.[146] According to Wills, Lincoln's Gettysburg Address effectively "etherealized" the nightmarish realities of the Civil War.[147] Apart from satisfying his sponsors' purpose, Lincoln used the crucible of his thick and thin moral reasoning not only to unify his divided conscience but also, rhetorically, to unify the divided nation. The public's affirmation of Lincoln's Gettysburg Address memorialized not only the president's maximalist whole—his better self—but also the better self of the entire nation. Beyond his immediate audience of 15,000, President Lincoln's thick-thin moral message was significant because it was rich in meaning for those who were far from Gettysburg then and now.

[143] Walzer, *Thick and Thin: Moral*, 17.
[144] Donald, *Lincoln*, 465.
[145] Katula, *The Eloquence of Edward*, 118.
[146] Wills, *Lincoln at Gettysburg: The Words*, 37–8.
[147] Ibid., 52.

Shortly after the war's end, Lincoln, at his last Cabinet meeting on April 11, 1865, emphatically expressed his determination not only to secure liberty and justice for all citizens, including fully protecting the freed slaves, but also to recognize the citizenship of black Americans as a part of reestablishing the unity of the renewed Republic.[148] Reacting, in part, to Lincoln's determination, John Wilkes Booth, the actor, "negrophobe," and Confederate agent, assassinated the president later that day.[149] Similar to the honored dead at Gettysburg, the president gave his life in courageously defending and nurturing the American constitutional polity.

Implications for Career Public Servants

Four implications emerge from this analysis that are relevant to today's public servants. The first implication concerns how they may govern the nation in dark times. According to Stivers, "Public service in dark times is mindful, critical, and enacted on common ground—in the world with others. It is hopeful, serious and committed to freedom"[150] Lincoln was an exemplary public servant who governed the nation during its darkest times—the Civil War. As a public servant, Lincoln did his job, as Stivers (2008) suggests, by putting himself in the American people's shoes to have them inform his thinking and judgment, and then he faced citizens in person to receive their vindication or condemnation about his morally questionable political conduct. In delivering the Gettysburg Address, the president offered hope about the nation's future and reiterated the serious matter of preserving the Union while invoking the political equality of the American people under the democratic government they authorized. The public at the Gettysburg cemetery accepted the president's moral arguments to continue the war, despite its horrendous impact on the American people.[151]

The second implication is that ethical progress in American society depends, in part, on morally and politically minded career public ser-

[148] Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery* 250.

[149] Ibid., 235.

[150] Stivers, *Governance in Dark Times*, 153.

[151] It is difficult to comprehend fully the magnitude of deaths produced in the Civil War. Perhaps the starkest comparison is with World War II, some memory of which still lingers in the American mind. The number of Civil War deaths was almost eight times the number of deaths in World War II by per capita population (Hacker, 2011; The National WWII Museum, 2015).

vants who are unafraid and determined not only to defend but also to nurture the US constitutional system. Lincoln's rhetorical appeal to the thin morality of human equality in the Gettysburg Address has had long-range impact. For most people, human equality is an abstraction not grounded in their daily lives or primary moral identities. Yet, as Walzer argues, thin moral accounts gain more power when they reach equally into private practice and collective (public) life.[152] In the Gettysburg Address, Lincoln rhetorically associated the grieving military families and enslaved black Americans with his personal determination to uphold his constitutional oath to preserve liberty and the Declaration's proposition of human equality. As Guelzo contends, the assertion of propositions is more appropriate for debates and disputations rather than for nation building or the formation of people's national identity.[153] In the Gettysburg Address, Lincoln, like the American founders, reconciled the Declaration's equality proposition with the Constitution's nation-building provisions and the formation of the American identity.[154] Thus, Lincoln's rhetorical reconciliation of thin and thick morality in the Gettysburg Address nurtured a nascent consensus of legal and social equity. This consensus was built on constitutional and procedural notions of morality wrapped around vital family and sacred religious obligations. Lincoln's moral and political leadership, together with his reelection in 1864 and the constitutional politics after the Civil War, facilitated a widespread social consensus against slavery (see Chap. 8). Slowly but steadily, this social consensus has changed the public morality of the USA for the better.

The third implication is that, through the Gettysburg Address, Lincoln, as a public servant, deepened the moral ties of most Americans to each other. Lincoln's blend of thick and thin morality integrated into the private lives of citizens the important public (constitutional) values that bind the American people together as a nation. As mentioned above, Lincoln wrapped the thin moralities of national unity and human equality around the thick moralities of sacred family and religious obligations. Thus, Lincoln defined the meaning of national citizenship so that it was not remote from the primary moral identity of most Americans and stood for much more than legal standing or political status (see Fig. 3.1). According

[152] Walzer, *Thick and Thin: Moral*, 101.
[153] Guelzo, *Gettysburg: The Last Invasion*, 480.
[154] Ibid., 479.

to Guelzo, it took Lincoln twenty minutes of moral reasoning in the Gettysburg Address to define what makes an American. The significance of Lincoln's moral leadership is that it alerts today's career public servants to recognize what it means to be an American citizen now—as it did then at Gettysburg: the political "oneness" of Americans cannot be separated from their moral and cultural "manyness."[155]

The fourth implication relates to the value of moral philosophy in helping career public servants to uphold the constitutional duties of their offices when facing emergencies or urgent situations. As a public servant, Lincoln used moral philosophy to review his conscience in an undeluded and disciplined way to fulfill his constitutional obligations, broaden his outlook to take a long view, and accept ethical responsibility for the consequences of his choices that dirtied his hands politically. Consequently, Lincoln steadied the wobbly ethics ladder associated with his holding the nation's highest office. As shown in the analysis of Lincoln's Gettysburg Address, Lincoln's presidency "[did] not corrupt him but [did] something like the reverse."[156]

In closing, this chapter discussed the power of the political ethics of public service under urgent conditions. Unlike the Emancipation Proclamation, Lincoln did not write the Gettysburg Address as a political document. Lincoln's purpose was to comfort the bereaved families as he elicited their trust to continue the Civil War under his constitutional authority. Ultimately, Lincoln's moral leadership had far-reaching political significance because he preserved and renewed the singular American (national) identity. Thus, the actions of philosophically reflexive public servants can have long-lasting, positive effects when they honestly probe their consciences to mediate the multiple viewpoints associated with their personal loyalties, constitutional obligations, and universal standards of morality.

Fortunately for most career public servants, they do not govern in the dark times comparable to Lincoln's circumstances. Therefore, the next chapter discusses why and how career public servants may apply the power of the political ethics of public service in everyday situations.

[155] Michael Walzer, "What Does It Mean to Be and 'American'?," *Social Research, an International Quarterly* 71, no. 3 (2004): 639.

[156] Miller, *Lincoln's Virtues: An Ethical*, 408.

CHAPTER 4

"What Will I Do?": Clarifying Self-Interest

> *It is in appreciating the reality of self-interest that public servants find some of the strongest forces for motivating behavior public and private. Normally speaking, if a public interest is to be orbited, it must have as a part of its propulsive fuel a number of special and particular interests. A large part of the art of public service is in the capacity to harness private and personal interests to public interest causes.*
>
> *Stephen K. Bailey, "Ethics and the Public Service"*

This chapter explains how ethical inquiry allows career public servants, as moral philosophers, to clarify their motivations and purpose when unsure about what to do in everyday situations. The previous chapter explored the question of "What am I to be?" and analyzed the impact of personal loyalties on the overall pattern of their moral lives. It also examined how career public servants may use "thick" and "thin" moral expressions derived from the private and public morality of American society to justify the actions that give meaning to their personal loyalties. Using the case of Lincoln at Gettysburg, Chap. 3 showed how career public servants may use their private conscience in a self-assessment process designed to uphold their constitutional responsibilities in life-and-death situations.

Fortunately, most career public servants do not face the crisis of conscience and the momentous life-and-death decisions that President Lincoln faced during the Civil War. Therefore, in this chapter, I examine the second question in the ethical inquiry of career public servants—"What will

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I do?"—in everyday situations. Against the backdrop of philosophical reflexivity, this inquiry is to increase their awareness about how narrow and enlightened interpretations of their self-interest inhere in their moral thinking and political judgment. Philosophical reflexivity helps career public servants clarify their motivations and the moral purpose of their lives when they are unsure about what to do but are not necessarily under the extreme mental duress that activates their conscience.

The purpose of philosophical reflexivity in the context of American political ethics is not to give public servants a particular democratic ideology but to give them conceptual tools for reflecting on everyday moral beliefs comprising their common-sense intuitions about good and bad conduct.[1] Specifically, this chapter concentrates on the philosophical standard of applied ethics known as logical reasonableness. This standard offers career public servants a methodology by which they can combine their basic moral beliefs with the products of ethical theories "to arrive at more realistic and intelligent perspectives on values in society."[2] In practice, this standard helps career public servants answer the question of "What will I do?" by enabling them to articulate and defend their moral choices without giving them the "correct" answer a priori. It also helps them identify the implications of their moral conflicts.[3]

This chapter builds on the premise of the previous chapter that career public servants are humans first with bundles of personal loyalties drawn from private or everyday morality. In other words, career public servants have basic moral beliefs before they enter the public service. Their basic moral beliefs are those they have learned early in life from their parents, religious leaders, and schoolteachers. Besides comprising the loyalties inherent in their primary moral identity, these basic moral beliefs of career public servants include dictums, such as the idea that lying, cheating, and stealing are "bad" things to do, while playing well with others is "good." However, inquiring career public servants must be careful that their attempts at philosophical reflexivity do not destroy their conscience. They can easily subvert their conscience if they use philosophical reflexivity to rationalize their actions based on the rational computational morality of

[1] Gene Blocker, *Ethical Inquiry* (unpublished manuscript, 2012).

[2] Abraham Kaplan, *American Ethics and Public Policy* (New York, NY: Oxford University Press, 1963), 101.

[3] Isaiah Berlin, "The Pursuit of the Ideal," in *The Crooked Timber of Humanity: Chapters in the History of Ideas*, ed. Henry Hardy (New York, NY: Alfred A. Knopf, 1991), 19.

the American way of ethics or to adorn their excuses with clever, though specious, arguments.[4] Although the use of philosophy as a supplement to conscience does not eliminate the problem of subjectivity in their interpretations and justifications, it allows them to practice their personal morality in a political manner.[5] According to Bailey, philosophical reflexivity enables career public servants to create the "propulsive fuel" for harnessing artfully personal and private interests that are within the law into the orbit of public interests.[6]

Thus, philosophical reflexivity assumes that self-interest inheres in the decisions of career public servants. In fact, Bailey (1964) argues that the most frequently hidden agenda in the deliberations of career public servants is the effect of their substantive and procedural decisions on their own lives and personal prosperity. Building on Bailey's observation, I argue that two perspectives of self-interest underpin the moral understanding and political judgment of career public servants. My argument is that philosophical reflexivity enables them to discern that they derive some choices from a narrow interpretation of their self-interest and other choices from a broad interpretation of their self-interest. My distinction between narrow and broad interpretations of self-interest allows career public servants to assess whether they are motivated to do something because it serves their personal interests or because "it is right."[7] Therefore, the next section discusses how these twin perspectives of self-interest underpin the ethics dimension of the political ethics of public service.

The Twin Perspectives of Self-Interest

As autonomous moral agents, career public servants exercise free will whether or not they conceive their actions from a narrow or a broad conception of their self-interest. In exercising their free will, they make conscious choices based on their own volition. These conscious decisions depend on their intention to do or not to do something. Specifically, conscious choices conceived from narrow interpretations of self-interest

[4] Stuart Hampshire, "Public and Private Morality," in *Public and Private Morality*, ed. Stuart Hampshire et al. (London, UK: Cambridge University Press, 1978).

Mark Lilla, "Ethos, 'Ethics,' and Public Service," *The Public Interest* 63 (1981).

[5] Kaplan, *American Ethics and Public*, 100.

[6] Stephen K. Bailey, "Ethics and the Public Service," *Public Administration Review* 24, no. 4 (1964): 237.

[7] Ibid., 236.

determine how career public servants *want* to live their lives, whereas conscious choices conceived from broad or enlightened interpretations of self-interest determine how they *ought* to live their lives. The twin perspectives of self-interest correspond to the distinction made in moral philosophy between human will and human understanding: human will refers to the conscious decisions people make to achieve specific desires or material interests; human understanding refers to the conscious decisions they make to pursue altruistic aims and larger societal interests.[8] From a philosophical perspective, human will without human understanding is as dangerous as human understanding without human will. In the following discussion, I argue that both human will and human understanding are necessary for career public servants to answer fully the question of "What will I do?"

Narrow interpretations of self-interest generate actions that are both willed and intended. This idea of narrow self-interest is condensed into the colloquial expression "where there is a will, there is a way." In other words, people who are highly motivated to do something will find a way of doing it. In opting for a narrow interpretation of self-interest, career public servants pursue a predetermined purpose drawn from their bundled personal loyalties as discussed in Chap. 3. Frequently, narrow interpretations of self-interest emphasize what people want to do immediately to achieve instant gratification, and their predispositions are likely to produce "knee-jerk" choices to satisfy reactive emotions. For example, a career public servant may want to get even with a new politically appointed agency head who is causing her difficulty because they have management differences. However, on second thought, she restrains herself because she does not want to hurt her chances for an upcoming promotion. A generalized version of this example is that moral people, according to common sense, will resist the temptation for immediate gratification by restraining their emotional reactions.[9] Although the career public servant in this example has restrained her emotions, she is, nevertheless, pursuing her narrow self-interest; but her choice rests on a long view rather than a short-term one to achieve her promotion.

Another narrow interpretation of self-interest motivates career public servants to take advantage of on-the-job opportunities to get ahead, even by unacceptable means, without regard for the consequences to other

[8] Peter A. Angeles, *Dictionary of Philosophy* (New York, NY: Harper Collins, 1981).
[9] Blocker, *Ethical Inquiry.*

people. An alternative interpretation of narrow self-interest involves public servants who seek personal recognition by claiming credit for the work of others in order to satisfy their need for public acclaim. Still another interpretation prompts them to act impulsively because something or someone has triggered a "hot button" associated with one of their primary loyalties. The triggering of a hot button causes people to become demoralized, and in some cases, demoralized people may get so angry they "lose their cool." In a few extreme cases, the anger of extremely demoralized people may become so uncontrollable that they resort to workplace or domestic violence (see Chap. 5).

Beyond the purpose of achieving immediate or deferred gratification, career public servants may act on their narrow self-interest by doing something out of habit or by conforming to what their peers are doing. Relatedly, they may act on their narrow self-interest to avoid doing something because they fear disapproval or do not want to go to jail. Also, their narrow conception of self-interest may motivate them to fulfill prima facie or self-evident moral duties based on their upbringing or religious beliefs. Underpinning these acts of narrow self-interest are basic moral values, such as self-defense, self-protection, self-esteem, and self-righteousness, for which people receive praise, blame, or punishment. These basic moral values are uniquely human traits. Moral value judgments also pertain to the choice of human goods to pursue, such as love, power, fame, comfort, and duty. Furthermore, there are non-moral values that may motivate career public servants to pursue their self-interest narrowly understood. In particular, non-moral values are desirable qualities that people attach to material objects, such as expensive cars, box seats at major sporting events, or expensive wines, from which they experience feelings of pleasure or happiness. However, by making narrowly self-centered choices, career public servants may not know what to do when a new situation arises. Thus, they are likely to react to new situations by relying on quick fixes or on their past experiences to get by.[10]

In contrast with narrow interpretations of self-interest, broad or enlightened conceptions of self-interest generate choices drawn from shared moral knowledge. Designed to deepen human understanding, shared moral knowledge taps into their wider—federated—selfhood of career public servants, as discussed in Chap. 3. To gather shared moral

[10] Ibid.

knowledge for deepening human understanding, they might consider ethical theories that answer the question of "What will I do?" Specifically, Table 4.1 compiles eight ethical theories that emphasize responsiveness rather than reactions to the attitudes and feelings of others.[11] On the one hand, these theories are helpful to public servants because they give them a variety of choices about what to do based on self-interest broadly understood. On the other hand, they may not fully understand the tenets gathered from separate ethical theories because these theories are abstractions taken out of context and remote from their experience.

Recognizing the remoteness of ethical theories from the daily lives of career public servants, Svara synthesizes fragments of shared ethical theories into a coherent and workable framework for career public servants.[12] His widely used framework rests on four established normative approaches: universal virtues, universal principles, beneficial consequences, and universal duties. To illustrate the key elements of his ethical framework, Svara uses the graphic of an equilateral triangle, shown in Fig. 4.1.[13] To deepen understanding at the broadest level, he formulates a basic question for each normative approach that career public servants may use in their ethical inquiry.[14] For virtues, the question is, what are the specific qualities most people associate with a good or morally excellent person? For principles, what universal truths underpin the right thing to do? For consequences, what actions are likely to produce the greatest benefits to society? For duties, what obligations bind everyone in public service? According to Svara, the ultimate duty of career public servants is to advance the public interest. To give meaning to this duty, career public servants, Svara says, must strive to make their choices balance universal virtues and principles with good consequences. A decision balancing the three normative approaches of virtue, principle, and consequence occupies the center of Svara's ethics triangle, marked as the duty to advance the public interest.

In Fig. 4.1, each normative approach is represented as a leg of the triangle and together the three legs are the boundaries for actions inside the ethics triangle. If used separately, any normative approach has limits and disadvantages. Svara cites the limits of each approach, as follows.

[11] Simon Blackburn, *The Oxford Dictionary of Philosophy* (New York, NY: Oxford University Press, 1996).

[12] James H. Svara, *The Ethics Primer for Public Administrators in Public and Nonprofit Organizations*, 2nd ed. (Sudbury, MA: Jones and Bartlett Publishers, 2007), 11–12.

[13] Ibid., 68.

[14] Ibid., 12.

Table 4.1 Ethical theories for "What Will I Do?"

Ethical theory	*Answer to the question of "What Will I Do?"*
1. Natural rights (pp. 199–200)	People possess permanent nature rights from birth to death simply for being human. These rights are universal because everyone can claim them. These rights are also unalienable because people cannot dispose or acquire them.
2. Kantian categorical imperative (p. 135, 148, 151)	Kant's categorical imperative says: (1) to treat others always as an end never as a means; (2) only do these things that are unbreakable obligations under a universal law; and (3) do not do anything you would not want others to do to you. An example is never to tell a lie, even if telling it might save someone's life.
3. Hedonism/egoism (pp. 11, 51, 98)	What makes anything right or good is its tendency to promote pleasure or happiness; what makes anything wrong or bad is its tendency to promote pain or unhappiness. Egoistical hedonism is the view that the ultimate good is whatever gives pleasure to a particular agent. Thus, ethical egoists do whatever is in their best interests by "looking out for #1."
4. Deontology (pp. 5, 71)	Deontology is a set of ethical theories in which the moral worth of an action is judged in terms of its intrinsic quality of obligation or duty. Deontology is concerned with the intentions of the agents rather than the consequences of their actions. The deontological theories assess human actions in terms of the moral good it produces.
5. Teleology/consequentialism (pp. 71,75, 100)	Teleology is a set of ethical theories in which the moral worth of an action is judged by the consequences it produces. Teleology explains the moral good of human actions in terms of non-moral goods or what consequences they actually do or produce. For the consequentialist, everything a person does is a means to a further end and is judged by how well the consequences achieved that desired end.

(*continued*)

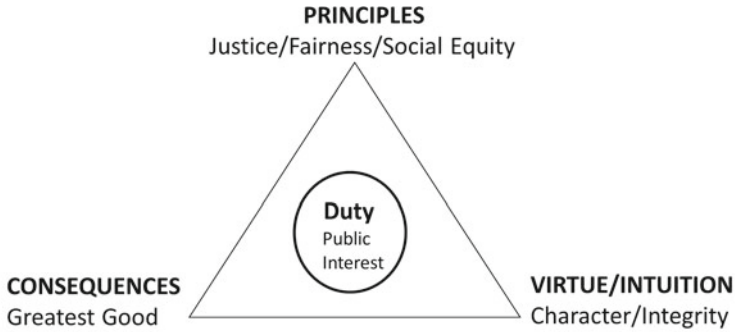
Table 4.1 (continued)

Ethical theory	*Answer to the question of "What Will I Do?"*
6. Prima facie duties (p. 149)	A prima facie duty is the obligation that people intuitively feel they ought to do in a particular situation as opposed to their other duties which have lower priority. A prima facie duty is different from an absolute duty, such as a categorical imperative, which people ought to do in every situation.
7. Utilitarianism (pp. 185, 225)	Utilitarianism is the theory that the primary obligation of people is to choose whatever increases their overall happiness or the overall well-being of society. Utilitarianism views the greatest good as the maximum pleasure for the greatest number of people.
8. Virtue theory (pp. 74–75, 86–87)	A virtue is a character trait of humans that intentionally fulfills a distinct purpose and is a source of excellent behavior. People choose to do the morally right thing to do, and they take responsibility for their actions. Virtue, for Aristotle, is "the Golden Mean" and balances the extremes of deficiency and excess, both of which are vices. Generosity, courage, modesty, and benevolence are among the important human virtues. The virtues of a society reflect the ideal person that particular society finds the most valuable to strengthen it. Political equality and social justice are important virtues of American society.

Source: Gene Blocker. 2012. *Ethical inquiry.* Unpublished manuscript

The virtue-based approach relies mostly on feelings; the principle-based approach uses authoritative reasons; and the consequential approach rests on a partial analysis.[15] Each point of the triangle—the vertex—serves as threshold beyond which the disadvantages of any single normative approach are magnified. According to Svara, the overutilization of a single normative approach is likely to produce unethical behavior outside the ethics triangle. Thus, if career public servants overutilize one normative approach at the expense of the others, then they may use it to justify extreme self-serving actions. For example, the overutilization of

[15] Ibid., 68.



Source: James H. Svara.. 2007 *The Ethics Primer for Public Administrators in Public and Nonprofit Organizations.* Sudbury, MA: Jones and Bartlett, p. 68.

Fig. 4.1 Svara's ethics triangle

the virtue approach may result in the justification to look the other way rather than to snitch on peers. The overutilization of the principle-based approach may allow career public servants to justify unethical behavior by rigidly interpreting rules or laws or by taking shelter under the orders of their superiors. The overutilization of the consequential approach may impel career public servants to cut corners to achieve an assigned task because "everyone does it" in their organization. However, as Bailey (1964) argues, career public servants who never deviate from the rules are rigid and lack compassion while those who deviate too much are subversive. Therefore, Svara advises career public servants to use the normative approaches together in their ethical inquiry to avoid the shortcomings of a single-factor analysis.[16]

Despite its elegance in synthesizing multiple normative approaches for use in practice, the ethics triangle restricts human understanding for three reasons. First, the model imposes a moral injunction on career public servants to advance the public interest. Advancing the public interest, however, is difficult because the Constitution, for example, contains multiple interpretations of it. Moreover, advancing the public interest resides in the secondary moral identity of most people and is not automatically accessed (see Chap. 3). As Svara acknowledges, career public servants who fulfill this ultimatum are likely to do so by interpreting

[16] Ibid., 64–6.

normative knowledge according to their predispositions. Even if they are conscientious, their pursuit of altruistic or universal goals based on self-interest broadly understood may result in excessive, misdirected, or warped behavior.[17] A second reason the model limits human understanding is its imposition of the duty to serve the larger public requires selflessness and nobility on the part of career public servants that goes "beyond the capacity of cynics to recognize or to believe."[18] Although they may hear calls from the mountaintop, "their feet may wallow in the bog of self-interest."[19] A third reason is that the sense of duty driven by dictums and predispositions is in the domain of everyday morality. The imposition of moral injunctions, the shaping of predispositions, and the giving of moral advice are tasks reserved for family members, clergy, teachers, and community leaders. These moral authorities "encourage the adoption and conformity to customary, socially approved morality," and they provide guidance in situations where everyday morality is unclear.[20]

Therefore, to deepen human understanding, career public servants in their ethical inquiry must reach beyond enlightened considerations of self-interest and the dictums of everyday morality. This means inquiring career public servants must know how to gather and interpret normative knowledge in an impartial and complete way but not in isolation from their direct experience. The methodology of reason-giving associated with the philosophical discipline of applied ethics is relevant for their ethical inquiry. Applied ethics enables career public servants to gather and interpret normative knowledge in relation to their own situations while controlling for the twin perspectives of self-interest. Most importantly, this methodology helps inquiring public servants articulate valid and objectively sound theories to discern *why* their choices are right or wrong.[21] Valid and objectively sound ethical theories rest on the highest order of reasons to do or not to do something in society. In effect, higher-order reasons trump the standards of everyday morality.

Specifically, the method of applied ethics helps career public servants differentiate between first-order (and everyday) moral reasons and second-order reasons germane to a particular situation. By articulating higher-order

[17] Ibid., 104.
[18] Bailey, "Ethics and the Public," 236.
[19] Ibid., 236.
[20] Blocker, *Ethical Inquiry*, 2.
[21] Ibid., 22.

reasons, individuals make choices that rest on the most general principles that can serve as applied ethical theories. Furthermore, by uncovering the highest-order reasons for their choices, career public servants are likely to discover proximate causes. In a chain of reasons associated with a sequence of events, a proximate cause is the reason immediately responsible for the observed outcome.[22] To build their capacity for articulating higher-order reasons, career public servants assume the role of a moral philosopher. The next section discusses how the search for higher-order reasons and the discovery of proximate causes elevate their inquiry into a systematic investigation of society's most urgent matters.

Clarifying Higher-Order Reasons and Proximate Causes

The argument made by Aristotle in the fourth century BCE is still appropriate today: one should not expect more precision in a field of knowledge than its subject matter admits.[23] Is it too much to expect career public servants to assume the role of a moral philosopher? How can they hope to arrive at anything other than a personal opinion, given that their ethical inquiry relies on intangible moral judgments rather than hard facts?

Although many normative theories exist about what people ought to do (as shown in Table 4.1), these theories as abstractions do not advance the human understanding of career public servants. The reason is that the ethical theories, as abstractions, do not clarify why the choices of career public servants are right or wrong in a particular situation. By contrast, the philosophical method of reason-giving provides a tool to trace the logical chain of justifications about *why* an action is right or wrong.[24] As Gene Blocker argues, the process of searching for higher-order reasons is as important as finding the right answer.[25]

Blocker offers an example of a boy who goes fishing with his father, but they do not catch any fish. Although this particular outing did not produce any fish, the second or third time they go out to fish, they may improve their methods and ultimately catch some. The search for higher-order reasons is

[22] Blackburn, *The Oxford Dictionary of Philosophy*.
[23] Blocker, *Ethical Inquiry*.
[24] Ibid., 10.
[25] Gene Blocker, "Virtue Is Knowledge: Ethics and Philosophy" (lecture, Cleveland, OH, September 12, 2012).

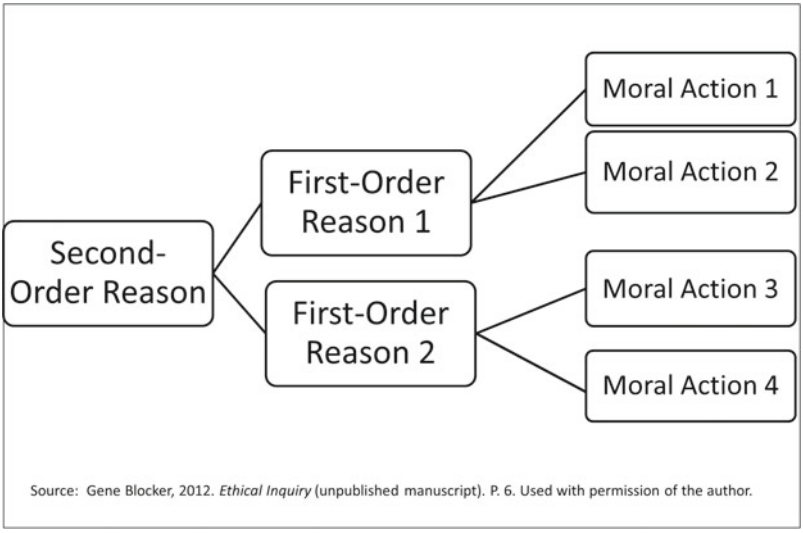


Fig. 4.2 Tracing the order of reasons

a similar process, not a onetime event, and career public servants are likely to get better in their search process the more times they do it. The purposes of the search process are to understand how: (1) lower-order reasons depend on higher-order and more general reasons, and (2) higher-order reasons provide explanations to justify why an action is right or wrong. As shown in the decision tree of Fig. 4.2, this philosophical method of reason-giving always generates fewer first-order reasons than moral actions and fewer second-order reasons than first-order ones. Thus, moral philosophers are different from everyday moralists because they do not stop the search process until they have found the highest-order and most general reason to justify human actions fully.[26]

I now explain the difference between the justifications produced by everyday morality and applied ethics against the backdrop of a pervasive lifestyle example—extramarital affairs.[27] Based on their upbringing and religious beliefs, many people believe that extramarital affairs are

[26] Blocker, *Ethical Inquiry*, 6.

[27] I am grateful to Gene Blocker for giving me permission to adapt this lifestyle example from his scholarship (2012).

wrong. Consequently, some people may try to persuade others to follow their example and criticize those who engage in extramarital relationships. Other people may want to live their lives according to their family backgrounds and religious beliefs but are unsuccessful. This example highlights the elements of everyday morality: (1) holding beliefs about good or bad behavior; (2) passing moral judgments about the behavior of other people; (3) acting morally or immorally according to these beliefs; and (4) offering moral advice and issuing moral commands to others. None of these elements of everyday morality explain *why* the extramarital relationship is wrong.[28]

Let us suppose a career public servant, Kim, who works for a county child support enforcement agency, is among those who believe that all extramarital relationships are wrong. From her professional perspective, Kim has seen the harmful effects of divorce and absentee parents on children, and her professional experience reinforces her personal reasoning. In addition, Kim has a co-worker Jane who is involved in an extramarital affair with a co-worker Susan. Besides criticizing Jane for her extramarital affair, Kim tries to persuade her friend to change her unethical behavior. While Kim believes her friend's behavior is morally wrong, Jane may not. Therefore, Jane may be suspicious of Kim's motives based on her interpretation that Kim's moral stance is designed to provoke, entrap, or maintain solidarity with her.[29] Thus, Jane reacts to Kim by questioning her as follows—"Why is your opinion better than mine?" Kim might not explain why her stance is morally superior to that of Jane to preserve her on-the-job relationship with her co-worker, and the matter is dropped without an ethical resolution. Alternatively, Kim may give Jane a reason to explain why she believes the extramarital affair is morally unjustifiable. If so, then Jane and Kim have begun the process of reason-giving to convince each other *why* the extramarital affair is morally justifiable or unjustifiable.

Although convincing others in society is an ambitious and difficult endeavor, career public servants should settle for nothing less. In the first place, they have the intellect to identify general reasons that establish an objectively valid, universal theory of right and wrong. In the second place, career public servants who establish general reasons of right and wrong have the power to find proximate causes, which is vital for

[28] Blocker, *Ethical Inquiry*.
[29] Angeles, *Dictionary of Philosophy*, 240.
Svara, *The Ethics Primer for Public*, 99.

facilitating ethical changes in behavior. Now, suppose Kim's search for a valid universal theory produces three reasons why Jane's extramarital affair is wrong: (1) Jane is married; (2) Jane's extramarital relationship goes against their shared religious beliefs; and (3) Jane's private behavior violates the agency's anti-fraternization policy. However, Kim's level of reason-giving is simply a series of restatements of traditional moral dictums that extramarital sex is wrong, despite her references to legality, religion, and workplace policy. Thus, Kim's level of reasoning does not provide an ineluctable conclusion for the everyday moral principle that Jane's affair is improper. In other words, Kim gave Jane three first-order reasons for why the extramarital affair is wrong. Given Kim's level of reason-giving at this time, Jane is unpersuaded that her extramarital affair is unjustifiable.

Meanwhile, Jane searches for an ethical theory to justify fully her extramarital affair, and her search uncovers the philosophical theory of ethical hedonism.[30] Ethical hedonism defines good moral actions as those that increase human happiness; happiness induces in humans feelings of pleasure, joy, contentment, and satisfaction of varying intensity.[31] For the ethical hedonist, the pursuit of one's happiness is the highest and most proper aim of human action.[32] Thus, Jane, who is unhappily married, responds to Kim's initial critique that the extramarital relationship with Susan gives her great pleasure and increases her happiness. Furthermore, Jane informs Kim that, as an ethical hedonist, she is morally obligated to live her life to obtain as much pleasure and as little pain as possible.[33] Against the backdrop of ethical hedonism, Jane's extramarital affair appears morally correct because her extramarital relationship with Susan maximizes her self-interest.[34] Ethical hedonism, says Blocker, means "we *ought* to be selfish" (emphasis in the original).[35]

[30] From a theoretical perspective, philosophers differentiate between psychological (egoistic) hedonism and ethical hedonism. Psychological hedonism is the theory that not being selfishly motivated to secure pleasure and avoid pain even at the expense of others is impossible for humans (Angeles 1981, 114). Psychological hedonism does not guide people about what they ought to do; it describes what people do and what they cannot avoid doing even if they wanted to do otherwise (Blocker 2012, 55).

[31] Angeles, *Dictionary of Philosophy*, 113.

[32] Blackburn, *The Oxford Dictionary of Philosophy*, 168.

[33] Angeles, *Dictionary of Philosophy*, 114.

[34] Blackburn, *The Oxford Dictionary of Philosophy*, 115.

[35] Blocker, *Ethical Inquiry*, 55.

From a philosophical perspective, the following question remains: Is Jane's hedonistic explanation the highest and most general reason to justify fully her extramarital affair? The answer is no because of the "hedonistic paradox." According to ethical philosophers, those who constantly seek pleasure for themselves will paradoxically not find it; in contrast, those who help others find pleasure that will, in turn, increase pleasure for themselves.[36] This paradox raises two objections to the practice of ethical hedonism. The first objection is that a person spending life in the sole pursuit of hedonistic pleasures is uninterested in others and cannot experience love or friendship.[37] Although Jane gains pleasure from her extramarital affair, she has, nonetheless, broken her promise to remain faithful to her spouse. The second objection is that ethical hedonism does not produce victimless acts; the adverse effects of hedonistic actions ultimately reduce the hedonist's happiness as well as that of others. Thus, to avoid harming her spouse and children, Jane decides to cover up her affair with lies. According to Sissela Bok (1989), lying is not a victimless act because lying harms those who are deceived. Furthermore, Bok argues that liars not only underestimate the harmful impact of their lies on those whom they deceive, they also overestimate the benefits of their immoral action. Therefore, by breaking her marriage vow and lying to cover up the affair, Jane has increased her unhappiness and reduced her pleasure from the relationship with Susan. Consequently, as an ethical hedonist who cannot achieve greater happiness or increase her pleasure from a practice—the extramarital affair—Jane is morally obligated to change her behavior or to abandon the theory of ethical hedonism.[38] Given this analysis, Jane must reject the ethical theory of hedonism as a higher-order reason to justify her extramarital affair.

Subsequently, Kim makes another attempt to search for a valid, universal standard to justify fully her opposition to the extramarital affair. Accordingly, Kim deepens her ethical inquiry and uncovers the philosophical theory of moral duty "to be in debt" or "to owe" to someone.[39] In the role of a moral philosopher, Kim interprets this duty as a social force that ethically obligates people to pursue actions as a result of their personal relationships with others. Based on this universal ethical theory, Kim gives Jane two alternative reasons to explain why Jane's infidelity is wrong: (1) Jane has broken her

[36] Angeles, *Dictionary of Philosophy*, 114.
[37] Blackburn, *The Oxford Dictionary of Philosophy*, 149.
[38] Blocker, *Ethical Inquiry.*
[39] Angeles, *Dictionary of Philosophy*, 67.

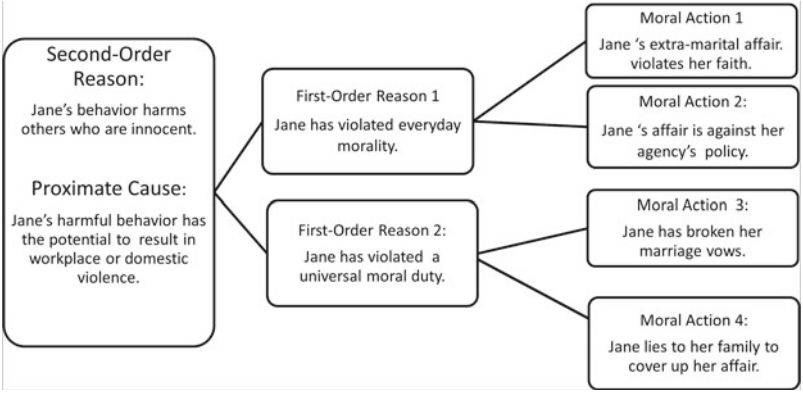


Fig. 4.3 Tracing Kim's second-order reasons

marriage vow to her spouse, and (2) Jane's extramarital affair is harmful to innocent people, such as her children. In this ethical inquiry, Kim divides her justification into three parts: (1) the action under consideration—the extramarital affair; (2) the everyday first-order moral reason—extramarital sex is wrong; and (3) the second-order reason based on the universal ethical theory of moral duty to justify why the everyday moral principle is wrong (see Fig. 4.3).

Given this deeper level of reasoning, Kim finds that the breaking of Jane's marriage vow is a second-order and a more general reason for the first-order principle, which, as stated earlier, is a restatement of a moral dictum (see Fig. 4.3). Thus, Kim's second-order reason justifies her first-order reason, which, in turn, explains why the particular action—the extramarital affair—is wrong. Similarly, Kim's second-order reason of avoiding harm to innocent people is a more general principle than any of her initial everyday moral reasons: Jane is married; Jane has violated her faith; and Jane has acted inconsistently with her agency's policy. Furthermore, Kim's second-order reason to avoid harming others is a general principle that not only applies to extramarital affairs but also is a proximate cause for other domestic or workplace situations involving human unkindness or physical violence.[40] Thus, by tracing the chain of her particular set of reasons and finding the universal second-order reason and a proximate cause related to workplace or domestic

[40] Blocker, *Ethical Inquiry.*

violence, Kim's inquiry enables her to distinguish good from evil choices. In effect, Kim has articulated the highest-order reason to explain *why* Jane ought to change what she is doing outside her marriage.

By articulating this highest-order reason and discovering a proximate cause, Kim has successfully fulfilled the role of a moral philosopher by balancing human will and human understanding. Given Kim's reason regarding the potential of extramarital affairs to extend to violent situations, Jane is convinced that she is morally wrong and so she chooses to end her relationship with Susan. In Chap. 5, I will discuss the case of an extramarital affair between a supervisor and a subordinate in a prominent nonprofit organization that ended violently because those who investigated the situation relied on first-order moral explanations that rendered them insensitive to the harmful effects of the affair.

The Standard of Logical Reasonableness

Is the method of logical reasoning a sufficient aid for overcoming the problem of subjectivism in moral justifications? According to Blocker (2012), logical reason-giving is found on a continuum somewhere between dogmatism and subjectivism. Dogmatists discredit the need to question an argument or examine a conclusion because they assert the truth of their beliefs with "undefended certainty."[41] In politics and religion, dogmas are the formal doctrines of unquestioned truths proclaimed by authoritarian leaders or powerful institutions such as a church.[42] Given their autonomy as moral agents, people as human beings can use an ordered logic to transcend the dogma of authorities to decide for themselves whether a reason to do something in society is morally correct or incorrect (or a good or evil choice).[43] In this way, the appeal to logical reasoning produces a standard above any single individual or conventional authority. In other words, people possess the standard of logical reasonableness by the fact that they are human beings.[44] Therefore, the philosophical process of reason-giving gives career public servants a tool they can use to (1) suspend their personal whims and self-serving beliefs; (2) avoid giving credence to the whims and self-serving beliefs of

[41] Blackburn, *The Oxford Dictionary of Philosophy*, 109.
[42] Angeles, *Dictionary of Philosophy*, 65.
[43] Blocker, *Ethical Inquiry.*
[44] Ibid., 24.

others; and (3) refrain from deferring blindly to conventional authorities to determine what to do.

Furthermore, the universal standard of logical reasonableness obligates people in diverse societies to take moral responsibility for their actions. In practice, this universal standard enables diverse citizens in the pluralist democracy of the USA not only to live together but also to hold career public servants accountable. However, in many pluralist societies like the USA, ethical relativism is a popular philosophy because of the widely shared values of tolerance and diversity of opinions. While ethical relativism may appear morally legitimate in abstract terms, its logical flaws are visible upon closer inspection. Specifically, ethical relativists deny the existence of any universal or objectively valid principle. As cultural pluralists, they claim that different people in different communities have different moral standards that are right for them in their societies. For example, in present-day American society, plural marriage is morally and legally unacceptable, but in some non-Western societies, the opposite is true. On finding empirical diversity, ethical relativists can claim no consensus exists around the practice of monogamy because there is not one morally acceptable standard on which everyone in every society can agree.[45]

Nevertheless, there are four objections to ethical relativism that disqualify its standing as a universally valid ethical theory. A basic objection is that relativism is a form of hedonism, and hedonism was rejected earlier as a universal ethical theory on logical grounds. A second objection to relativism is that the diversity of opinion drawn from an empirical description of societies fails to address the normative question of *why* an action is right or wrong.[46] For instance, to favor ethical relativism is to accept that those who engage in the harmful practice of sexual or racial discrimination are as morally correct as those who oppose discrimination. A third objection is that relativism is conceived as absolute in practice. Moral absolutism assumes there is only one correct and unchanging explanation for reality.[47] In political theory, absolutism translates into unquestioned allegiance to a governmental ruler or an external sovereign.[48] As discussed in Chap. 3, the acceptance of moral absolutism supports religious fanatics, political extremists, and repressive ultra-nationalists who seek to dominate a society. This domination removes ethical action from the control

[45] Ibid.
[46] Ibid., 51.
[47] Angeles, *Dictionary of Philosophy*, 2.
[48] Blackburn, *The Oxford Dictionary of Philosophy*, 3.

of humans as moral agents. A fourth objection is that relativism rests on a logical contradiction. Therefore, those who oppose ethical relativism only have to posit that an objectively correct moral standard, such as one ought not to harm innocent people, exists and is discoverable.[49]

Besides these objections, relativism must be rejected as the political ethos of the American public service for another reason: a complex society whose ethical foundation rests on relativism is incapable of correcting its moral mistakes because under the logic of relativism morally right answers do not exist.[50] By rejecting ethical relativism, human understanding based on second-order reasons and proximate causes, when combined with social-legal interventions, has allowed for the achievement of ethical progress in the USA. For example, to uphold slavery was morally acceptable in the antebellum society of nineteenth-century America, whereas slavery is morally unacceptable in the society of twenty-first-century America. In the wake of the Union's victory in the Civil War and through the democratic processes of constitutional politics and constitutional change (discussed in Part III of this book), the American people through their state governments ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the US Constitution. These amendments outlawed slavery and prohibited any American government from denying the constitutional rights of persons born in the USA. Over time, these constitutional changes have spawned significant social interventions that have compensated for the harm and suffering of black Americans who were involuntarily enslaved. In effect, a widespread social consensus emerged to oppose slavery and to affirm the civil rights of former slaves in American life. Slowly and steadily, this social consensus has changed the public morality of the USA for the better. In other words, a universally valid theory informed by the genealogy of morality and the standard of logical reasonableness enables societies to make ethical progress. As Phillip Kitcher (2012) argues, "Our ethical progress hangs on our knowing our ethical past."[51] The significance is that the development of a better public morality in the USA was a series of proximate social choices as well as a matter of ultimate political goals.

In summary, this chapter analyzed the question of "What will I do?" by clarifying the twin perspectives of self-interest. This analysis highlighted

[49] Blocker, *Ethical Inquiry*.

[50] Ibid., 42.

[51] Philip Kitcher, "Our Ethical Progress Hangs on Our Knowing Our Ethical Past," ABC Religion and Ethics, last modified February 20, 2012, accessed November 12, 2013, http://www.abc.net.au/religion/articles/2012/02/20/3434923.htm.

the importance of searching for second-order reasons to justify everyday moral choices rather than resorting to a priori prescriptions and proscriptions. Furthermore, the philosophical method of reason-giving based on the universal standard of logical reasonableness is offered as an antidote to the mechanical computational morality of the prevailing American way of ethics. By facilitating their human understanding, career public servants in the role of moral philosophers have the capacity to identify proximate causes that may contribute to the ethical progress of American society.

However, knowing what is the right thing to do is not the same as following through to do it. Therefore, in the next chapter, I discuss the costs associated with the implementation of the ethical choices made by career public servants.

CHAPTER 5

"Will I Do It?": Clarifying the Costs of Ethical Voice

In general, the higher a person goes on the rungs of power and authority, the more wobbly the ethical ladder.

Stephen K. Bailey, "Ethics and the Public Service"

The last chapter concluded with a discussion of how career public servants may use their capacity to discern second-order reasons and proximate causes to contribute to the development of a better public morality in the USA. However, a gap exists between one's knowing the right thing to do and following through to do it. To close this gap, career public servants must decide if they are willing to bear the costs of acting on their second-order ethical choices. Consequently, this chapter explores the third question associated with their ethical inquiry of public servants—"Will I do it?"—because the willingness to act ethically has a cost associated with it. Most people measure this cost in terms of the value they receive for doing or not doing something in society. Thus, the argument presented in this chapter is as follows: If career public servants perceive the cost of exercising their ethical voice as low, then they are likely to follow through. Alternatively, if they perceive the cost as high, then they are unlikely to follow through. High costs can range from a mistake costing people their jobs and livelihood to the loss of a life. To avoid high costs, most people try to exit in order to escape from experiencing potentially unpleasant consequences.

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Also significant in closing the gap between knowing and following through with ethical choices is the context and environment in which people carry out their decisions. The implementation of an ethical choice may have a low cost in one setting and a high cost in another setting. For example, personal loyalty to family and friends is the moral foundation of living well in private life, but it is a conflict of interest to which felony sanctions are attached in public service. Career public servants who favor friends and relatives in their official capacity give them an advantage over other citizens, and this unequal treatment of citizens betrays public trust. Thus, the federal government and every US state prohibit favoritism to friends and family in governmental hiring and procurement practices as well as in the awarding of public contracts. Yet, loyalty to friends and family pervades public service and comprises a significant proportion of investigations of ethics enforcement agencies.[1] In other words, neither appeals to public service obligations nor the threat of criminal sanctions can completely obliterate the power of personal morality in public service.

To clarify the power of personal morality and the costs and contexts of ethical choices, this chapter extends Hirschman's (1970) construct of loyalty. I have reframed Hirschman's question of "Will I Do It?" into the question of "Will I Exercise My Ethical Voice?" Specifically, Hirschman argues that the availability of exit options and the elusive feelings of personal loyalty disproportionately affect the exercise of voice. The combination of exit and loyalty raises and lowers the costs associated with the exercise of ethical voice. To explore this dynamic, I clarify the interplay of exit, voice, and loyalty in a variety of private and public settings. After examining the factors that go into making difficult everyday decisions,

[1] National Conference of State Legislatures (NCSL), (2013a), "State Conflict of Interest Laws," NCSL, last modified April 2013, accessed December 29, 2013, http://www.ncsl.org/research/ethics/50-state-table-conflict-of-interest-definitions.aspx.

National Conference of State Legislatures (NCSL), (2013b), "Nepotism Restrictions for State Legislators," NCSL, last modified December 9, 2013, accessed December 29, 2013, http://www.ncsl.org/research/ethics/50-state-table-nepotism-restrictions.aspx.

According to the NCSL (2013a), all fifty states prohibit legislators from using their office to advance their personal or private interests or to receive personal financial benefits. Furthermore, nearly half of the states supplement their conflict of interest laws with separate anti-nepotism statutes or constitutional provisions. The NCSL (2013b) defines nepotism as "bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship." The Ohio Inspector General (2013, 11) reports that the majority of cases (N = 126) investigated and closed by this office in 2012 involved criminal conduct (29 %), which includes conflicts of interest, and abuse of office or position (24 %).

this chapter offers guidelines to career public servants on how to follow through by applying their disciplined use of conscience and second-order moral reasoning.

To illustrate this framework, I analyze two cases of love-hate relationships to draw attention to the proximate causes that underpin an explosive combination of exit and voice that may contribute to workplace tragedies. As will be shown, this explosive combination of exit and voice leads powerless people to destroy not only themselves but also the lives of others. The last part of this chapter analyzes the interplay of voice and loyalty in the special case of deteriorating public goods, resulting in perverse and politically correct societal behaviors. This chapter concludes with a discussion of how career public servants can convert the perverse loyalty to public goods in support of significant public purposes, such as universal K-12 public education, by reducing the costs of exercising ethical voice.

Clarifying the Interplay of Exit and Voice

To follow through on their second-order ethical choices, public servants must change existing unacceptable behaviors or practices to produce a different outcome in an interpersonal or organizational relationship. Therefore, understanding the dynamics of exercising their ethical voice is necessary for them. Specifically, Hirschman defines the voice function as "any attempt at all to change, rather than to escape from, an objectionable state of affairs, whether through an individual or a collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion."[2] Well-known expressions of voice and exit are those of the dissatisfied consumers who refuse to buy products in marketplaces and disaffected citizens who do not vote in electoral politics. Beyond private markets and electoral arenas, voice takes on a political dimension in a variety of everyday settings. According to Hirschman, the voice function is "political action par excellence," and political voice is exercised in human groups ranging from the family and religious organizations to the formal institutions of the state, all of which bind people emotionally and

[2] Albert O. Hirschman, *Exit, Voice, Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970), 30.

intellectually to them.[3] Like Hirschman, Oakeshott argues that people exercise the voice function through the language of politics in order to express desires, aversions, preferences, approvals, and disapprovals in the ordinary course of everyday relationships. The political language of voice expresses appeals, threats, accusations, injunctions, and punishments; it allows people to "make promises, ask for support, recommend beliefs and actions, devise and commend administrative expedients and organize the beliefs and opinions of others."[4] Oakeshott concludes that the political language of voice is the language of everyday morality.

For Hirschman, the interplay of exit and voice involves reciprocal actions and reactions in private and public settings. The exit and voice functions play important roles for the disaffected members of voluntary associations and the discontented members of competitive political parties. However, the leaderships of these organizations may circumscribe the available exit and voice functions by developing rules to expel their members.[5] The threat of expulsion may result in appeals to a higher authority to prohibit an organization's leadership from restricting the exercise of voice. In diametric opposition to relationships and organizations with available exit options and voice functions are totalitarian groups, street gangs, criminal enterprises, and terrorist cells. These authoritarian organizations do not arrange for the exercise of either exit or voice by their members.[6] In fact, the leaders of authoritarian organizations use intense mental pressure and physical force to keep their members from exiting or expressing their dissatisfaction.

In contrast, discontented customers of businesses where competitors exist may choose not to exercise their voice function because they have an easy, low-cost, way to exit. For example, these consumers may shift from one private-sector firm to another on perceiving a decline in the quality or performance of a product. By extension, the presence of an easy exit option and the elasticity of choice in competitive elections mean that discontented voters loosely allied with the major political parties are unlikely to exercise their voice function. According to Hirschman, the presence of an easy exit option tends to "*atrophy the development of the art of voice*" (emphasis in the original).[7] Therefore, it serves no purpose for the

[3] Ibid., 16.

[4] Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Books, 1991), 206.

[5] Hirschman, *Exit, Voice, Loyalty: Responses*, 77.

[6] Ibid., 121.

[7] Ibid., 43.

leaderships of organizations operating in competitive markets or electoral arenas to threaten consumers or voters with expulsion. Hirschman also argues that it is pointless for organizations operating in competitive environments to encourage discontented people to switch from using an exit option to exercising their voice function.[8]

Unlike consumers and voters who can exit competitive marketplaces and elections with ease, people have difficulty leaving their families, religious affiliations, and country relationships. As discussed in Chap. 3, these relationships rest on the personal morality and loyalties established for life or inherited at birth. Estranged family members, lapsed members of religions, and those who object conscientiously to the obligations of country arouse enmity in deeply personal relationships built on love, faith, and honor. In fact, those who exit from family, religious, or country relationships are denounced as morally reprehensible humans for betraying their families, faiths, and fatherlands; they are also labeled as deviants, heretics, criminals, deserters, and traitors, all deserving scorn, punishment, or banishment. Thus, to avoid bringing shame to their families, disgracing their faiths, dishonoring their countries, or suffering the ignominy of prison, people in these deeply personal relationships turn to the exercise of voice to register their dissatisfaction.

To register their dissatisfaction, they use the political language of voice encased in thick and thin moral expressions, as discussed in Chap. 3. Political voices expressed in terms of personal morality take on greater intensity when disaffected people believe that they have no exit from a birthright or inherited relationship, rendering them powerless. If powerless people believe that the exit option is unthinkable or unavailable, then their estranged birthright or inherited connections become a breeding ground for "love-hate relationships."

According to Aaron Ben-Zeév (2008), hateful expressions are the primary means of communication if other paths in deeply personal relationships are blocked. In other words, powerless individuals who feel a loss of intimacy or lose a sense of belonging may become cynical about their future and seek emotional strength through hateful expressions. In effect, hate functions to preserve a perverse form of closeness between powerless individuals and the people who have wronged them. As Ben-Zeév argues, these love-hate relationships are not based on a moral or logical contradiction; they are a product of extreme emotional dissonance.

[8] Ibid., 122.

Under extreme emotional dissonance, estranged individuals are willing to sustain very high costs to exercise their political voice because they believe that a full exit from an intimate relationship or a relationship built on honor is impossible. Understanding the risks of these emotionally charged expressions of political voice is important to career public servants because of the human costs and the potential to unleash violent reactions in public settings.

The Explosive Combination of Exit and Voice

In this section, I examine two cases arising out of the explosive combination of exit and voice. Both cases emerge out of love-hate relationships that spilled over to the workplace, resulting in tragic outcomes. The first case is a variation of an estranged family relationship in which isolated individuals trapped in an intimate relationship react strongly to their feelings that they have been unpardonably wronged by strongly asserting their voice function. If, for example, the injured parties believe their life relationship has deteriorated to the extent that reconciliation is neither available nor desirable, then they may avenge themselves in a violent and self-destructive rage.[9] This explosive combination of exit and voice is shown in a case study drawn from one of the nation's top art museums.

According to publicly reported allegations, the art museum director, who was married with children, had a secret affair with a female employee in the development department; this employee reported directly to him. The director's secret affair violated the museum's policy requiring the disclosure of a dating relationship between a supervisor and a subordinate.[10] After 6 months into the affair, the female employee left the museum to take a lower paying and more stressful job, but she did so under the impression that the director would divorce his wife and marry her.[11] However,

[9] Ibid., 121.

[10] Steven Litt, "Investigation Remains Closed in the Suicide of the Lover of the Cleveland Museum of Art Director David Franklin, but Questions Linger," *The Plain Dealer* (Cleveland, OH), November 2, 2013, accessed November 22, 2013, http://www.cleveland.com/arts/index.ssf/2013/11/investigation_remains_closed_i.html.

[11] Litt, "Investigation Remains Closed in the Suicide."

Steven Litt, "The David Franklin Scandal Highlights the Need for Transparency at the Cleveland Museum of Art," *The Plain Dealer* (Cleveland, OH), November 22, 2013, accessed November 22, 2013, http://www.cleveland.com/arts/index.ssf/2013/11/the_david_franklin_scandal_hig.html.

when museum trustees initially investigated whether the director had dated a subordinate in violation of the museum's anti-dating policy, the director falsely denied the extramarital affair. In a one-sided inquiry, the museum's investigators labeled the female employee as troubled, based on allegations of previous mental instability, while accepting the director's cover up at face value, even though they had evidence of his troubled employment history when he was hired. Given the director's false statements, the museum trustees closed their investigation without interviewing the female employee.[12] In effect, whether intentionally or through a reckless failure to investigate fully, the museum trustees colluded with the director in covering up his extramarital affair, and this collusion not only humiliated the powerless woman but also rendered her invisible. Two months later, the woman committed suicide, and the director discovered her hanging by a rope in her apartment. In a separate investigation, the police ruled out foul play.[13] Six months after the suicide, the director resigned suddenly for personal reasons—to pursue research and writing opportunities—despite the museum's plans for a major international exhibition and the completion of a $350 million expansion.[14] Although the museum trustees accepted the director's resignation, they retained his services as a consultant apparently because they continued to believe his false statements about the existence of the affair. Eight months after the initial investigation, the museum trustees fired the director because they learned about the woman's suicide and claimed to have credible evidence that his denials about the affair were false. Even after his firing, the director never admitted to his romantic relationship with his female subordinate.[15]

In light of Ben-Zeév's framework, the female employee's suicide was a powerful means by which she exercised her political voice because other

[12] Litt, "The David Franklin Scandal."

[13] Steven Litt, "Cleveland Museum of Art Confirms That Extramarital Affair Led to David Franklin's Resignation as Director," *The Plain Dealer* (Cleveland, OH), October 24, 2013, accessed November 22, 2013, http://www.cleveland.com/arts/index.ssf/2013/10/cleveland_museum_of_art_confir.html.

[14] Ted Diadium, "Sound Judgment Guided Coverage of David Franklin's Resignation from the Cleveland Museum of Art," *The Plain Dealer* (Cleveland, OH), October 25, 2013, accessed November 22, 2013, http://www.cleveland.com/readers/index.ssf/2013/10/cleveland-museum-art-david-fra.html.

[15] Steven Litt, "Lying about the Affair Led to David Franklin's Leaving Cleveland Museum of Art's Top Job, Board Chairman Says," *The Plain Dealer* (Cleveland, OH), November 13, 2013, accessed November 22, 2013, http://www.cleveland.com/arts/index.ssf/2013/11/lying_about_affair_led_to_davi.html.

paths of communication were closed to her, and she had nowhere else to go in her intimate relationship with her married supervisor. Under the circumstances of estrangement from her lover, the loss of intimacy, and cynicism about her future, she willingly resorted to an extreme expression of self-hate and self-destruction (i.e., her suicide). Of significance is that the woman's suicide occurred between the trustees' first and second investigations into the claims alleging the extramarital affair. It is important to note that the initial investigation rested on first-order moral explanations that rendered the museum trustees insensitive to the harmful effects of the alleged affair. First-order explanations emphasize the personal characteristics of powerless individuals and do not get to the root of a problem. In this case, the first-order moral explanation centered on the woman's alleged history of mental illness so that the blame for the tragedy was pinned on her instead of investigating fully the role of the director.

Furthermore, by delaying the full investigation of the allegations of the affair, the museum trustees favored the director, a powerful leader of the arts community, over the powerless employee. Through her suicide, the woman exited her intimate relationship with her married supervisor, but she paid the ultimate price. Nevertheless, she made herself heard because the violent expression of her political voice served as her proof of the affair. The director could not refute his lover's voice which expressed a counter-argument about their intimate relationship. In effect, the woman's irreversible exit meant that the unscrupulous director could neither talk back to her nor talk her out of publicly revealing his mendacity. The woman's unanswerable voice also disgraced the powerful museum trustees because, by delaying the full investigation into the affair, they allowed the director to continue covering it up. In the end, the invisible employee acquired power over the museum director and trustees by combining an irreversible exit with a violent and unanswerable political voice. According to Hirschman, this explosive exit-voice combination enables powerless people to have singular influence on public opinion in society.[16]

The explosive combination of an irreversible exit and an unanswerable political voice can extend beyond suicides in extramarital affairs to suicides associated with active shooters in public workplaces. In general, workplace violence in the public sector is lower than in the private sector. Of 160 active shooter incidents that occurred between 2000 and 2013, 34.3 % took place on government properties (including public schools)

[16] Hirschman, *Exit, Voice, Loyalty: Responses*, 126.

as compared with 45.6 % on commercial properties (including malls); the remaining incidents occurred in open spaces (9.4 %), homes (4.4 %), houses of worship (3.8 %), and health care facilities (2.5 %).[17]

However, a different picture emerges when one examines co-worker violence. Specifically, in 2005, co-worker violence in the private sector stood at 2.4 % as compared with 17.7 % in state government and 4.3 % in local government.[18] The traditional first-order explanation for violence in the public sector is that the members of the fringe elements in society hate government so much that they want to destroy its employees.[19] In contrast, the second case study analyzed in this section, the post office shooting at Royal Oak, Michigan, reverses the traditional explanation. In this case, government managers hated their employees so much that they sought to destroy them.

On November 14, 1991, Thomas McIlvane, a suspended postal carrier shot eight co-workers, four of them fatally, and then himself. In the wake of McIlvane's shooting rampage, media (and official) reports denounced him as an unstable, gun-loving, and substance-abusing ex-employee who was a dishonorably discharged Marine veteran.[20] Essentially, the media and official investigators attributed the violence to an alcohol- and drug-addicted, violent employee who could not cope with being disciplined for insubordination. Moreover, the media described the Royal Oak shooting pejoratively by using the term "going postal" to connote employee workplace violence.[21] In his letter of transmittal to the U.S. Postal Commissioner

[17] J. Pete Blair and Katherine W. Schweit, "A Study of Active Shooter Incidents, 2000–2013," Texas State University and Federal Bureau of Investigation, U.S. Department of Justice, last modified September 26, 2013, 13, accessed September 25, 2014, https://www.fbi.gov/news/stories/2014/september/fbi-releases-study-on-active-shooter-incidents/pdfs/a-study-of-active-shooter-incidents-in-the-u.s.-between-2000-and-2013.

[18] U.S. Census Bureau, *Table 662: Workplace Violence Incidents and Security Measures, 2005*, table (428: The 2012 Statistical Abstract, 2012), accessed June 30, 2015, http://www.census.gov/compendia/statab/2012/tables/12s0662.pdf.

[19] Charles T. Goodsell, *The New Case for Bureaucracy* (Thousand Oaks, CA: CQ Press/Sage, 2015), 17.

[20] Doron P. Levin, "Ex-Postal Worker Kills 3 and Wounds 6 in Michigan," *The New York Times*, November 15, 1991, accessed April 3, 2015, http://www.nytimes.com/1991/11/15/us/ex-postal-worker-kills-3-and-wounds-6-in-michigan.html.

U.S. Postal Service Commission (USPSC), *The United States Postal Service Commission on a Safe and Secure Workplace* (New York, NY: National Center on Addiction and Substance Abuse at Columbia University, 2000), 22, accessed March 30, 2015, http://permanent.access.gpo.gov/lps12068/33994.pdf.

[21] Ibid., 4, 13.

Joseph Califano (2000), the chairman of the United States Postal Service Commission (USPSC) on a Safe and Secure Workplace, stated that "going postal" was "a myth" and a "bad rap" because homicide rates at post offices were significantly lower than those in other executive branch agencies of the federal government.

Nevertheless, the initial interpretations of the Royal Oak shooting rested on first-order moral explanations because they framed the postal shooting as the work of a particular mentally unstable individual. As discussed in Chap. 4, it is necessary for career public servants to search for the highest-order and the most general reasons to explain fully immoral social actions. Thus, searching for second-order reasons and proximate causes of the Royal Oak violence is needed. The combination of no exit and no voice provides a plausible second-order and proximate cause for this type of workplace tragedy. This combination assumes that the violent expressions of injured parties reflect their strong beliefs that they have been unpardonably betrayed by totalitarian authorities who control their lives and livelihoods. If these injured parties are isolated and believe they can exercise neither voice nor exit from a significant life (work) relationship, then they may take vengeance for being wronged by retaliating and destroying the people and the institutions that have betrayed them. Using an unanswerable political voice, the injured parties cause destruction and commit suicide to exit the relationship.

In fact, a proximate cause for the Royal Oak postal center violence emerges when one moves from the media and official reports to those who were present during McIlvane's shooting spree. In the documentary *Murder by Proxy*, film director Emil Chiaberi (2010) presents eyewitness testimony gathered from Royal Oak postal workers. Coined by criminologist James Alan Fox, the term "murder by proxy" connotes a situation in which normal, not deranged, individuals commit mass murder to avenge injustices committed by abusive supervisors in the workplace; the abusive supervisors are the proxies or the extensions of despotic bosses and authoritarian organizations.[22]

Specifically, the film's director Chiaberi (2010) attributes the Royal Oak shooting to a combination of systemic defects and an abusive management team that used its power to create hostile work conditions. Chiaberi associates the systemic defects to the Postal Reorganization Act of 1970

[22] *Murder by Proxy: How America Went Postal*, directed by Emil Chiaberi (2010; n.p.: Aldamisa Releasing, 2010), DVD.

(Pub. L. 91–375) that converted the U.S. Postal Department from a cabinet agency into an independent and profit-centered public corporation. Established as a cost center, the Royal Oak Post Office surrounded employees in hostile work conditions created by a bullying, profit-centered management team. The U.S. Postal Service headquarters transferred this management team from Indianapolis to Royal Oak after an investigation by the Government Accounting Office (GAO). The GAO investigators found that this management team while in Indianapolis violated Equal Employment Opportunity Commission (EEOC) regulations, initiated cuts that disrupted service to the public, and harassed the workforce.[23] Subsequently, at Royal Oak, the despotic managers exerted pressure on untrained postal employees to work fast using unfamiliar and dangerous technology so that the cost center could reach unrealistic performance and profit goals. This management team also used retaliatory and punitive actions to punish employees who did not conform to the new business model of productivity and profit.

In his book *The Tainted Eagle,* Charlie Withers (2009) documented the toxic style of Royal Oak's management team that created the deadly situation at Royal Oak. As the chief union steward for the Royal Oak letter carriers, Withers described McIlvane as a conscientious worker who stood up for himself and for his co-workers in Royal Oak's hostile work setting. Based on his independent investigation, Withers concluded that the Royal Oak management used McIlvane to serve as an example to others. Although McIlvane loved his job, he hated the postal agency's management, and the feeling was mutual, given management's unrelenting harassment of McIlvane. Withers reported that postal supervisors disciplined McIlvane for petty offenses, such as not turning in a form within 10 minutes of his last dispatch, wearing tight work shorts, gassing up his truck too soon, and going two miles over the posted speed limit. According to Withers:

> The best way to ruin someone's life is to take away the one thing he had going for him. He loved his job. … so you hit him in the pocketbook. You start suspending him to kill his morale. You take the money out of his pocket. You do false charges on him. You ruin people, and that's what …[the Royal Oak management] did.[24]

[23] Charlie Withers, *The Tainted Eagle: The Truth Behind the Tragedy* (Xlibris, Corp., 2009), digital file.

[24] Quoted in *Murder by Proxy: How America.*

After McIlvane filed a grievance, his supervisors retaliated by placing him on administrative leave without pay. Given his placement on administrative leave, McIlvane could not collect unemployment insurance. Consequently, McIlvane was forced to deplete his savings to survive while his appeal went to arbitration. Finding himself isolated, powerless, penniless, and on the brink, McIlvane threatened to kill people if he lost the arbitration.[25] The day after the arbitrator rejected his appeal, McIlvane murdered the abusive superiors whom he held responsible for the workplace injustices against him and his co-workers.

Congressional investigations backed up the testimony presented in the film *Murder by Proxy*. After receiving a list of complaints from Royal Oak postal workers, US Senator Carl Levin of Michigan concluded that this postal center was rife with the harassment of employees.[26] Similarly, an investigation by the US House of Representatives Committee on Post Office and Civil Service found that not only was the Royal Oak Post Office a "powder keg" and a "lethal formula," but also the shootings were avoidable.[27] Furthermore, in 2012, the Royal Oak postal workers signed a petition that said: "We feel that it is an injustice that in 21 years no manager has been held accountable for the hostile work environment they created, which resulted in a horrible tragedy."[28] These postal workers also placed two wreaths outside the Royal Oak Postal Office that said "a preventable tragedy" and "the tragedy was caused by a hostile work environment, created by postal management, condoned by postal management for the sole purpose of intimidating and threatening the workforce in order 'to make the numbers' no matter what the cost!"[29] Ultimately, McIlvane's exercise of his political voice was not heard because he failed to influence the authoritarian organizational system that he felt betrayed him and his co-workers.

[25] U.S. Postal Service Commission (USPSC), *The United States Postal*, 21.

[26] Judy Davids, "20 Years Later: A Look Back at the Royal Oak Post Office Shooting," *Royal Oak Patch* (Royal Oak, MI), November 14, 2011, accessed February 14, 2015, http://patch.com/michigan/royaloak/a-look-back-at-the-royal-oak-postal-shootings.

[27] Ibid.

[28] Catherine Kavanaugh, "Royal Postal Workers Mark 21st Anniversary of Infamous Shooting—'A Preventable Tragedy,'" *Oakland Press* (Oakland County, MI), November 14, 2012, accessed February 14, 2015, http://www.theoaklandpress.com/general-news/20121114/royal-oak-postal-workers-mark-21st-anniversary-of-infamous-shooting-a-preventable-tragedy.

[29] Ibid.

As public anthropologist Daniel Lende argues, "Violence as tragedy, rather than something that can be explained away due to the faults of human mind or soul or society, is a strong narrative—one that both demands action and resolution."[30] In its report, the USPSC concluded that postal workers had substantial differences in attitudes and psychological characteristics from their counterparts in the federal workforce.[31] While postal workers were less angry, stressed, hostile, and depressed than their national counterparts, they had more negative attitudes about work, co-workers, and management than their national counterparts. Besides having less confidence in management's interest in protecting workers than their national counterparts, postal workers were more likely to be victims of discrimination and more fearful of violence by their co-workers than the comparison group.[32] Specifically, the U.S. Postal Service resolved the Royal Oak shooting by putting "workplace environmental analysts in place."[33] This resolution aimed at ameliorating the effects of alcohol- or drug-related violence in people and the aggressive behaviors of disciplined employees.[34] Still this resolution rested on first-order moral explanations because it attributed the violence to the work of an abnormal individual.

Instead, the analytical structure of the combination of no voice and no exit directs attention to a plausible proximate cause for the workplace massacre at Royal Oak—the systemic deficiencies and the hostile workplace. This proximate cause stands above the personal characteristics of a particular individual and transcends the a priori prescriptions and the facile proscriptions of conventional approaches. By identifying the proximate cause of the workplace tragedy as emerging out of the explosive combination of exit and voice, organizational leaders have a second-order narrative on which to formulate resolutions that get to the root of the problem. It is important to point out that the identification of a proximate cause does not condone the moral or legal culpability of the people responsible for committing these tragedies and the harm they cause to their victims. However, with deepened moral understanding of the volatile interplay of exit and voice, organizational leaders can provide the safety valves necessary to prevent powerless people involved in love-hate relationships that

[30] Daniel H. Lende, "The Newtown Massacre and Anthropology's Public Response," *American Anthropologist* 115, no. 3 (2013): 498.

[31] U.S. Postal Service Commission (USPSC), *The United States Postal*, 40.

[32] Ibid., 40.

[33] Goodsell, *The New Case for Bureaucracy*, 17.

[34] U.S. Postal Service Commission (USPSC), *The United States Postal*, 237.

have gone awry from causing destructive outcomes in workplaces. While anti-harassment federal and state statutes exist, these laws do not prevent hostile work environments from erupting into violence. In other words, organizational leaders who do not seek proximate causes may allow discriminatory conditions to persist with the potential to unleash the explosive combination of exit and voice in their workplaces. Thus, the search for proximate causes is a way to anticipate and design resolutions that prevent the explosive combination of exit and voice from causing public workplaces to erupt into tragic scenes.

Clarifying the Interplay of Voice and Loyalty

Whereas the previous sections discussed the interplay of exit and voice, this section examines the interplay of voice and loyalty. Specifically, Hirschman argues that the perceptions of dissatisfaction and the activation of voice are functions of loyalty in market relationships and traditional relationships in everyday (political) affairs. By contrast, traditional relationships, which Hirschman places under the rubric of political affairs, involve birthright and inherited allegiances to family, church, and country (see Chap. 3). The traditional relationships drawn from personal loyalties and thick moralities operate on a different cost dynamic than that of market-based loyalty. Specifically, personal loyalties attached to people at birth or by inheritance do not have an entry price, but they can extract high exit costs. For instance, a gay individual, who is very close to his family, may not reveal his sexual orientation to his parents because he fears the high emotional toll of being rejected and separated from them. Thus, the relationships of family, faith, and fatherland are nearly impossible to break if people repress the available exit option because of their feelings of guilt, shame, or vengeance.

As discussed earlier, those who repress a difficult but available exit option are likely to nurture the voice function and use the power of political language to defend their participation in morally objectionable actions. According to Hirschman, "It is perhaps for this reason that the traditional groups which repress exit alone have proved to be far more viable than those which impose a high price for both entry and exit."[35] Hirschman offers the behavior of ordinary Germans in Nazi Germany under the Third Reich as an illustration. He argues that most Germans did not exit from

[35] Ibid., 98.

the Nazi Party because they attached a high affective cost for breaking their affiliation with the German state. Consequently, they carried out evil choices to destroy the German-Jewish people by reinventing everyday roles as socially appropriate and a part of the normal course of events.[36] For Hirschman, the profound lesson of the Holocaust is that the penalty for exiting the Nazi Party was internalized rather than directly imposed or legally sanctioned.[37]

The Holocaust example raises another question about the interplay of voice and loyalty: What motivates reasonable people not to exit a morally objectionable relationship in society? One answer has to do with the special case of loyalty that people attach to public goods. In this case, people are not responsive to the moral or material costs they expect from avoiding available choices to exit. Therefore, in the next section, I discuss the first-order morality associated with the special loyalty to public goods that leads to perverse social outcomes.

The Special Loyalty to Public Goods

The concept of public (or collective) goods is drawn from economic theory. Public goods are those goods consumed by all members in a given community, geographical area, or country in a way that one person's consumption does not affect that of another. In addition, no one can be excluded from consuming public goods because public goods are indivisible.[38] Well-known examples of public goods are public education, environmental protection, infrastructure maintenance, disease control, and national security; among the accomplishments of public policies supporting public goods are "advanced standards of literacy and public health" that everyone in the USA ought to enjoy.[39] Whereas private consumers can exit with ease when they are dissatisfied with the quality of non-public goods in the marketplace, the opposite is true for the public as consumers of public goods. The reason for this difference is that governments are the producers of public goods. As non-market organizations, governments have a monopoly over the production of public goods, and

[36] Guy B. Adams, "The Problem of Administrative Evil in a Culture of Technical Rationality," *Public Integrity* 13, no. 3 (2011): 278.

[37] Hirschman, *Exit, Voice, Loyalty: Responses*, 96.

[38] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1971).

[39] Hirschman, *Exit, Voice, Loyalty: Responses*, 101.

they fund this production through compulsory taxation. This monopoly makes it impossible for people to avoid consuming public goods even if public goods are poorly produced. Consequently, an entire community is affected by the benefits or harm derived from the consumption of public goods. Although residents can refuse to pay the taxes to finance the production of deteriorating public goods in their communities, they cannot stop consuming those public goods because no one can exit fully from the larger American society and the life consequences affected by the deteriorating quality of public goods.[40] For this reason, Hirschman says, "he who says public goods says public evils."[41] In other words, what some in a community judge as a public good may be viewed by others in the same community as a public evil.

The special loyalty of Americans to public education provides common situations of this consumption conundrum. Specifically, these situations involve dissatisfied parents who distort their moral judgments about public education to avoid exercising a difficult, though available, option to exit. One situation involves dissatisfied parents who are passionate about the idea of public education but enroll their children in private schools because their community has a failing public school system. However, by remaining in the community, these dissatisfied parents continue to support the poorly performing school district through their taxes. In effect, these parents only partially exit as consumers of the low-quality public education product.

Another situation involves parents who loyally keep their children enrolled in the failing public school system because of the importance they attach to public education in democratic society. In other words, these parents allow their children to receive an inadequate education because of their special loyalty summarized as "public education, right or wrong" welfare.[42] In the second situation, the parents tolerate the poor performance of their public school districts because they believe that their exit would produce a high cost to the general social welfare. In effect, these parents avoid the available, though difficult, exit option to move to another community with a high-quality public school system. These loyal parents wrap their avoidance behavior around the steadfast belief that public education and their community "*to which they belong would go*

[40] Ibid., 102.
[41] Ibid., 101.
[42] Ibid., 104.

from bad to worse if they left" (emphasis in the original).[43] Hirschman also argues that this peculiar belief gets stronger the longer the parents remain as steadfastly loyal consumers of public education and unresponsive to its deficiencies. According to Hirschman, this special loyalty of parents perversely converts into a situation in which "the wronger, the stronger" their commitment to public education.[44]

At first, it might appear that the parents' special loyalty to public education is a second-order (proximate) reason not to degrade communities producing faulty public goods. However, Hirschman classifies the avoidance behaviors prompted by the parents' special loyalty to public goods as "spinelessness."[45] In modern terms, spineless behavior is known as political correctness. In fact, spineless or politically correct behaviors are built on first-order reasons drawn from defensive conceptions of self-interest. These first-order reasons to avoid a difficult, though available, exit option give the loyal parents ways to save face and maintain positive public images as civic-minded residents of their communities. Moreover, the dissatisfied parents who move to another community to escape the adverse personal consequences of a failing school district also resort to first-order reasons based on a defensive conception of self-interest.

All defensive first-order reasons used to endure or flee from jurisdictions with faulty public goods are dangerous. The reason is that everyone in the USA directly or indirectly experiences the harmful social effects resulting from the massive numbers of ill-educated children and adults who are the products of deplorable public education systems. Furthermore, Hirschman argues that spinelessness or politically correct behaviors associated with the special loyalty to public goods can lead ordinary people to tolerate, if not actively support, a range of morally objectionable purposes and public evils of "truly ultimate proportions."[46] In effect, the avoidance behaviors associated with declining quality of public goods are morally negligent and result in irreparable human costs that can ruin a community.

Unfortunately, spineless or politically correct behaviors thrive in civic organizations and political jurisdictions producing public goods.[47] On the one hand, most people will grow a moral spine if they perceive a

[43] Ibid., 98.
[44] Ibid., 104.
[45] Ibid., 103.
[46] Ibid., 103.
[47] Ibid., 104.

dire personal emergency regarding their consumption of public goods. On the other hand, people may grow a moral spine as a result of their recognition of the harm associated with the perverse loyalty to public goods. To grow a moral spine, people have to assert moral courage, which, according to Bailey (1964), is more difficult in day-to-day affairs than in public service. Moral courage means that people choose not to neglect or remain silent as public goods deteriorate in their communities. In fact, moral courage activates and transcends first-order everyday morality based on self-interest narrowly understood because its performance is rooted in the human capacity to deliberate and to distinguish good choices from evil ones.[48]

Essentially, the roots of moral courage are grounded in second-order explanations based on the universal standard of logical reasonableness discussed in Chap. 2. By activating moral courage, people recognize and take responsibility for the contributions of their politically correct (defensive) behaviors in damaging the lives of the most vulnerable individuals in society, such as public school children. Preventing harm to vulnerable individuals in society is a second-order and universally valid reason for people to reconsider their special loyalty to flawed public goods and to change their morally objectionable (politically correct) behaviors. In the next section, I discuss how the special loyalty to public goods can be converted into the exercise of active ethical voice based on second-order reasons that include empathy for society's most vulnerable individuals and caring for public interests.[49]

Converting Special Loyalty into Ethical Voice

The conversion of spineless loyalty to public goods into second-order reasons for exercising ethical voice is elusive. The difficulty in exercising ethical voice is due to confusion over different types of exit options available to people who are confronted with declining quality in public goods. Therefore,

[48] Lee Ward, "Nobility and Necessity: The Problem of Courage in Aristotle's Nichomachean Ethics.," *American Political Science Review* 95, no. 1 (March 2001).

Gene Blocker, *Ethical Inquiry* (unpublished manuscript, 2008).

[49] John Dewey, *The Public and Its Problems* (Athens, OH: Swallow Press, 1954).

Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982).

Carol W. Lewis and Stuart C. Gilman, *The Ethics Challenge in Public Service: A Problem-Solving Guide*, 2nd ed. (San Francisco, CA: Jossey-Bass, 2005).

Available Actions in Response to the Reduced Quality of Public Goods

Individual Responses	Escape Options	Escape Actions	Voice	Loyalty	Moral Reasoning
Accept the Status Quo	Full Escape	Go Out	Silent voice	Tacit Loyalty	First-order Defensive Reasons
	Partial Escape	Opt Out	Muted Voice	Passive Loyalty	
	Escape without Public Protest	Cover Up	Hollow Voice	Appearance of Loyalty	
Change the Status Quo	Escape with Public Protest	Go After	External Ethical Voice	Dissenting Loyalty	Second-order Proximate Reasons
	Reserved Escape/Public Protest from Within	Fight For	Internal Ethical Voice	Active Loyalty	

Fig. 5.1 Available actions in response to the reduced quality of public goods

to clarify ethical voice, it is necessary to distinguish between options that accept the status quo or change the status quo. As shown in Fig. 5.1, three exit or escape actions associate with acceptance of the status quo: (1) *to go out*, (2) *to opt out*, and (3) *to cover up*; and two escape actions associate with changing the status quo: (1) *to go after* and (2) *to fight for*. The five combinations to the degradation of public goods are analyzed in turn.

People who exercise any of the three escape actions associated with acceptance of the status quo choose not to do something about deteriorating public goods. These exit options are morally improper because they all rest on defensive first-order loyalties, motivating people to evade the need to reverse the production of poorly performing public goods. Specifically, the first escape option is that of dissatisfied consumers of public goods who *go out* by completely and silently exiting a local community to avoid experiencing personal adversity of degraded public goods. For example, dissatisfied parents who *go out* of a failing public school system not only dodge short-term personal adversity, but their flight also makes them insensitive to the suffering of others who cannot escape from the degraded public school system. In general, the silent ethical voice of these

dissatisfied consumers gives tacit consent to the harmful effects of the low-quality public education on the children and families left behind.

The second escape option associated with acceptance of the status quo is to *opt out*, and it is illustrated by the dissatisfied parents who shift from public to private education while remaining in a community with a failing school system. By remaining in the community, these parents accept the norm to pay taxes to fund the failing school district even though they have evidence that increased funding does not reverse the deterioration in public education. Furthermore, those who *opt out* may be at peace with themselves emotionally for not leaving their communities in the lurch, but their passive loyalty mutes their ethical voice. As long as tax levies continue to pass in failing school districts, the parents' partial escape and muted ethical voice are unlikely to have an impact on school officials who are the monopoly suppliers of public education.

Covering up is the third escape option associated with the acceptance of the status quo, and the exercise of ethical voice is hollow. An example involves influential community members who resign their formal governance positions without a public protest. By *covering up*, these influential community members avoid denouncing the policy decisions that have contributed to the deterioration of public goods. For example, the governing body of an insolvent school district may choose to eliminate popular programs, services, and staff instead of fixing system-wide shortcomings.

Suppose in response, a highly esteemed community member on a Board of Education quietly quits his part-time elective office rather than publicly oppose these policy decisions. However, as an insider, this community member knows that the board's policy choices are tactics designed to pressure the voters to approve a tax hike or to punish them if the levy fails. Instead of asserting the true reason for his resignation, this community member uncourageously chooses to save face in the community by framing his escape as a private matter, citing the need to spend more time on family or other personal obligations. By framing his resignation as a private matter, his expression of voice is devoid of moral significance because he has hidden the true reason for his exit. Nevertheless, his hollow ethical voice gives the appearance of loyalty to public education and to his former board colleagues. In this way, he avoids sustaining a personal cost or drawing an adverse public reaction for his escape, thereby warding off threats to his political future or jeopardizing his standing in the community. Most significantly, his *cover up* does nothing about mitigating the harm to the children in the failing public school system he once governed.

The conversion of special loyalty into ethical voice depends on the willingness of discontented consumers of public goods to switch their reactions from accepting the status quo to changing the status quo. As shown in Fig. 5.1, two escape options aimed at changing the status quo activate the ethical voices of dissenting loyalty and active loyalty, and both types of loyalty rest on second-order reasons to alter objectionable conditions regarding public goods. The first option involves dissatisfied consumers who *go after* the governmental producers of low-quality public goods by combining their escape with a public protest. Dissatisfied consumers who *go after* the producers of public goods serve as external change agents by raising public objections through expressions of dissenting loyalty.

For example, dissatisfied parents may show dissenting loyalty by submitting complaints to regulatory and oversight bodies about the problems they have experienced with unresponsive public school management; they may also participate in public school reform movements. In these ways, the discontented parents go on the record with the reasons for their exit and to create community-based political pressure for change. As external change agents, these parents earnestly attempt to alter an objectionable state of affairs resulting from deteriorating public goods, and their public protests may persuade others to activate their ethical voices. However, few incentives and rewards exist for dissatisfied consumers of public goods to express their ethical voice as external change agents. Therefore, the dissenting loyalty associated with *going after* the governmental producers of low-quality public goods is practiced rarely.[50]

A better way for discontented consumers to reverse degraded public goods is through the second action associated with changing the status quo—to *fight for*—while keeping the option to escape with a public protest in reserve. Discontented consumers of public goods who *fight for* altering the status quo use their ethical voices to express active loyalty to public goods as internal community-based change agents. In fact, discontented consumers who *fight for* change and speak up to express active loyalty have more clout than those who express dissenting loyalty from the outside. According to Hirschman, the governmental producers of faulty

[50] According to Josh Cunningham (2013), twenty-three states have empowered discontented parents to select private schools in lieu of neighborhood public schools through vouchers, tax deductions, and scholarship credits. However, the incentives of vouchers, tax deductions, and scholarship credits give parents incentives to exit without a public protest. In effect, these parents opt out without exercising ethical voice to reverse the decline of public education in their communities.

public goods are more responsive to the exercise of voice from within than to the external expressions of voice.[51] This is no surprise because governments as non-market organizations are less sensitive to any type of consumer exit than are market organizations. If, for example, the management of a failing public school system works hard to blunt the influence of parents as community-oriented change agents, then the latter's expressions of internal ethical voice reduce to nothing more than "blowing off steam."[52] By degrading community feedback mechanisms, unresponsive school administrators are likely to motivate the internal change agents to exercise the escape option they have kept in reserve.

If, instead, school administrators are responsive to community-based feedback mechanisms, then the discontented parents who have exercised their internal ethical voices are rewarded for their active loyalty in fighting for quality public education. Furthermore, if school administrators genuinely value the feedback obtained from internal community-oriented change agents, then they elevate the role of parents to that of active co-producers of public education. In effect, the parents, as internal change agents, have extended their co-production of public education beyond the passive role of voters who approve school tax levies. For Stivers, this type of active co-production creates "a practical community of collaboration."[53] Her argument is that the active loyalties of parents as internal change agents and responsive school officials are working together as equals to care for a significant public interest by making improvements in the public education available to the children of all members of their community.

One finds examples of Stivers' practical community of collaboration in the school (parental) choice movement that has spread across the USA. According to a report prepared by the National Conference of State Legislatures, most state have adopted policies to give discontented parents who *stay in* public school choices in lieu of enrolling their children in traditional public education.[54] The first and most common policy is the charter school. Forty-three (43) states and the District of Columbia permit parents to select free high-quality, tax-supported, charter schools

[51] Hirschman, *Exit, Voice, Loyalty: Responses*, 122.

[52] Ibid., 124.

[53] Camilla Stivers, "Citizenship Ethics in Public Administration," *Public Administration Public Policy* 86 (2001): 599.

[54] Josh Cunningham, *Comprehensive School Choice Policy: A Guide for State Legislators* (Denver, CO: National Conference of State Legislatures, 2013), accessed April 3, 2015, http://www.ncsl.org/documents/educ/ComprehensiveSchoolChoicePolicy.pdf.

instead of low-quality neighborhood schools.[55] Although operating under the legal authority of public school districts, charter schools are run by private management organizations that have more autonomy than traditional neighborhood schools. Besides incorporating parents into governance decisions, charter schools have mandates to give community members significant oversight of school operations. The underlying policy assumption is that competition from charter schools will improve the performance of failing public schools within the same district.[56] Thus, by operating in a competitive environment, the management teams of traditional public schools are forced to be responsive to parental feedback to recruit and retain pupils because their enrollments determine the size of their operating subsidies. The second and less common policy under the school choice movement is parent-trigger legislation. Seven state legislatures have authorized dissatisfied parents who *stay in* to intervene in poorly performing public schools. By gathering enough signatures determined by state law, discontented parents who *fight for* change can compel reforms in a failing public school by converting it into a charter school, replacing teachers, staff, and administrators, or closing it.[57]

The practical communities of collaboration fostered by the school choice movement have transformed the production of public education in the USA. Although charter schools and parental trigger laws have increased the responsiveness of public school management to community feedback mechanisms in funding allocations, program innovations, and service delivery, the implementation of these policies is far from perfect and requires refinements.[58] Nevertheless, these policy innovations are significant because they provide incentives for discontented consumers of public education to switch from accepting degraded school systems to *fight for* reforming underperforming school systems in their communities through the exercise of internal ethical voice and active loyalty.

[55] Josh Cunningham, "Charter Schools Overview," National Conference of State Legislatures, accessed April 3, 2015, http://www.ncsl.org/research/education/charter-schools-overview.aspx.

[56] Under the school choice movement, parents can also choose to send their children to magnet schools within their public school systems or to homeschool them (Cunningham, 2013). These options also compete with traditional neighborhood public schools.

[57] Cunningham, *Comprehensive School Choice Policy*, 122–3.

[58] Ibid.

David Arsen and Yongmei Ni, "The Effects of Charter School Competition on School District Allocation," *Educational Administration Quarterly* 48, no. 1 (2012).

However, as practical communities of collaboration, the parental choice movement rests on an unstable combination of exit, voice, and loyalty. This instability is due not only to the costs associated with the exercise of ethical voice and active loyalty to public goods but also to the power imbalance inherent in these collaborative communities. Specifically, lay citizens who *fight for* public school reforms as co-producers of public goods can easily become overwhelmed by the professional expertise of the governmental providers of public goods. These experts with technical, legal, programmatic, and procedural knowledge are necessary for the efficient and effective production of public goods, but they can easily drown out the active ethical voices of citizen change agents. This power imbalance is also magnified by the fact that those served by public goods often live in separate worlds from those who produce public goods. According to Bailey, "The autonomous and disproportionate power of professional experts, and of the limited worlds they comprehend, is a constant threat to more general consideration of the public good."[59] Consequently, the expression of internal ethical voice and the exercise of active loyalty to declining public goods are rife with open and hidden costs, rendering a high price for the willingness of people to follow through with second-order moral choices.

Implications for Career Public Servants

This section offers guidelines to help career public servants facilitate the combination of exit and voice associated with changing the status quo. The first set of guidelines focuses on how career public servants might approach situations as the providers of deteriorating public goods by enabling citizens to express external ethical voice and dissenting loyalty. The recommendations are for career public servants to encourage dialogue by allowing citizens to *go after* and challenge the operating assumptions that contribute to the deterioration of public goods, and then to listen and make appropriate changes.[60]

The second set of guidelines focuses on how career public servants might approach situations to enable citizens to *fight for* improving the

[59] Stephen K. Bailey, "Ethics and the Public Service," *Public Administration Review* 24, no. 4 (1964): 241.

[60] Rosemary O'Leary, *The Ethics of Dissent: Managing Guerrilla Government* (Washington, DC: CQ Press., 2006), 109–12.

quality of public goods by expressing internal ethical voice and showing active loyalty. These guidelines emphasize the need for career public servants to promote social equity and foster citizen participation within their organizations.[61] The National Academy of Public Administration defines equity as "the fair, just, and equitable management of all institutions serving the public directly or by contract; the fair, just, equitable distribution of public services, and the implementation of public policy; and the commitment to promote fairness, justice, and equity in the formation of public policy."[62] In other words, career public servants who are the providers of public goods and committed to the principle of equity should look after the interests of the poor and minorities as well as the most vulnerable people in their communities.[63]

Consequently, career public servants should be especially mindful of the effects of declining public goods on those citizens who cannot escape because they have no other options.[64] Svara offers the following three strategies to help career public servants foster equitable governance and inclusive management:

- Conduct an equity inventory to identify lapses and deficiencies in service to all entitled to receive it and initiate corrective actions;
- Include citizens on task forces and advisory committees; and
- Provide methods of customer feedback allowing citizens to assess service quality and then follow up with appropriate improvements.[65]

The third set of guidelines is for career public servants to engage in sound public personnel management practices that build a positive organizational climate for the exercise of ethical voice. By using positive personnel practices, public servants can create safety valves to prevent powerless employees from triggering the explosive combination of an irreversible exit and an unanswerable ethical voice resulting in workplace tragedies.

[61] James H. Svara, *The Ethics Primer for Public Administrators in Public and Nonprofit Organizations*, 2nd ed. (Sudbury, MA: Jones and Bartlett Publishers, 2007), 139–43.

[62] Blue Wooldridge, "Social Equity in Governance," National Academy of Public Administration, last modified 2015, accessed July 2, 2015, http://www.napawash.org/fellows/standing-panels/social-equity-in-governance.html.

[63] H. George Frederickson, "The State of Social Equity in Public Administration," *National Civic Review* 94, no. 4 (Winter 2005): 38.

[64] Svara, *Ethics Primer*, 140–2.

[65] Svara (2007, 141) provides a sample equity inventory in Figure 9.1 of his *Ethics Primer.*

Drawn separately from Svara and Dennis Dresang, these practices include the following[66]:

- Have clear policies, such as disclosure of consensual relations and prevention of hostile workplaces, that are enforced;
- Conduct ethical climate surveys to identify safety values to neutralize toxic organizational environments;
- Provide a process whereby staff complaints can be made to a third party if the direct supervisors are involved in the problematic situation;
- Investigate complaints fully and expeditiously;
- Provide multiple channels for staff to register complaints and protecting complainants so that fear of retaliation will not inhibit the reporting of problems;
- Resolve problems in ways that do not further penalize victims; and
- Deal with whistleblowers proactively so that their going outside the organization with their complaints is unnecessary.

The last set of guidelines focuses on what career public servants can do to offset the significant costs associated with the exercise of their own ethical voice as either citizens or consumers of public goods. As discussed in Chaps. 3 and 4, the moral courage of career public servants to exercise their ethical voices is bolstered by their philosophical reflexivity. Specifically, in their ethical inquiries, they can probe their consciences and use methods of moral philosophy to *fight for* reversing the decline in public goods. Philosophical reflexivity promotes the growth of moral courage by enabling career public servants to "recognize harsh necessities without blinding themselves to moral costs."[67]

In particular, philosophically reflexive career public servants can discern how their conceptions of self-interest may yield avoidance behaviors regarding the decline in public goods in their private lives so that they can overcome their own capacity for callousness and cynicism regarding the suffering of others. Also, philosophical reflexivity enables them to perceive

[66] Ibid., 137–9.

Dennis L. Dresang, *Personnel Management in Government Agencies and Nonprofit Organizations*, 5th ed. (New York, NY: Pearson Education, 2009), 146.

[67] William A. Galston, "Toughness as a Political Virtue," *Social Theory & Practice* 17, no. 2 (1991): 176.

the perverse consequences of the special loyalty to public goods and the interplay of public goods and public evils. Besides deepening understanding, philosophical reflexivity encourages career public servants to seek second-order reasons based on the universal standard of logical reasonableness to change an objectionable state of affairs in their workplaces and in society. In these ways, morally courageous career public servants can act on difficult ethical choices without losing their own humanity or draining it from others.

Finally, by following through with difficult second-order ethical choices, career public servants make known where they stand on issues of great significance or value in their communities. The willingness to act on important social issues is within every career public servant who is "not spiritually dead"; it creates in them "a calling for politics."[68] Thus, career public servants with a calling for political ethics are motivated not only to secure the wobbly ethics ladder in public service but also to let it down and raise others up. As will be discussed next in Part III of this book, their raising up of others is strengthened by second-order reasons framed in terms of the great political ideas about the guarantees of democratic freedoms for Americans embedded in the US constitutional heritage.

[68] Max Weber, "Politics as a Vocation," in From Max Weber: Essays in Sociology, ed. H. H. Gerth and C. Wright Mills, trans. H. H. Gerth and C. Wright Mills (New York, NY: Oxford University Press, 1958), 127.

PART III

Great Political Ideas and American Constitutionalism: Balancing Liberty and Equality in Government

CHAPTER 6

Political Philosophy, the American Constitutional Heritage, and Constitutional Thinking

> *It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.*
>
> *Publius (Alexander Hamilton),* Federalist Paper #1

The last chapter of Part II closed with a discussion of the moral strength of career public servants to follow through with difficult second-order ethical choices on important public issues. Moral strength built on philosophical reflexivity, though necessary, is insufficient in the political ethics of public service. The reason is stated in the epigraph of Hamilton. The American people depend on the political constitution of the USA to provide a system of good government. However, most Americans accept the US constitutional system without much thought because they are used to the way things are done throughout their lifetime. In effect, the constitutional system is a given in their lives until they have a personal legal problem or experience widespread governmental corruption, as happened in Cuyahoga County. Thus, most people do not take the time to reflect on why government does what it does. Nor do they seriously consider the constitutional choices available to them to change the system, especially

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V. Vogelsang-Coombs, *The Political Ethics of Public Service*,
DOI 10.1057/978-1-137-49400-9_6

if they perceive it as broken. This constitutional naiveté may make the American people the potential subjects of a government based on political accidents or imposed on them through force.[1]

The central argument of the three chapters in Part III is that political ethics of public service requires career public servants to assume the leadership role of a constitutional steward to facilitate long-term political change. In this role, they help the American people decide two great issues of politics: first, who is free or not free in American society at a given moment, and second, whether the authority of government originates with the people and reinforces democratic freedoms under limited government, or originates with government and undermines democratic freedoms. Answers to these great issues of politics are controversial, generating political conflicts and constitutional debates, resulting in temporary solutions institutionalized in constitutional law. Thus, as Joseph Ellis argues, the Constitution is an invitation to each generation of Americans to deliberate over the meaning of these great issues of politics in their lives.[2] For Ellis, the ongoing constitutional debates inhere in the fabric of Americans' national identity, but, as discussed in Chap. 3, the national democratic identity of most Americans resides in their secondary moral identity. Therefore, by assuming the leadership role of constitutional stewards, career public servants accept the Constitution's invitation to deliberate over the meaning of democratic freedoms and the structure of governmental authority on behalf of their generation of Americans.

As constitutional stewards, understanding the normative foundations of American government is necessary for career public servants. This type of understanding requires them to broaden their ethical inquiry drawn from moral philosophy to comprehend the good government (political) philosophy of the American constitutional framers. By comprehending

[1] Hamilton's purpose in *Federalist Paper #1* was to make the case for changing the American political system of government. In the epigraph, Hamilton summoned his countrymen to reject the flawed Articles of Confederation and ratify the national government authorized under the new 1787 Constitution.

Clinton Rossiter, ed., *The Federalist Papers: Alexander Hamilton, James Madison, John Jay* (New York, NY: Mentor Books, 1961), xix.

[2] Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation*, 1st vintage books ed. (New York, NY: Vintage Books, 2002), 26.

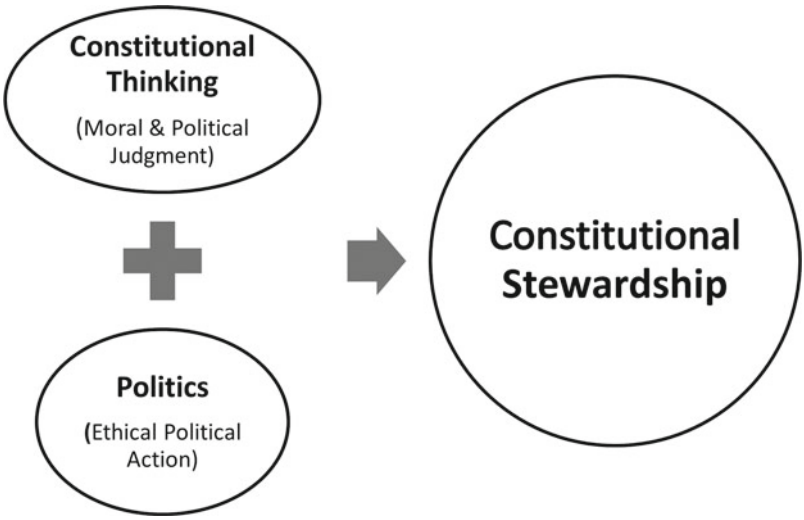

Fig. 6.1 The political-ethical leadership role of constitutional stewardship

the ideals, values, institutions, and processes of American government derived from the founders' good government philosophy, career public servants can develop moral judgments and "robust" conceptions of political possibilities.[3] However, constitutional thinking makes career public servants aware of the conflict over incommensurable ethical (regime) values, such as liberty and equality, and the institutional tensions associated with those political possibilities.[4] Thus, in exercising constitutional stewardship, career public servants engage in constitutional thinking and constitutional politics to facilitate positive constitutional change in American society (see Fig. 6.1). This chapter examines the first part of constitutional stewardship—constitutional thinking; the second part

[3] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton, NJ: Princeton University Press, 2005), 77.

[4] William A. Galston, "Realism in Political Theory," *European Journal of Political Theory* 9, no. 4 (2010): 385.

of constitutional stewardship—constitutional law and constitutional change—is reserved for Chaps. 7 and 8, respectively.

Constitutional Thinking About the Ends and Means of Government

Constitutional thinking combines moral and political judgments drawn from moral philosophy as well as political philosophy. In practice, this combination may pull career public servants in opposite directions because moral philosophy and political philosophy are contending systems of thought and action. On the one hand, the inquiry of career public servants into moral disagreements leads them to search for the highest-order reasons on which to base their ethical choices (see Chap. 4). On the other hand, their inquiry into political disagreements leads them to interpret the Constitution to justify what they can legitimately do under its authority.[5] Both are necessary for career public servants to formulate the moral and political leadership strategies necessary for constitutional thinking.

In particular, I conceive of constitutional thinking as having three elements—the Constitution, constitutionalization, and constitutionalism. The normative aspects of the Constitution answer the political philosophical question about the ends or purpose of American government. The second element of constitutional thinking is constitutionalization, which, according to Johan Olsen (2003), is the process of seeing government begin at the founding of a nation. In particular, constitutionalization gives institutional expression to the purpose and values of government. Constitutionalism is the third element of constitutional thinking. Constitutionalism answers the philosophical question about the means that public servants apply within American political institutions to legitimate their use of state power. The following sections describe each element of constitutional thinking.

First and foremost, all career (and non-career, i.e., elected) public servants take an oath to uphold the US Constitution as the "supreme Law of the land" (see Article VI). Hence, career public servants must know the normative aspects of the Constitution and the constitutional heritage they have sworn to uphold.[6] Besides creating and sustaining the American

[5] Williams, *In the Beginning Was the Deed*.

[6] Douglas F. Morgan et al., *Foundations of Public Service*, 2nd ed. (Armonk, NY: M.E. Sharpe, 2013).

polity, the US Constitution is the law that determines all other laws.[7] For these reasons, the Constitution is the moral, legal, and political foundation of American public service.[8] Normatively, the Constitution of 1787 establishes a social and legal contract that defines the relationship between citizens (the governed) and the state (those who hold governmental office). The Constitution's Preamble makes clear that the American people are the creators of the Constitution and that the Constitution, in turn, empowers the national political institutions that govern them. For what purpose does the national government have power over the American people? The Preamble answers this question as follows.

> **We the People** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[9]

Thus, the purpose of the national government is to serve the interests of the general public (the People) and to provide for the effective functioning of the national Union, that is, the nation-state, to preserve the American democratic republic. As a fiduciary for the People, the national government is entrusted to achieve five broad goals. The first goal translates into a system of justice that gives the national government the authority to protect property and to regulate how citizens treat each other under the law. The second goal is to secure public safety and maintain internal order under a system of law enforcement so that citizens can live together peacefully. The third goal is for the national government to support a mili-

Vera Vogelsang-Coombs, "The American Constitutional Legacy and the Deliberative Democracy Environment of New Public Governance," in *New Public Governance: A Regime-Centered Perspective*, ed. Douglas F. Morgan and Brian J. Cook (Armonk, Ny: M.E. Sharpe, 2014).

[7] John A. Rohr, "The Constitution in Public Administration: A Report on Education," *American Review of Public Administration* 16, no. 4 (Winter 1982).

[8] Dwight Waldo, *The Enterprise of Public Administration: A Summary View* (Novato, CA: Chandler & Sharp Publishers, 1980).

John A. Rohr, *To Run a Constitution* (Lawrence, KS: University of Kansas Press, 1986).

David H. Rosenbloom, "Reflections on Public Administration Theory and the Separation of Powers," *American Review of Public Administration* 43, no. 4 (May/June 2013).

[9] U.S. Const. pmbl. Accessed January 27, 2014. http://www.archives.gov/exhibits/charters/constitution_transcript.html#top.

tary through taxation and conscription for the purpose of defending the American people from foreign invasions. The fourth goal authorizes the national government to formulate policies designed to promote the public good in order to benefit all (or the common welfare). The last goal is to secure the liberties of American citizens by protecting them from governmental abuses. Together these five goals foster a culture that gives diverse Americans a sense of belonging to a national political community as well as a distinct democratic way of life.

What is the source of these governmental goals? The primary source is the political philosophy of Locke (1632–1704). In eighteenth-century America, Locke's ideas about the purpose of government were the political gospel of most educated colonists, and colonial leaders translated his ideas to shape the political institutions of colonial America.[10] Thus, it is no surprise to find that Locke's political philosophy underpinned the constitutional thinking of the American founders.

The Political Philosophy of John Locke

Specifically, the events of 1688 in England, known as the Glorious Revolution, heavily influenced Locke's political philosophy. This revolution involved the military overthrow of King James II (a Catholic) and installed Holland's William of Orange and his wife Mary (both Protestants) as dual English monarchs. The Glorious Revolution transformed England's government by establishing a constitutional monarchy that contained republican elements. Beyond his immediate past, Locke grounded his political philosophy in the historic accounts of government from which he discerned the minimal functions that any government must perform. Locke encapsulated these fundamental ideas about government in his conceptions of natural law, political equality, the social contract, popular sovereignty, and the preservation of liberty, all of which he published in *The Second Treatise of Government* (1690).

Specifically, Locke derived his theory of natural law from his views about how individuals live in a natural state. For him, individuals lived happily and as equals in a natural society, where they possessed unalienable rights to life, liberty, and property. However, weak persons in this natural society had no protection from those who were strong. Thus, Locke argued that people instinctively bonded together and formed a contract,

[10] Thomas P. Peardon, introduction to *The Second Treatise of Government*, by John Locke, ed. Thomas P. Peardon (Indianapolis, IN: Bobbs-Merrill, 1952).

or a constitution, to erect a lawful government to protect themselves.[11] This governing contract established a political society where individuals surrendered their natural rights to the lawful government; the lawful government, in turn, produced rules for all to live by in order to secure public safety and provide for the public good.[12] In constituting a political society, the people granted limited fiduciary powers to the lawful government. In exchange, the government provided the environment that allowed individuals to live up to their potential consistent with the greatest amount of freedom within a safe and orderly society. In short, the purpose of government was to enlarge the freedom of individuals as long as their behaviors did not infringe upon the rights of other people. In philosophical terms, this is known as negative liberty.[13]

Of the rights the people voluntarily surrendered to lawful government under the social contract, the most important one for Locke was the preservation of liberty. As Locke wrote:

> The end of law is not to abolish or restrain but to preserve and enlarge freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is not law; but freedom is .... but a liberty to dispose and order as he lists his person, actions, and possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.[14]

Thus, Locke established the connection between freedom and the ownership of property. Specifically, he argued government "cannot take from any man part of his property without his own consent" because man had property to keep him secure.[15] Given this connection, Locke defined the citizen as the man who owned property, no matter how little; the proper-

[11] John Locke, §113, VIII to *The Second Treatise of Government*., ed. Thomas P. Peardon (1690; repr., Indianapolis, IN: Bobbs-Merrill, 1952).

[12] Ibid., §87, VII.

Ibid., §110, VIII.

[13] Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford, UK: Clarendon Press, 1958).

In "Two Concepts of Liberty," Berlin (1958/1969) also conceives of positive liberty. Whereas negative liberty curbs authority, positive liberty involves the power and resources that enable individuals to realize their human potential. However, Berlin warns that positive liberty can lead to totalitarianism for two reasons. The first reason is that positive liberty cannot be reduced to any form of self-realization; the second reason is that positive liberty facilitates the distinction between higher and lower selves.

[14] Locke, §57, VI to *The Second Treatise of Government*, 57, VI.

[15] Ibid., §138, XI.

tyless individual did not possess the political rights of citizens. For Locke, citizens had the power to hold government accountable because he considered them as the ultimate sovereign of lawful political society.

Locke linked his idea about the consent of the governed to his view of popular sovereignty. For Locke, the legislature ranked supreme among all agents of government because it represented the people and expressed the will of society (the majority) in law. Accordingly, he argued the executive (i.e., King William) should not only be limited by the legislature (i.e., the Parliament) but also serve as a subordinate functionary. Furthermore, Locke stressed the importance of curbing the power of strong legislative majorities to tyrannize the people. Therefore, he argued that the people must protect themselves from tyrannical governmental agents who trample on their unalienable natural rights or who violate the constitutional contract. If in a political society, a conflict erupted between a tyrannical government and the governed, then, according to Locke's theory, the people could overthrow the tyrants. The people, Locke said, can never surrender their unalienable right to save themselves because "whenever that end is manifestly neglected or opposed, the trust [of the people] must necessarily be forfeited and power devolve into the hands that gave it, who may place it anew where they shall think best for their safety and security."[16] Thus, the people, in their role as the supreme political sovereign, can rescind or amend the contractual powers they have granted to government. Although Locke advocated for the dissolution of tyrannical governments that abuse their power, he viewed rebellion as a last resort.[17] Rebellion was not a means of continuous popular control over the regular activities of lawful government.[18]

When Locke published his political ideas in 1690, they were deemed dangerous. The reason is that Locke's philosophy challenged the governing authority of powerful European monarchs whose reigns rested on the feudal doctrine of the divine right of kings to rule. Nearly a century later, Locke's dangerous ideas found expression in the American Declaration of Independence, written by Thomas Jefferson in 1776. In severing the ties of the American colonies from Great Britain, the Declaration of Independence referenced more than two dozen grievances as evidence of how the despotic government of King George III trampled on the unalienable natural rights of the Americans. Accordingly, Jefferson wrote:

[16] Ibid., §149, §84, XIII.

[17] Ibid., XVIII, XIX.

[18] Leslie Lipson, *The Great Issues of Politics: An Introduction to Political Science*, 10th ed. (Upper Saddle River, NJ: Prentice-Hall, 1992), 234.

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands that connected them to one another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and Nature's God entitle them …
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among them are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive to these Ends, it is the Right of the People to alter or to abolish it, and to institute a new Government, laying its foundations on such principles and organizing its powers in such a form, as to them seem most likely to effect their Safety and Happiness.…
>
> We, therefore, the Representatives of the united States of America. . .do in the Name, and by the authority of the good People of these Colonies solemnly publish and declare, that these United Colonies are, and of Right ought to be, Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be totally dissolved[19]

Thus, the American revolutionaries made use of Locke's ideas about the fundamental purpose of government to justify their act of establishing the USA as an independent nation-state.

American Constitutionalization: The Twin Foundings of the USA

As shown in Fig. 6.2, the second feature of constitutional thinking is constitutionalization or the founding of the new US nation. By understanding American constitutionalization, career public servants learn how the founders designed the institutions of the national government to express the moral values and achieve the political purposes on which they founded the independent USA. However, in his treatise of government, Locke juxtaposed the conflicting values of equality and liberty as the ultimate purpose of constitutional government. Therefore, it is no surprise to

[19] "The Declaration of Independence: A Transcription," National Archives of the United States, accessed February 17, 2014, http://www.archives.gov/exhibits/charters/declaration_transcript.html.

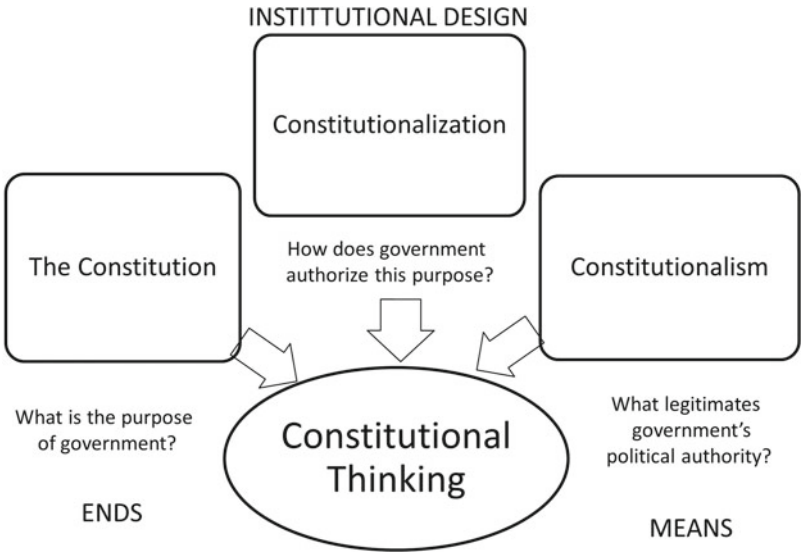

Fig. 6.2 The elements of constitutional thinking

find that the American founders did so as well when they established the political institutions of the new nation-state. Thus, as Ellis (2002) argues, American constitutionalization involved two incompatible foundings: the first one promoting the political value of equality above all and the second one promoting the political value of liberty above all. Each American founding or constitutionalization is discussed in turn.

The First Founding The initial US constitutionalization occurred after the American revolutionaries declared independence from Great Britain, based on the Declaration of Independence's proposition that all men are created equally. At the first founding in 1777, the American leaders hastily established the USA as a confederacy under the constitution known as the "Articles of Confederation and Perpetual Union." Ellis characterizes the Articles of Confederation as "an improvisational affair" that created political institutions in a "spasm of enforced inspiration and makeshift construction."[20]

[20] Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation*, 1st vintage books ed. (New York, NY: Vintage Books, 2002), 5.

By design, the Articles united the former thirteen colonies with no common history into a unitary political system with a weak and limited central government. In practice, the Articles created a league of friendship among the newly independent states for the purpose of winning the Revolutionary War under the leadership of General George Washington. In keeping with Locke's political philosophy, the Articles vested the supreme power of the new nation in a unicameral legislature—the Continental Congress. Within the Congress, each state, despite the size of its population, had one vote, and the legislature's most important actions required the consent of nine independent states. The Articles granted the Congress the power to create five administrative departments that covered foreign affairs, finance, the navy, war, and the post office. Consequently, the Congress could declare war, conduct foreign policy, borrow and coin money, equip the navy, and appoint the senior officers of the army who led the state militias. However, the Articles did not establish an independent executive branch, and so the new nation lacked a chief executive officer, such as a president, to run the government energetically. Nor did the Articles establish a national system of courts. Ultimately, the original thirteen states took 5 years to ratify the Articles of Confederation, and the first American constitutionalization took effect just before the British surrendered at Yorktown in 1781.

Merrill Jensen identifies two major achievements of the Articles of Confederation.[21] The first achievement is that the Articles laid the foundation for a central administration with a small staff of permanent employees to run the government continuously. Another achievement is that the Continental Congress, inspired by Jefferson, enacted the Northwest Ordinance on July 13, 1787.[22] This ordinance developed the policies and the political institutions necessary to facilitate the westward expansion of the USA to the Pacific Ocean, besides providing for the admission of new states to the Union. In particular, the Northwest Ordinance established the federal government's sovereignty in lands north and west of the Ohio River, east of the Mississippi River, and south of the Great Lakes. This law

[21] Merrill Jensen, "The Achievements of the Confederation," in *Major Problems in the Era of the American Revolution, 1760–1791*, ed. R. D. Brown (New York, NY: D.C. Heath, 1992), 406–7, previously published in *The New Nation: A History of the United States during the Confederation, 1781–1789* (New York, NY: Alfred A. Knopf, 1950).

[22] George W. Knepper, *Ohio and Its People*, bicentennial ed. (Kent, OH: Kent State University Press, 2003), 57.

According to Knepper, the achievements of the Northwest Ordinance have been overlooked because a convention was framing a new constitution for the USA at the same time.

gave the settlers in the territories the power to govern themselves in townships that were surveyed and divided into six miles square or thirty-six sections. Besides prohibiting slavery in the American territories, the ordinance prohibited the taking of the property of Native Americans without their consent (unless lawfully authorized by the Congress). Furthermore, the Northwest Ordinance provided the settlers with six "articles of compact" that gave them a bill of rights, guaranteeing the freedom of religion, the rights of habeas corpus and trial by jury, and other civil rights. In particular, the third article linked public education to territorial governance by stating, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[23] Thus, the two achievements of the Articles of Confederation contributed to the growing wealth and prosperity of the new nation in the era after the Revolution.

Although the Articles of Confederation gave the USA limitless long-term prospects based on the Declaration of Independence's political philosophy of equality, its weak central government made the country's short-term prospects bleak. The bleakness stemmed from the incapacity of the confederal governing institutions to function on a national scale.[24] By the time American leaders signed the Treaty of Paris to end the Revolutionary War in 1783, the thirteen states had achieved independence not just from Great Britain but also from each other. In effect, the American states won their freedom from England but were unable to form a new nation due to the strains in the Articles of Confederation.

Strains in the First Founding The weak central government established by the founders under the Articles of Confederation created extreme difficulties in governing the new nation. Given that the Articles delegated little power to the national government, the Continental Congress failed to attract the most important politicians of the day; instead, those politicians preferred to serve in more

(Continued)

[23] Yale Law School, "Northwest Ordinance: July 13, 1787," Lillian Goldman Law Library: The Avalon Project, http://avalon.law.yale.edu/18th_century/nworder.asp.

[24] Ellis, *Founding Brothers: The Revolutionary*, 8.

(Continued)

powerful state governments.[25] In fact, the members of Congress would often not show up, and their absences made it difficult for the national legislature to maintain a quorum of seven states or to gather the approval of nine states on important matters. The independent states were often unwilling to give the unanimous agreement necessary to pass congressional revenue plans. Of the few revenue plans enacted unanimously, the states then refused to pay their assessments. Thus, the Continental Congress could not raise money except by borrowing from private bankers at very high rates of interest. Additionally, the independent states placed burdens on interstate commerce by levying duties or erecting trade barriers, and they burdened foreign commercial interests with taxes and duties. For these reasons, foreign investors had no confidence in the financial solvency or the stability of the US government, and they held off on plans to invest in the new American economy.

Moreover, the weak and nearly bankrupt national government had trouble maintaining law and order.[26] After the British surrendered at Yorktown, the soldiers from the Continental Army demanded payment for their military service, but the Continental Congress could not raise the funds to pay them. In 1783, a group of eighty drunken soldiers stationed in Philadelphia stole some weapons, took up positions near the Congress, and fired some rounds. Another 500 unpaid and angry soldiers participated in mobbing the Congress. Under the Articles of Confederation, state militias were responsible for keeping domestic order in peacetime. Although the Congress directed the Pennsylvania Executive Council to call out the militia, the council president refused to quell the Philadelphia mutiny because he sympathized with the mutineers. Thus, the Congress was forced to move from Philadelphia to Princeton for its safety. For the next 3 years, the embattled Congress

[25] Gordon S. Wood, "Forward: State Constitution-Making in the American Revolution," *Rutgers Law Journal* 24, no. 4 (Summer 1993).

[26] Jensen, "The Achievements of the Confederation," in *Major Problems in the Era of the American*.

Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, NC: University of North Carolina Press, 1993).

wandered from Princeton to Trenton to Annapolis, back to Trenton, and finally to New York City.[27] Benjamin Rush, a prominent constitutional framer from Philadelphia, observed that the Congress was "being abused, laughed at, pitied, & cursed in every Company."[28]

Meanwhile, the British and Spanish Crowns, both of whom had armies stationed in North America, expected the new nation to fall apart because of the central government's weaknesses.[29] When the Congress was unable to meet the demand for payments of various British claims stemming from the Revolutionary War, Britain refused to evacuate its garrisons in New York and the West. The British also encouraged Vermont to seek provincial status within its Canadian colony and discriminated against the shipbuilders and merchants based on the East Coast. The weak Congress under the Articles could not agree on a commerce act to retaliate against Britain. Furthermore, Spain controlled the Mississippi River and claimed territories that later became the states of Alabama, Mississippi, Tennessee, and Kentucky. Specifically, the Spanish thwarted the plans of American policy makers to expand westward and to develop foreign markets by closing the Mississippi River.[30] The closing of the Mississippi River prevented American farmers and manufacturers from depositing their goods in New Orleans for export and shut off the flow of many vital household goods to American families. The closing of the Mississippi River also put the American settlers in the Northwest Territories at the mercy of the Spanish for their survival because the Mississippi was their lifeline to the world.

[27] This experience contributed, in part, to the establishment of a federal district as the nation's permanent capital. In *Federalist Paper # 43,* James Madison (1788/1961, 271–278) argued that the federal government needed to have "complete authority" over the operation and security of the nation's capital. To facilitate gaining the states' support for the establishment of such a district, Madison proposed in *Federalist #43* a compromise that was adopted in the Constitution of 1787. This compromise is found in the Constitution's Article VI that provides for the federal government to assume the debts incurred by state governments under the Articles of Confederation. Subsequently, in 1790, the Congress passed the Residence Act (1 Stat. 130) that gave President Washington the authority to select a permanent location on the Potomac River for the District of Columbia (Library of Congress 2014).

[28] Quoted in Jack N. Rakove, "The Confederation: A Union Without Power," in *Major Problems in the Era of the American Revolution, 1760–1791*, ed. R. D. Brown (New York, NY: D.C. Heath, 1992), 416.

[29] See *Federalist Paper #15* written by Alexander Hamilton.

[30] Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Williamsburg, VA: Institute of Early American History and Culture, 1980), 122.

Thus, the unprotected settlers threatened to secede and ally with the Spanish. Another problematic situation arose in the Mediterranean Sea when Barbary pirates seized US ships and enslaved the American crews. Whereas European nations paid the pirates a tribute to protect their ships, the weak Congress could not, thereby placing the unprotected American merchant seamen and cargo at risk.

The strains in the first founding of the USA under the Articles of Confederation reached a climax as a result of Shays' Rebellion. In 1786, nearly 800 debt-laden farmers who faced foreclosure of their mortgaged properties rebelled under the leadership of Daniel Shays. Shays was a wounded Revolutionary War veteran, and he accumulated debts while he was fighting the British; on returning home to his farm, he went broke. Between 1783 and 1786, the Massachusetts legislature that was controlled by a political minority—wealthy merchants and landowners—enacted steep property taxes, forcing widespread indebtedness among the majority of the state's population—the farmers. When law enforcement began to seize the farms foreclosed by the banks, the Massachusetts lawmakers were unsympathetic to the plight of the desperate farmers. Shays' rebels, many of whom were war veterans, threatened a state armory and closed a courthouse in Boston. Governor James Bowdoin responded by asking the Congress for help in raising a federal army, but the federal government under the Articles of Confederation was not authorized to use the military to quell a domestic rebellion. Thus, mercenaries hired by the governor and paid for by the rebels' creditors quelled the rebellion.[31]

As reported by Hamilton in *Federalist Papers #6*, *#21*, and *#28*, Shays' Rebellion drew the attention of the American founders to the tyranny of popular majorities in state legislatures. According to Hamilton, the American founders were worried about the dangers of a civil war that could spread from Massachusetts to brew the type of disorder that could cause the country to dissolve into regional sections, each allied with a different European power. Realizing the survival of the USA was in jeopardy, the American founders called for a second constitutional convention in 1787 to correct the political weaknesses of the Articles of Confederation.

[31] Radley Balko, *Rise of the Warrior Cop* (New York, NY: Public Affairs (Perseus) Books, 2013).

The Second Founding The second constitutionalization of the USA occurred in September 1787. At that time, the state delegations in the constitutional convention unanimously approved a new constitution, and the Continental Congress, in turn, submitted it for ratification by the independent states. By writing the Constitution of 1787, the American founders facilitated the second founding of the country, and upon its ratification by all thirteen states on May 29, 1790, the USA achieved nationhood. Ellis argues that the founders achieved nationhood for the USA by converting the weak American confederacy into a federal republic that had a central government strong enough to "discipline a national union."[32]

In *Federalist Paper #39*, Madison identified three criteria that established the new constitutional government as a federal republic: first, its power was directly derived from the consent of the people; second, the people's representatives served as the administrators of government; and third, the people's elected representatives held office for a limited period or during good behavior.[33] In *Federalist Paper #10*, Madison explained the rationale for establishing a republican government rather than a democracy in the second constitutionalization of the USA. In reviewing history, the founders learned that the political institutions of a republican government could best achieve their goal to secure the liberty of citizens above all. According to Madison in *Federalist Paper #10*, a republican government can:

> Refine and enlarge public views, by passing them through a medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose.[34]

Furthermore, Madison argued that a republic can better control the corrosive influence of factions (by which he meant political parties) than a

[32] Ellis, *Founding Brothers: The Revolutionary*, 8.

[33] James Madison, "Federalist Paper #39," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 241.

[34] James Madison, "Federalist Paper #10," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 82.

democratic government because a republic extends over a greater number of citizens and a greater amount of territory than a democracy. Madison expressed this argument in *Federalist Paper #10* as follows:

> The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States … [for any] improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district, than an entire state.[35]

Moreover, the constitutionalization of the USA as a federal republic was also a political compromise designed to facilitate the ratification of the new constitution by the independent states while safeguarding the liberty of citizens.[36] Specifically, the Constitution of 1787 established two sovereigns—the independent states and the national (federal) union—with concurrent jurisdiction. In *Federalist Paper #31*, Hamilton explained the thinking that shaped this institutional design as follows:

> It should not be forgotten that a disposition in the State governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of State governments. … As in republics strength is always on the side of the people …. and that it is by far the safest course …. to confine our attention wholly to the nature and the extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped will always take care to preserve the constitutional equilibrium between the general and State governments.[37]

In effect, the constitutional equilibrium of the American federal republic balanced the institutional needs of the new nation and the jealousies and fears of state governments.

[35] Ibid., 84.

[36] The founders gave the states the key power to ratify and amend the Constitution. In particular, Article V provides two ways to amend the Constitution. The first way is for each chamber of the Congress to pass an amendment by a two-thirds vote followed by ratification by three-fourths of the state legislatures. The other way is for two-thirds of the state legislatures to approve to call a constitutional convention and the amendments emerging from this convention must be ratified by three-fourths of the state legislatures. To date, only the first method has been used.

[37] Alexander Hamilton, "Federalist Paper #31," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 196–7.

However, the American founders tipped this balance when they established the Constitution of 1787 as the supreme law of the land. Article VI of the Constitution provides that all laws and treaties made under the authority of the USA shall be superior to all laws adopted by any state or its political subdivisions. In other words, every action taken by the Congress must be applied within each state as though the actions were the equivalent of state law. It is for this reason that all state and local officials in addition to all federal officials are required to take an oath to defend the Constitution and support the national government. By requiring the independent states to respect all US treaties, the founders kept the individual states from going their separate ways in matters of international politics and trade as they had done under the Articles of Confederation. Additionally, the founders reinforced the Constitution's supremacy by establishing the Supreme Court of the United States. In Article III of the Constitution, the founders structured the federal judicial power to enable the new national government to enforce its own laws in a uniform way throughout the vast and growing country. In effect, the supremacy clause gave the federal government the ultimate power to compel the independent states to obey national laws. Thus, the second founding of the USA was "an accommodation of liberty to power" and "a realistic compromise with the requirements of [governing] a national domain."[38]

In practice, American constitutionalization rests on the normative contradiction between the political values of equality and liberty on the one hand, and the irreducible institutional tensions between national and state sovereignty on the other hand.[39] As Ellis points out, Americans have lived successfully with these constitutional incongruities for more than two centuries, except during the Civil War. Therefore, recognizing these constitutional incongruities is important for today's career public servants. Moreover, this recognition makes it important for them to comprehend the third element of constitutional thinking—constitutionalism.

Constitutionalism: Thinking About the Means of Government

As shown in Fig. 6.2, constitutionalism answers the big philosophical question of what legitimates the political authority of government. Constitutionalism addresses the means by which career public servants

[38] Ellis, *Founding Brothers: The Revolutionary*, 9.
[39] Ibid., 16.

use their powers to achieve the goals of government without jeopardizing the liberty of citizens. It is necessary to note that before the American Revolution, a constitution was not differentiated from government and its operations.[40] In founding the new nation based on a written constitution, the constitutional framers rejected the eighteenth-century approach of legitimating new rulers as descendants of a divine power or the leaders of a military junta. Instead, the founders chose the method of constitutionalism to safeguard the unalienable rights of citizens as they legitimated the new US government. Thus, constitutionalism requires for every provision of national power that a parallel provision must exist to restrain that power. By safeguarding the liberty of all citizens under written, self-evident, constitutional guarantees, the founders sought to persuade free citizens to have confidence in the new American rulers.

It should also be pointed out that the achievement of constitutionalism in the 1787 Constitution was the product of two groups of constitutional framers. The Federalists comprised one group, and they included Madison, Hamilton, and Jefferson. The Federalists strongly advocated for the ratification of the 1787 Constitution to replace the weak Articles of Confederation in *The Federalist Papers*.[41] Their decision to replace the Articles of Confederation was risky because people outside of the constitutional convention could accuse the delegates of staging a coup d'etat. Comprising the other group, the Anti-Federalists, including Patrick Henry and George Mason, vigorously opposed the ratification of the 1787 Constitution because they saw it as deviating from the principles of equality associated with the American Revolution. In *Letters from the Federal Farmer*, the Anti-Federalists suggested modifications to correct the Articles of Confederation rather than to replace it entirely.[42]

According to Herbert Storing, the political disagreements between the Federalists and Anti-Federalists were differences in degree, not in kind, because both groups agreed on the following fundamental premises of constitutionalism: first, government's purpose was to regulate and protect individual rights, and second, a limited republican government provided the best means to accomplish this purpose.[43] However, the public debates

[40] Lipson, *The Great Issues of Politics*.

[41] Rossiter, *The Federalist Papers*.

[42] Herbert J. Storing and Murray Dry, eds., *The Anti-Federalist: An Abridgment, by Murray Dry, of The Complete Anti-Federalist: Writings by the Opponents of the Constitution* (Chicago, IL: University of Chicago Press, 1985).

[43] Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago, IL: University of Chicago Press, 1981), 5.

between the Federalists and the Anti-Federalists sparked fierce contention in most state constitutional conventions. As a result, modifications came forth to guard against the abuse of power by the federal government.[44] Thus, the US Constitution ultimately ratified by the thirteen states was different from that which emerged from the 1787 constitutional convention.[45]

First among the constitutional provisions designed for the purpose of securing the liberty of citizens is the doctrine of expressed power. This doctrine means that the federal government can exercise only those powers explicitly granted to it under the 1787 Constitution. In particular, Article I, Section 8 contains a list of the enumerated powers granted to the federal government. At the same time, this provision implies that the powers not explicitly granted to the federal government are not permitted. However, at the end of Section 8, the Constitution has an escape clause that gives the Congress the power to make all laws "necessary and proper" to execute the federal government's expressed powers. Rather than invent new powers for the Congress, this clause enables the legislature to adopt the reasonable means to carry out its powers legitimately.

Another essential feature of constitutionalism is "the rule of law." The rule of law means that the Constitution does not permit government officials to do whatever they please; all agents of government must operate on the basis of agreed-upon legal and equitable procedures. In short, no government official in the USA is above the law. As Hamilton wrote in *Federalist Paper #33*, "A LAW by its very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe" (emphasis in the original).[46] In other words, the rule of law requires rulers to give up a certain amount of power in return for their legitimacy to use the rest.[47] The founders reinforced the rule of law in the

[44] Herman C. Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs, NJ: Prentice-Hall, 1984), 5.

[45] Storing, *What the Anti-Federalists Were*, 3.

[46] Alexander Hamilton, "Federalist Paper #33," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 204.

[47] Lipson, *The Great Issues of Politics*, 238.

Lipson (1997, 236) identifies four principles associated with the rule of law. The first principle is that government officials can only exercise power in accordance with known laws enacted through regular constitutional procedures. The second principle is that no laws can be converted into offenses if those actions were lawful when they performed. The third principle is that no one may be convicted on any charge unless there has been a fair trial conducted in an open court. The fourth principle is that the members of the judiciary apply

last provision of Article VI with the requirement for every government official in the USA to take an oath to uphold and defend the Constitution as the supreme law of the land. Lastly, the Constitution specifies the procedures for the impeachment and conviction of federal officials who violate the rule of law. Under the Constitution, the president, the members of Congress, and Supreme Court justices can be tried, punished, and fined for treason, bribery, and other high crimes and misdemeanors. In these ways, the rule of law converts the real and the unquestioned power of the American rulers into legal and equitable procedures by which citizens can protect themselves from the abuses of tyrannical governmental agents.

Still another means by which the founders legitimated the new nation is through federalism. Whereas the doctrine of expressed power and the rule of law had historical precedents, federalism did not, and the term federalism appears nowhere in the Constitution. However, by establishing two sovereigns with concurrent jurisdiction in the American federal republic, the founders created competition between the national government and the states in order to restrain the power of both. As an added protection for the liberty of citizens, the founders, according to Madison in *Federalist Paper #46*, made the people the ultimate judge of political legitimacy.[48] Thus, the Constitution's Preamble, along with the provisions of Articles II, IV, and VII, accomplishes the founders' purpose of making the US federal republic accountable to the people. As discussed earlier, the Preamble opens with a statement that the national government derives its powers directly from the people. The Constitution also recognizes that state governments derive their powers from the people. In effect, Article IV guarantees a republican form of government in every state. Given Article IV, the sovereign states have the power to write their own constitutions, enact their own laws, and select their own judges. Finally, Articles II and VII provide for federalism by granting the sovereign state governments other key powers, including the appointment of electors responsible for selecting the president and the control over ratifying and amending the Constitution. According to Madison in *Federalist Paper # 39*, federalism creates a complex balance of power to safeguard the liberty of citizens as follows:

generalities of law to particular cases, and for this reason, justices must be independent of external pressure and control.

[48] James Madison, "Federalist Paper #46," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 294.

> In its foundation, …[the Constitution] is federal, not national; in the sources from which the ordinary powers of government are drawn, it is partly federal and partly national; in the operations of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.[49]

This combination of national and sectional units under federalism gives economic and social differences in the US institutional and political expression.[50] The significance is that federalism accommodates and controls existing divisions in American society.

As an additional safeguard for the people's liberty, the founders separated the agencies and agents of the national government into three distinct branches.[51] The doctrine of the separation of powers specifies the three functions of government—to legislate, to administer, and to adjudicate. By assigning the legislative function to the Congress, the administrative function to the Presidency, and the adjudication function to the Judiciary, the founders created a mixed regime to prevent the abuses that resulted from the concentration of power in the legislature under the Articles of Confederation. In *Federalist Paper # 48*, Madison warned of the dangers of this type of legislative dominance: "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex … by assembling all power in the same hands must

[49] Madison, "Federalist Paper #39," in *The Federalist Papers*, 246.

[50] Bernard Crick, *In Defence of Politics*, 2nd ed. (Chicago, IL: University of Chicago Press, 1972).

[51] The American founders, especially Madison, were influenced by Montesquieu's *Spirit of the Laws* (1748). Montesquieu formulated the idea of the separation of powers that went further than that of Locke. For Montesquieu, laws and constitutions were less significant than the spirit behind them to operate them well (Curtis, 1961, 381). Specifically, the ideal system that provided the maximum liberty for citizens was one in which one body made the law, another body executed it, and a third one ruled on it; each body contained different personnel and performed a different function. Besides the theories of Locke and Montesquieu, the American founders drew on their colonial experience to formulate the American version of the separation of powers. The functions of the governors who headed the executive branches of the colonies were distinct from those of colonial legislatures. Furthermore, colonial leaders were familiar with the device of judicial review to resolve political disputes between executives and legislative bodies. The reason is that colonial legislation could be challenged in a British court constituted by the Judicial Committee of the Privy Council (Lipson, 1997, 268).

lead to the same tyranny as is threatened by executive usurpations."[52] The political idea of separating the powers of American government into three branches is the basis for Articles I, II, and III of the Constitution.

Article I is the longest section of the US Constitution, and it enumerates the legislative powers of the federal government. The founders replaced the unicameral Congress of the Articles of Confederation with a bicameral Congress. They designed the US House of Representatives as a popular assembly whose members were directly elected by the people for short terms of office. In contrast, they designed the other chamber—the Senate—to represent the thirteen states by having state legislatures elect the US senators for longer terms of office. Consequently, the members of the two congressional chambers lived in different worlds so that the passions of the people expressed in the House could be calmed in the more remote and dispassionate Senate. In an alleged conversation between Washington and Jefferson, the former made the analogy between the bicameral Congress and the latter's practice of pouring his tea into a saucer to cool it before he drank it. Similarly, said Washington, "we pour House legislation into the senatorial saucer to cool it."[53] In this way, the founders achieved their purpose to establish a representative assembly in which popular legislative majorities were restrained. Nevertheless, in Section 7, the founders required all revenue bills to originate in the US House of Representatives. This provision emerged out of the political theory that the basic taxing powers belonged to the "people's house"—the House of Representatives—rather than the Senate because the election of senators by state legislatures made them too remote from the people. Thus, by deliberately building tensions and conflicts into the congressional structure, the founders operationalized the theoretical notion of balancing power against power.

Furthermore, the three branches have distinctive functions, and, taken together, they balance each other's institutional powers. To limit the autonomy of the branches, the founders distributed only a part of the three functions to each branch. Moreover, each branch uses a different method to recruit its top institutional leadership. As a result of the Seventeenth Amendment adopted in 1913, the bicameral Congress now uses direct election methods for both the House and the Senate; the president is indirectly elected through the Electoral College; and the justices of the

[52] James Madison, "Federalist Paper #48," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 309.

[53] Quoted in Robert Caro, *The Years of Lyndon Johnson: Master of the Senate* (New York, NY: Alfred A. Knopf, 2002), 3:9.

Supreme Court are appointed for life. Thus, these different institutional actors are held accountable by different political constituencies. In addition, the Constitution empowers the three branches to pursue the different national goals specified in the Preamble. Whereas the Congress as the legislative body provides for the general welfare of the nation (Article I, Section 8), the president as the chief administrative officer is in charge of the national defense, diplomacy, and policy execution (Article II, Section 3). The judiciary (which did not exist under the Articles of Confederation) is responsible for administering a national system of justice, including jury trials at both the state and federal levels of government (Article III, Section 2).

Nevertheless, the separation of powers is not absolute because the founders overlapped the three functions of government through a system of checks and balances. The reason is that the founders recognized a need for the federal government to maintain internal law and order.[54] Familiar examples of checks and balances are the provisions for the presidential veto and senatorial advice and consent. Whereas the president may participate in the legislative process when the chief executive vetoes objectionable laws, the Congress may override a presidential veto (Article I, Section 7). Whereas the Senate has the right to approve treaties and top presidential appointees through the confirmation process (Article II, Section 2), the Congress can gather information and draw concessions from executive branch officials. Through the device of checks and balances, the different political wills of American governing institutions must be reconciled. As Richard Neustadt aptly states, the Constitution sets up three separated institutions that share powers.[55] In this way, the founders protected American government from legislative encroachment and citizens from the despotism of legislative assemblies and executive tyrants.[56]

Late in the constitutional convention, the delegates debated whether to adopt a bill of rights to protect citizens in criminal and civil proceedings, assure the liberty of conscience, and guarantee the freedom of the press.[57] However, the constitutional delegates overwhelmingly decided against incorporating a bill of rights into the 1787 Constitution. According to Hamilton in *Federalist Paper #84*, the delegates believed that the protection of the civil rights and liberties of citizens belonged in the bailiwick of state governments. Since most states had bills of rights in their constitutions, the delegates viewed a national bill of rights as unnecessary. Furthermore,

[54] Crick, *In Defence of Politics*.

[55] Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York, NY: The Free Press, 1991), 29.

[56] Wood, "Forward: State Constitution-Making in the American," 924.

[57] Storing, *What the Anti-Federalists Were*, 64.

Hamilton argued that a national bill of rights was dangerous because of its potential to destroy the careful power equilibrium the founders established in the Constitution. In *Federalist Paper #84*, Hamilton reported that the Federalists were particularly concerned that a bill of rights "would contain exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted."[58] The Anti-Federalists countered that the purpose of a national bill of rights was to secure the rights of individuals and minorities against usurpation and tyranny of legislative majorities in state governments and against the strong central government established under the 1787 Constitution.[59] In *Letter XVI*, the Anti-Federalist Farmer wrote that "it is fit and proper to establish, beyond dispute [in the federal government through the US Constitution], those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government." The Anti-Federalists also emphasized the educative and exhortative importance of a bill of rights on citizens by "reminding them of the beginning and the end of civil government."[60] Immediately following the Constitution's ratification in 1790, a political movement was successfully mobilized to have the thirteen states adopt a national bill of rights. As the first ten amendments to the US Constitution, the national Bill of Rights took effect on December 15, 1791.

The Bill of Rights guarantees the citizenry's liberty and equal protection of the law.[61] The Fifth Amendment is noteworthy in that it specifies no person shall be deprived of life, liberty, or property without due process of law, nor shall [the federal] government take private property without consent or just compensation. Enacted in 1868 after the Civil War, the Fourteenth Amendment prohibits state governments (and their political subdivisions) from violating these Fifth Amendment protections. The Tenth Amendment is also noteworthy because this provision serves as the Constitution's "reserve clause" by placing strong restrictions on the powers of the federal government: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[62] Through the enactment of

[58] Alexander Hamilton, "Federalist Paper #84," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 513.

[59] Storing, *What the Anti-Federalists Were*, 68.

[60] Ibid., 70.

[61] David H. Rosenbloom and Joshua Chanin, "What Every Public Personnel Manager Should Know about the Constitution," in *Public Personnel Management*, ed. Richard C. Kearney and Jerrell Coggburn, 6th ed. (Los Angeles, CA: Sage/CQ Press, 2016).

[62] U.S. Const. amend. X. Accessed January 27, 2014. http://www.archives.gov/exhibits/charters/constitution_transcript.html#top.

the national Bill of Rights, the Anti-Federalists made a lasting contribution to American constitutionalism.[63]

Finally, American constitutionalism is tied to the normative notion of "good government." For the American founders, not only does good government conduct the people's business energetically and efficiently, but also its vigor is necessary to secure the liberty of citizens (see Hamilton's *Federalist Papers* #1, #22 & #23). According to Madison in *Federalist Paper #62*, "A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained."[64] Conversely, "bad government," in Madison's view, was inefficient, despotic, and inherently unstable, causing evil consequences for the people.[65] Accordingly, in *Federalist Paper #62*, Madison wrote:

> But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people toward a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than any individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.[66]

Thus, the foundation of good government is the respect and confidence of the people—public trust. In other words, public trust necessary for good government rests on political persuasion rather than military force or administrative coercion.

Consequently, the legitimacy of good government depends on the existence of a widespread social consensus that the orderly operations of American government secure the happiness of citizens. The happiness of citizens is operationalized as a higher scheme of values that reflect the constitutional ideals of liberty and equality. In other words, career public servants operationalize public trust by formulating and defending their choice of actions in terms of this higher scheme of constitutional values. Even if career public servants justify their interpretations

[63] Storing, *What the Anti-Federalists Were*.

[64] James Madison, "Federalist Paper #62," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 380.

[65] Ibid., 381.

[66] Ibid., 382.

of these constitutional values based on experience, expertise, religion, philosophy, or tradition, they are not in a position to change them for the sake of personal or political expediency or for moral improvisation to fit a situation. In this way, the Constitution is the American equivalent of a natural law. As a natural law, the Constitution provides the universal moral standard by which the American people of all generations have judged the political conduct of career public servants and all levels of US government.

All in all, the founders were extraordinary in that they constitutionalized the USA based on a written constitution and the methods of constitutionalism to legitimate the new American rulers. Not until the American founders had anyone developed everyday political institutions to control government and protect the rights of individuals while providing a constitutional framework for diverse citizens to coexist peacefully.[67] By engaging in constitutional thinking, today's career public servants can appreciate the big political ideas associated with the founders' good government philosophy, the design of the political institutions established at the country's founding, and the constitutional debates between the Federalists and Anti-Federalists over the ends and means of American government. By consulting this history of ideas, career public servants comprehend the constitutional foundations of American government that they have sworn to uphold.

Yet, inherent in the notion of good government is that the legitimacy of American government is less than perfect or ideal. Consequently, American government has to be good. This means that the appearance of good government associated with the American way of ethics is insufficient to sustain the social consensus that underlies public trust. Therefore, the actions of career public servants derived from their constitutional thinking are automatically ethically suspect and require defending in political arenas where the citizenry can hold them accountable. The upshot is that the legitimacy of American good government cannot be separated from constitutional politics. Thus, career public servants can fulfill their leadership role of constitutional stewardship only if they combine their constitutional thinking with their involvement in constitutional politics. In the next chapter, the constitutional politics of public service is analyzed in light of contending legal interpretations of federalism.

[67] Wood, "Forward: State Constitution-Making in the American," 926.

CHAPTER 7

Federalism, Constitutional Law, and the Politics of Freedom

The world is full of saints, each of whom knows the way to salvation, and the role of the …[public servant] is that of the sinner who stands at the crossroad to keep saint from cutting the throat of saint. This may possibly be the highest ethical level of the public servant.

York Willbern, "Types and Levels of Public Morality"

In establishing the US Constitution, constitutionalizing the new nation and legitimating the powers of American government through constitutionalism, the founders settled many moral and political questions in American society. However, despite their extraordinary achievements, they did not settle everything, as exemplified by the constitutional buttressing of the institution of slavery that made the Civil War inevitable. Therefore, the underlying assumption of this chapter is that the moral and political lives of the American society as well as the survival of the US constitutional polity are ongoing works in progress.[1] As constitutional stewards, career public servants are an important driver of the moral and political progress in American society through constitutional politics.

[1] Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago, IL: University of Chicago Press, 1981).

Michael Walzer, "What Does It Mean to Be and 'American'?" *Social Research, an International Quarterly* 71, no. 3 (2004).

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The conclusion reached in Chap. 6 is that the engagement in constitutional politics by career public servants is vital to the freedom of the American people. This means that in the political ethics of public service, career public servants in their role as constitutional stewards must not only engage in constitutional thinking but also take actions to defend and nurture the US constitutional system. To defend and nurture the US constitutional system, career public servants use their authority and power to facilitate legitimate changes in the governance of the ever-changing American society. However, their engagement in constitutional politics is fraught with danger. The reason is that the constitutionally driven ethical choices of career public servants are not politically neutral and have political implications. Often, the substance of constitutional politics is incompatible with the everyday morality of Americans and with prevailing social conditions. Consequently, career public servants find themselves as "sinners" standing at an intersection to prevent violence between two sets of "saints"—those who are determined to change existing constitutional arrangements and those equally determined not to alter them.[2]

This chapter examines the interplay of liberty and equality on the constitutional politics of public service. In practice, the liberty of Americans depends primarily on the intrinsic goodwill of the people in power. From his review of history, Michael Spicer (2014) concludes that this type of goodwill is unreliable. Thus, the central argument of Chap. 7 is that the protection of political freedoms in the USA depends on ethically driven career public servants who engage in constitutional politics. According to Spicer, politically engaged career public servants are more likely to negotiate the rights and privileges of Americans so that people are freer to go about their lives without governmental interference. This notion of political freedom translates into the philosophical idea of "expressive liberty." Galston defines expressive liberty as the freedom of individuals and groups to lead their lives as they see fit, "within a broad range of variation, in accordance with their own understanding of what gives [their] life meaning and value."[3] Thus, the constitutional politics of public service is the constitutional politics of freedom.

[2] York Willbern, "Types and Levels of Public Morality," *Public Administration Review* 44, no. 2 (March/April 1984): 108.

Gary Jeffrey Jacobsohn, "Constitutional Identity," *Review of Politics* 68 (2006).

[3] William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (New York, NY: Cambridge University Press, 2002), 3.

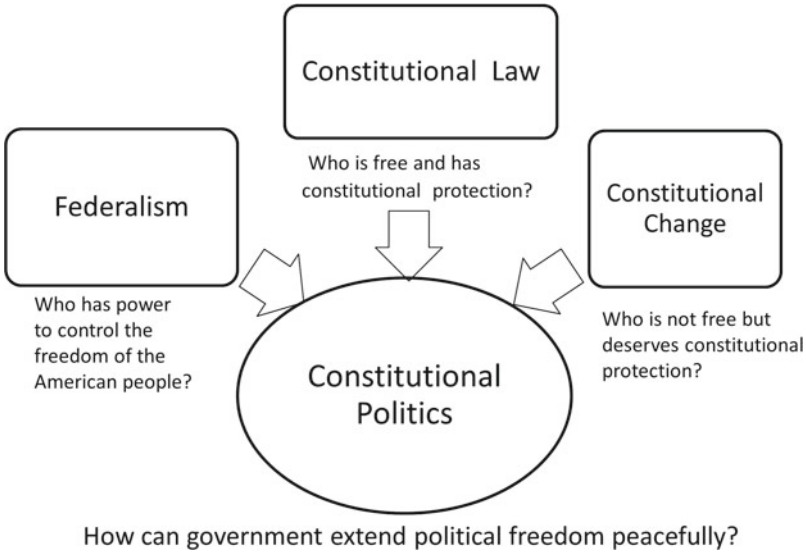

Fig. 7.1 The constitutional politics of freedom

Specifically, I conceive of constitutional politics as having three features: federalism, constitutional law, and constitutional change (see Fig. 7.1). As the first feature of constitutional politics, federalism answers the big governance question of who has the political power to control the freedom of the American people—their life, liberty, and happiness (and property). In the setting up the federal republic, the founders created two dynamic sovereign powers—the national government and the states—to protect the freedom of Americans, but the founders also recognized that conflicts between these two political sovereigns would be inevitable. Constitutional law is the second feature of constitutional politics, and it answers the big question of who is free and has constitutional protection in American society at a particular point in time. Constitutional law is the pillar of American civil liberties. As the third feature of constitutional politics, constitutional change asks the big governance question of "who is not free" in American society but should be and requires constitutional protection. The answer to this question reveals who lacks the freedom of choice because they are marginalized groups that are the targets of unjust laws or oppressive administration. Together these features of constitutional politics help

career public servants search for what they can legitimately do under the authority of the Constitution to change public laws, policies, and administration to extend political freedom peacefully in American society.

The plan of this chapter is as follows. I will examine the interplay of the federalism and constitutional law and illustrate its explosive dynamic by analyzing the historic constitutional debates over homeland security and slavery. Constitutional change, which is the third element of constitutional politics, is reserved for the next chapter. This chapter concludes with a discussion of the relevance of the constitutional history of federalism and freedom for today's career public servants.

Federalism

Federalism, the first feature of constitutional politics, is inseparable from the freedom of Americans. As discussed in the previous chapter, the Constitution's text enacts the moral and political values that embody the American collective identity.[4] In the two centuries since the adoption of the Constitution, federalism is its most significant feature in shaping the legal status of this collective identity and the political freedom and duties of American citizens.

Yet, most Americans view federalism as ordinary because of its familiarity in their everyday life: they hold dual citizenship. Americans are simultaneously citizens of the US nation and the state in which they reside. Dual citizenship is expressed in constitutional language as "diverse citizenship." However, the two elements of diverse citizenship are not equal. For most Americans, the concept of a "homeland" (or their identification with a national civic identity) has low salience as discussed in Chap. 3, except after horrific events, such as the terrorist attacks on September 11. On a daily basis, Americans identify more closely with the place and state where they have lived most of their lives and less with the nation as a whole.[5] This condition is not surprising because, independently of each other, state legislatures make most policies regulating the daily lives of citizens. Therefore, it makes a difference to citizens whether they live in Ohio or Oregon, Minnesota or Mississippi concerning the protection of their

[4] John A. Rohr, "The Constitution in Public Administration: A Report on Education," *American Review of Public Administration* 16, no. 4 (Winter 1982).

[5] Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity* (New York, NY: Simon & Schuster, 2004).

democratic freedom and civil rights as well the patterns of enforcement related to crime and punishment.

This power position of state governments has evolved from constitutional interpretations of the reserve clause in the Tenth Amendment. Also, as discussed in the previous chapter, this clause reserves the power not delegated to the federal government under the Constitution nor prohibited to it by the states to state governments or to the people. Although the constitutional framers did not adopt this provision to hamstring the federal government, advocates of states' rights interpreted the Tenth Amendment to serve as a barrier to federal action.[6] According to their interpretation, the authority delegated to the federal government was, in fact, limited by the power of state governments. This interpretation established the constitutional doctrine of "dual federalism."

Dual federalism is premised on the need to divide the power between the federal government and the states to overcome internal and external threats to liberty.[7] For example, this interpretation of federalism gave both the federal government and the states their own military capacity, but each had a different role. Whereas the Congress had the power to raise an army and wage wars to defend the nation from foreign aggressors, the states controlled their own militias to reduce threats from domestic enemies. Furthermore, the establishment of dual power centers under federalism made it unlikely that a political majority could achieve control over the national government and every state simultaneously.

The relationship between dual federalism and the liberty of Americans underwent its first constitutional test over the Alien and Sedition Acts of 1798. Four acts were bundled together under the Alien and Sedition Acts. First, the Naturalization Act of 1798 extended the residency requirement for the naturalization of citizens from 5 to 14 years.[8] Second, the Act Concerning Alien Friends gave the president the broad authority to arrest and deport aliens of countries not at war with the USA; deportations could take place without evidence or due process if the president suspected that the aliens were threats to national (homeland) security.[9] Third, in the

[6] Herman C. Pritchett, *The American Constitutional System* (New York, NY: McGraw-Hill, 1981).

[7] Paul E. Peterson, *The Price of Federalism* (Washington, DC: Brookings Institution, 2012).

[8] An Act to Establish a Uniform Rule of Naturalization (The Naturalization Act of 1798) 1 Stat. 566 (1798).

[9] An Act Concerning Alien Friends of 1798. 1 Stat. 577 (1798).

Alien Enemies Act, the Congress gave the president the authority to arrest foreign-born male residents of countries at war with the USA.[10] Fourth, the Sedition Act of 1798 for the Punishment of Certain Crimes against the USA criminalized antigovernment speech by making "any false, scandalous, or malicious writing or writings against the government of the United States" a high misdemeanor.[11]

The Alien and Sedition Acts were the legislative products of the Federalist Party that controlled the Congress, and President Adams, also a Federalist, signed them into law. The legislative intent was to enable the USA to wage an undeclared war against France after France demanded bribes from American diplomats during the *XYZ Affair*.[12] This affair prompted war hysteria at home. Consequently, another legislative intent was to protect the US government from internal subversion of terrorist conspiracies organized by the émigrés of countries, such as France and Ireland, where domestic revolutions were occurring.[13]

However, instead of deporting dangerous terrorists to France, the Adams administration used the Sedition Act to fine and imprison newspaper editors who supported the Democratic-Republican Party and its leader Vice President Jefferson, a Francophile.[14] Jefferson was the most vocal and powerful political opponent of the Federalists.[15] Earlier, in 1791, when Jefferson was the Secretary of State, he and Congressman Madison of Virginia left the Federalist Party to create the rival Democratic-Republican Party. Their purpose was to oppose legislation inspired by Treasury Secretary Hamilton designed to establish powerful federal institutions, including a national bank. Jefferson and Madison believed the national

[10] Alien Enemies Act of 1798. 1 Stat. 570 (1798).

[11] Sedition Act for the Punishment of Certain Crimes against the USA 1798. 1 Stat. 596 (1798).

[12] John C. Milton, *Crisis in Freedom: The Alien and Sedition Acts* (New York, NY: Little Brown, 1951).

[13] Lucius J. Barker and Twiley W. Barker, *Civil Liberties and the Constitution: Cases and Commentaries*, 2nd ed. (Englewood Cliffs, NJ: Prentice-Hall, 1975).

Rochelle Raineri Zuck, "The Alien and Sedition Acts," in *The Making of Modern Immigration: An Encyclopedia of People and Ideas*, ed. Patrick J. Hayes (Santa Barbara, CA: ABC-CLIO, 2012).

[14] Ishmael Reed, "Thomas Jefferson: The Patriot Act of the 18th Century," *Time*, July 5, 2004.

[15] Jefferson received the second highest number of votes in the presidential election of 1796, and under the Electoral College's procedures specified in the 1787 Constitution, he was selected Vice President under President Adams.

bank was not legitimated under the 1787 Constitution, but the Virginians were unsuccessful in blocking the bank legislation in the Congress. Nevertheless, the hostility between Adams and Jefferson and their opposing political parties lingered, and their competing interpretations of dual federalism shaped the constitutional politics of the USA at the turn of the nineteenth century.

The political controversy surrounding the Alien and Sedition Acts highlighted a significant gap in the 1787 Constitution. According to Rogers Smith, the Constitution was silent about national citizenship because it "did not define or describe citizenship, discuss criteria for inclusion or exclusion, or address the sensitive relationship between state and national citizenship."[16] Consequently, the determination of who was and who was not a citizen in early American society was left for the states to decide, until the Congress enacted the Federal Naturalization Law of 1790.[17] Formulated by the Federalists, this law limited the naturalization of American citizens to free white people of good character and excluded persons of color and indentured servants (until the latter completed their servitude). In effect, the Alien and Sedition Acts of 1798 extended these limitations.

Strong political opposition to the Alien and Sedition Acts emerged from private citizens, especially Irish Americans who issued the "Plea of Erin" in 1798; the petitioners asserted their irrefutable rights to personal liberty, tranquility, and safety, claiming every US resident, regardless of status, deserved equal protection of the law.[18] Political opposition also emerged from the leaders of the Democrat-Republican Party, notably Vice President Jefferson and Congressman Madison. Jefferson and Madison secretly drafted the Kentucky and Virginia Resolutions in 1798 and 1799, respectively, to challenge the constitutionality of the Sedition Act. To make their case, they introduced the constitutional principles of interposition and nullification.

The principle of interposition challenged the national government's authority over state governments, based on the assumption that the Constitution was a compact between the federal government and the people in the sovereign states. In *Federalist Paper #39*, Madison argued that interposition was the right of a sovereign state to oppose the actions

[16] Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997), 115.

[17] The Naturalization Act of 1790. 1 Stat. 103 (1790).

[18] Zuck, "The Alien and Sedition," in *The Making of Modern*, 1: 21.

of the federal government that its legislature deemed unconstitutional. Then, the state could interpose itself between the federal government and the people of that state by taking action to prevent the federal government from enforcing the unconstitutional law. Based on Madison's language, the Virginia legislature enacted "that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties, appertaining to them."[19]

The constitutional principle of nullification articulated by Jefferson was an extreme version of interposition. Drawing on the Tenth Amendment, he asserted that a sovereign state had the right to nullify an unconstitutional federal law by declaring it invalid. Once a state legislature made this declaration, the state was absolved from enforcing the nullified federal law within its jurisdiction. Using Jefferson's language, the Kentucky Resolution stipulated the following:

> Resolved, That the several states composing the United States of America, are not united on the principle of unlimited submission to their general [federal] government; but that, by compact, under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumed undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact, each state acceded as a state, and is an integral party; that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common Judge, *each party has an equal right to judge for itself, as well as of infractions as of the mode and measure of redress* (emphasis in the original).[20]

However, the approach to preserve liberty taken under the dual federalism doctrines of Jefferson and Madison failed to gain the support

[19] Quoted in Herman C. Pritchett, *The American Constitution* (New York, NY: McGraw-Hill, 1959), 60.

[20] Ibid., 59–60.

of any other state. In fact, the Kentucky and Virginia resolutions mobilized formal opposition from seven states, mostly in the Federalist-based northeastern USA.[21] Apart from upholding the constitutional principle of national supremacy, the legislatures of these seven states denied the right of a sovereign state to nullify a federal law because nullification threatened national unity.[22] An additional three states expressed their disapproval of the two resolutions without formally transmitting their objections to the Kentucky and Virginia.[23] In this political conflict, most states took positions to preserve liberty that went against their own sovereign interests.

The political controversy over the constitutionality of the Alien and Sedition Acts ended with Jefferson's defeat of Adams in the 1800 presidential election.[24] In fact, President Jefferson considered all four Alien and Sedition acts unconstitutional. Thus, upon his election, the new president pardoned those who had been convicted under them during the Federalist administration of President Adams.[25] Furthermore, the Congress allowed the Alien Friends Act and the Sedition Act to expire in 1800 and 1801, respectively. With the enactment of the Naturalization Act of 1802, the Congress repealed the Naturalization Act of 1798.[26] Only the Alien

[21] The seven states were Delaware, Massachusetts, New York, Connecticut, Rhode Island, New Hampshire, and Vermont.

[22] Pritchett, *The American Constitution*, 61.

[23] The three states were Maryland, Pennsylvania, and New Jersey.

[24] In the presidential election of 1800, Jefferson and his Democratic-Republican running mate Aaron Burr received the same number of electoral votes. According to the Constitution, a tie in the Electoral College required the House of Representatives to decide who would become the president and the vice president. The House selected Jefferson and Burr as president and vice president, respectively, after Hamilton, a Federalist, led an intense pro-Jefferson campaign. In 1804, Burr challenged Hamilton to a duel, where he fatally shot his rival. The duel ended Burr's political career.

[25] John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (New York, NY: Little Brown, 1951).

[26] Enacted during Jefferson's presidential administration, the Congress in the Naturalization Act of 1802 (2 Stat. 153) eased the hostility toward immigrants. Specifically, the 1802 law repealed the Naturalization Act of 1798, reduced the residency period for the naturalization of citizens to 5 years, and required prospective citizens to declare their intention to renounce their previous citizenship and titles of nobility. The 1802 legislation also required naturalized citizens to take an oath to uphold the Constitution and to declare that they were of good moral character (2 Stat. 153). The Congress extended the scope of the 1802 law by granting automatic citizenship to children born abroad to American fathers and the foreign-born wives of American citizens (10 Stat. 604) in 1855 (Cornell, 2015). In the Naturalization Act of 1870 (16 Stat. 254), the Congress opened the naturalization process to "aliens of African nativity and to persons of African descent."

Enemies Act remains in effect as 50 U.S.C. Sections 21–24.[27] In fact, some 1798 provisions resurfaced in the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001 (115 Stat. 272) adopted in the wake of the September 11 terrorist attacks on the USA.[28]

Although the constitutionality of the Alien and Sedition Acts failed, the constitutional politics of dual federalism had lasting effects on the US polity. On the one hand, dual federalism secured the liberty of Americans in 1801 by requiring the Federalists who controlled the US government to cede power peacefully to a rival set of national leaders, that is, Jefferson and the members of his victorious political party.[29] This voluntary transfer of power to opposition leaders was a remarkable achievement. The change in the partisan leadership of the federal government based on the electoral results that expressed the will of the people occurred without military force or administrative coercion, a rare event in human history. Since then, the voluntary transfer of power from incumbents to newly elected leaders has become the American political tradition for facilitating legitimate change in all American governments.

On the other hand, the dual federalism doctrines of interposition and nullification remained available in nineteenth-century America for use "when Southerners once again felt threatened by encroaching national power."[30] Resenting the federal government's unlawful interference in their distinct (slave-holding) way of life, prominent Southern leaders openly talked of secession after the Congress sharply increased the rates of tariff in 1828.[31] As a more extreme version of the nullification doctrine,

[27] Alien Enemies Act, 50 U.S.C. §§ 21–24 (Supp. 1798). Accessed June 25, 2014. http://www.law.cornell.edu/uscode/text/50/chapter-3.

[28] Reed, "Thomas Jefferson: The Patriot."

[29] Peterson, *The Price of Federalism*.

[30] Ibid., 8.

[31] According to Pritchett (1959), the doctrine of nullification reemerged in 1828 as a justification for the Southern states to resist the federal government's authority. Specifically, John C. Calhoun of South Carolina, in office as vice president and, as a vice-presidential candidate, anonymously published *The South Carolina Exposition and Protest*. In this pamphlet, Calhoun (1828) used the nullification doctrine formulated earlier by Jefferson and Madison to express the South Carolina's strong opposition to the Tariff of 1828, which was also known as "the Tariff of Abominations."

Calhoun especially objected to the constant increases in federal tariff rates between 1816 and 1828 that protected Northern manufacturing industries at the expense of Southern agrarian interests and burdened South Carolinians who relied heavily on imported goods.

this new interpretation of dual federalism asserted the right of a sovereign state to secede from the national union to preserve its own economic and social institutions.[32] The interplay, rather than the independence, of the ideology over maintaining or dissolving the federal union provided a fuse that sparked the Civil War. As Paul Peterson (2012) concludes, the price of the constitutional doctrine of dual federalism was the monumental loss of American lives.

Authoritative Sources of Constitutional Law

As the second feature of constitutional politics, constitutional law determines who is free and has constitutional protection at a particular point in time. Whereas federalism addresses the relative power positions of the federal government and the states in preserving liberty, constitutional law focuses on the changing legal interpretations of federal and state powers in determining American citizenship and, in turn, the civil rights of Americans. This section divides constitutional law into two parts. The first part discusses the authoritative sources to interpret and modify constitutional law; the second part focuses on the legal history of federalism and freedom in the pre-Civil War era.

He justified his protest on the grounds that the Constitution did not explicitly grant the Congress the power to raise tariffs to impose "protective or prohibitive duties." Therefore, South Carolina, he said in his *Exposition*, had the natural right to reject this federal law because it was "unconstitutional, unequal, oppressive, and calculated to corrupt the public virtue and destroy the liberty of the country." If the Congress failed to repeal the tariffs, then Calhoun argued South Carolina was justified in seceding from the Union. In 1830, President Andrew Jackson denounced the nullification doctrine of his vice president. In retaliation to Jackson, South Carolina enacted its statute of Nullification that declared the federal tariff acts of 1828 and 1831 as "null, void, and no law, nor binding upon the State, its officers or citizens" (Pritchett 1959, 62). Consequently, South Carolina forbade federal agents within its jurisdiction from collecting the federal tariffs. President Jackson responded by sending battleships into Charleston Harbor and requested support from the Congress to enforce the tariffs.

Subsequently, Vice President Calhoun, as the Senate's presiding officer, and Senator Henry Clay of Kentucky forged a legislative compromise that balanced Southern interests and national supremacy. Besides lowering the federal tariffs, the Congress enacted the Force Bill of 1833 (4 Stat. 632) to give the President the authority to use the military to collect federal tariffs in South Carolina. Mollified on the tariff issue, South Carolina withdrew its nullification statute but voided the Force Bill. Although a political compromise was reached on the tariffs, the underlying issue of slavery remained unsettled (Pritchett 1959, 61–62).

[32] Pritchett, *The American Constitution*, 62.

In practice, constitutional law is made often because

> The Congress recreates the Constitution every time it passes a law or holds a hearing. The President construes the Constitution whenever he makes a decision, issues an executive order, or signs a bill into law. The Constitution of the United States is the body of practice built up during past decades by the executive departments. It is manifested in the historic crises that have been met …. It is discoverable equally at lower levels, in the routines and the customs of public life, in what Justice Holmes called the inarticulate major premises of a nation and a people.[33]

Nonetheless, the statutory laws enacted by the Congress and the executive orders issued by the president must obey the Constitution.[34] In American society, the US Supreme Court is widely considered as the "official interpreter" of the Constitution, and its decisions are the "best evidence" of constitutional meaning.[35]

The origin of this view is the Judiciary Act of 1789 (1 Stat. 73). Besides enumerating the powers of the US Supreme Court, the Congress established a multitiered federal court structure to operate side by side with a system of courts within state governments. At the federal district court level, judicial interpretations produce case laws involving disputes over the meaning of statutes. Moreover, the Congress granted the US Supreme Court the power to review the decisions of state courts in order to preserve the supremacy of the Constitution.[36] Nevertheless, many state

[33] Ibid., vii–viii.

[34] David H. Rosenbloom and Joshua Chanin, "What Every Public Personnel Manager Should Know about the Constitution," in *Public Personnel Management*, ed. Richard C. Kearney and Jerrell Coggburn, 6th ed. (Los Angeles, CA: Sage/CQ Press, 2016).

[35] Herman C. Pritchett, *The American Constitutional System* (New York, NY: McGraw-Hill, 1981), 13.

[36] Constitutional modifications can also occur as a result of custom. For example, the two-party system emerged as a result of the adoption of the Twelfth Amendment in 1804. In Article II, Section 1, the 1787 Constitution specified that electors were to cast two votes: the highest vote getter became the President and the second-highest vote getter became the Vice President. Under this procedure, the candidate who got beat became the vice president. In effect, the Constitution placed the president's most vocal partisan opponent as the second in command of the US government. This procedure guaranteed conflict between the nation's top two political executives, as in the Electoral College's 1796 selection of President Adams, a Federalist, and Vice President Jefferson, a Democratic-Republican. In 1800, Jefferson and Burr ran as running mates under the banner of the Democratic-Republican Party. Given that the votes of the electors for President and Vice President were not listed on separate ballots,

governments were resistant to the grant of power that authorized the US Supreme Court to rule on the decisions of their courts that adversely affected their sovereign rights.[37] In two landmark decisions—*Martin v. Hunter's Lessee* (1816) and *Cohens v. Virginia* (1821)[38]—the Supreme Court asserted its power to decide disputes between the federal and state governments over the constitutional division of powers.

Furthermore, the 1787 statute made the US Supreme Court the highest court of law and equity.[39] In the statute's controversial Section 25, the Congress empowered the Supreme Court to hear appeals from the supreme courts of state governments that involved the constitutionality of state or federal legislation. In 1803, the Supreme Court under Chief Justice John Marshall resolved this controversy by establishing the constitutional doctrine of judicial review in the landmark decision *Marbury v. Madison* (1803).[40] The Court rejected the "coequality" of the three branches of federal government in favor of judicial supremacy while empowering itself to nullify both federal and state statutes.[41]

Constitutional law is shaped by complex proceedings that are not always speedy. The judicial review of the Constitution occurs only if it becomes necessary for the Supreme Court to dispose of a specific dispute that reaches its level. Sometimes, cases may take years to reach the Supreme Court because they experience setbacks in the process for procedural reasons.[42] Therefore, it is no surprise that only 1 % of constitutional issues

Jefferson and Burr tied in the Electoral College, and the House of Representatives determined the election outcome (US Electoral College, 2014). By requiring electors to cast separate ballots for selecting the President and the Vice President to their separate 4 year terms, the Twelfth Amendment legitimated an official vice president candidate in the Electoral College.

[37] Pritchett, *The American Constitutional System*, 19.

[38] *Martin v. Hunter's Lessee*. 14 U.S. 304 (1816).

Cohens v. Virginia. 19 U.S. 264 (1821).

[39] Pritchett, *The American Constitution*, 67.

[40] *Marbury v. Madison*. 5 U.S. 137 (1803).

[41] Pritchett, *The American Constitution*, 141.

[42] Procedurally, the federal judiciary will only hear cases that are justiciable. Justiciable cases must have a plaintiff who has legal standing because the individual has suffered harm and his or her case raises political or social issues that involve a substantial controversy warranting judicial intervention. Furthermore, the Supreme Court refuses to hear a case involving "a political question" (Pritchett 1959, 151). Such cases involve legal challenges over the sole responsibility of the other two political branches of the federal government, such as the congressional procedures to impeach a federal judge (see *Nixon v. USA*) (506 U.S. 224) (1993). Judge Walter Nixon was the focus of this case.

are decided at the level of the Supreme Court, leaving many important political and social issues unsettled.[43] For example, the US Supreme Court was not involved in deciding the constitutionality of the Alien & Sedition Acts of 1798 because no legal case involving them was raised.

Constitutional law is limited in scope. Its limits derive from the interpretation of the Supreme Court's role as an umpire in deciding disputes over the division of power between the federal government and state governments. As Chief Justice John Roberts stated in his confirmation hearing:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure that everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire.[44]

In this role of umpire, the Supreme Court exercises judicial restraint and applies the judicial doctrine of *stare decisis*. In practice, the justices' understanding of constitutional issues is much narrower than that of executive or legislative branches because the Supreme Court focuses only on the legal arguments and counterarguments presented in the case briefs and during oral arguments and on the precedents set in earlier judicial decisions. By embracing the contestation of ideas in the form of legal arguments and counterarguments, the judiciary engages in politics and settles societal disputes nonviolently.[45] Given that constitutional law is also made by the other two branches, the Court has at various times deferred to congressional or presidential interpretations or looked at their practices to resolve constitutional issues.[46] Additionally, the Constitution provides for the legislative and executive branches of the federal government to disagree with and to override judicial rulings, as happened with the passage

[43] Pritchett, *The American Constitution*.

Supreme Court of the USA, "Frequently Asked Questions," Supreme Court of the USA, last modified 2014, accessed February 18, 2015, http://www.supremecourt.gov/faq.aspx#faqgi9.

[44] Quoted in Neil S. Siegel, "Umpires at Bat: On Integration and Legitimation," *Constitutional Commentary* 24 (2007): 701.

[45] Michael W. Spicer, *In Defense of Politics in Public Administration: A Value Pluralist Perspective* (Tuscaloosa, AL: University of Alabama Press, 2010), 42.

[46] Joseph Mead, email, Feb. 15, 2015, "Your Book."

of the Eleventh Amendment in 1795.[47] In practice, most constitutional cases mean what the Supreme Court says they mean. Even if the American people perceive its decisions unfavorably, the constitutional interpretations of the Supreme Court are generally regarded as binding agreements.[48]

Constitutional law is provisional, and it involves political compromises made by the Supreme Court to manage conflicting societal interests at a given moment. These compromises have the potential to stabilize or destabilize American society, given that the Court's rulings are the moral and political opinions of the justices concerning a specific controversy. In effect, "judicial *expertise* is not a guarantee of correctness or wisdom" (emphasis in the original).[49] Frequently, the Court's decisions provide ameliorative relief in a social conflict so that the American people can coexist peacefully. Thus, in the wake of most court rulings, Americans willingly abandon violence under constitutional law.[50] Occasionally, the Supreme Court may take an active role in creating rather than applying constitutional law, as in the landmark decision of *Marbury v. Madison* that established the principle of judicial review. In a few instances, the Court may render an extreme decision as in the *Korematsu* decision[51] that forced the relocation of American citizens of Japanese descent from the West Coast in 1944.[52] Whereas *Korematsu* occurred during World War II, the Court may render a peacetime decision that is contemptuous of widespread cultural and societal commitments.[53] A resolute minority may use the court's moral authority and extremist political ruling, as in the 1857 *Dred Scott v. Sandford* decision, to subjugate an unorganized majority.[54] Consequently, societal divisions are exacerbated with the potential of ruining American government. Under this circumstance, adversaries may resort to extraconstitutional

[47] Pritchett, *The American Constitution*, 34. The Eleventh Amendment was a reaction to the Supreme Court's 1793 decision in *Chisolm v. Georgia* (2 U.S. 419). The Congress formulated the Eleventh Amendment to prohibit the federal courts from accepting jurisdiction of a suit against a state by a citizen of another state.

[48] Pritchett, *The American Constitutional System*, 13.

[49] Pritchett, *The American Constitution*, 141.

[50] Spicer, *In Defense of Politics.*

[51] *Korematsu v. United States.* 323 U.S. 214 (1944).

[52] Barker and Barker, *Civil Liberties and the Constitution*, 171.

[53] Siegel, "Umpires at Bat: On Integration," 706.

[54] *Dred Scott v. Sandford.* 60 U.S. 393 (1857).

and violent measures involving "conspiratorial coercion, mob reaction, and police repression."[55]

The Constitutional Politics of Federalism and Freedom in Antebellum America

The moral authority and the potentially violent political dynamic of constitutional law were evident in the complicated and chaotic history of freedom and federalism in the pre-Civil War era. This antebellum narrative centered on the interplay on the civil (citizenship) rights of Americans and the rights of states under federalism. A series of political compromises enacted by the founders in the 1787 Constitution combined with the Supreme Court's interpretations of civil liberties not only shaped this antebellum narrative but also influenced constitutional thinking and politics after the Civil War and well into the twentieth century. In particular, seven issues were central to this antebellum narrative.

The first issue concerned political representation and slavery that resulted in the Great Compromise (or the Connecticut Compromise) engineered by the founders in 1787. At that time, eight out of the thirteen states had slave economies.[56] The founders realized that no constitution embodying the principle of national supremacy could emerge from the Philadelphia convention until the delegates decided the place of slavery in the new nation. Once the delegates agreed not to change the status of slavery in American society, then reforming the Articles of Confederation to establish a strong national government became possible. There is no question that the major accomplishment of the Philadelphia Convention was the transformation of the US confederation into a federation through the adoption of the constitutional doctrine of national supremacy.

As discussed in Chap. 6, the founders established the Congress as a bicameral legislature by providing for proportional representation in the US. House of Representatives and equal representation of the states in the US Senate. Adopted as Article I, Sections 2 and 3 of the 1787 Constitution, the Great Compromise equalized the difference between states with small populations and those with large populations. Replacing

[55] Leslie Lipson, *The Great Issues of Politics: An Introduction to Political Science*, 10th ed. (Upper Saddle River, NJ: Prentice-Hall, 1997), 253.

[56] The following states had slave economies in 1787: Virginia, North Carolina, South Carolina, Georgia, Maryland, Delaware, New York, and New Jersey (Vile 2005; Harper 2003).

the unicameral Congress of the Articles of Confederation with a bicameral Congress in the 1787 Constitution was not politically controversial because most states functioned under bicameral legislatures. Furthermore, this structural arrangement satisfied Northern interests because it avoided giving the Southern states with large slave populations the majority of seats in and control over the US House of Representatives. However, the bicameral compromise was a large step in drawing the American founders away from their political philosophy.

Yet, the compromise producing the bicameral Congress failed to quell the fears of the Southern states over encroaching federal power. As Madison astutely observed:

> The great danger to our general government is the great Southern and Northern interests of the continent, being opposed to each other. Look to the votes in Congress, and most of them stand divided by the geography of the country, not according to the size of the states. The institution of slavery and its consequences form the line of discrimination.[57]

Madison noted in *Federalist Paper #55* that slave-holding states included both large states such as Georgia and small states such as Delaware.[58] Moreover, over 90 % of the slaves in 1787 lived in five Southern states, wherein they totaled 30 % of the total population; in some states, the slaves outnumbered the non-slave population by as much as ten to one. Thus, the constitutional framers crafted the Three-Fifths Compromise that became the basis for Article 1, Section 2 of the 1787 Constitution.

The Three-Fifths Compromise established the ratio of counting five slaves as three persons for the purpose of representation in the House of Representatives and for taxes apportioned among the states. By balancing the sectional interests of the states, the founders hoped it would reduce the temptation of the Southern slave-holding states to secede from the federal union.[59] Furthermore, in *Federalist Paper # 42*, Madison predicted that slavery would die out within 25 years because of its unprofitability.[60]

[57] Quoted in Sydney Howard Gay, *American Statesman, James Madison* (Cambridge, MA: Riverside Press (Houghton Mifflin), 1884), 104.

[58] James Madison, "Federalist Paper #55," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 342.

[59] Gay, *American Statesman, James Madison*, 166.

[60] James Madison, "Federalist Paper #42," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 266.

Therefore, the founders compromised to protect slavery where it existed while agreeing not to encourage its expansion in the American territories or to increase the importation of slaves. Unfortunately, Eli Whitney's invention of the cotton gin invalidated the founders' prediction. After Whitney's invention, the slave economy became relatively efficient, and its operation, based on the extreme domination and physical cruelty of the slaves, enabled the South to prosper before the Civil War.[61]

Setting aside the economics of slavery, Madison abhorred the Three-Fifths Compromise on theoretical, moral, and political grounds. Theoretically, he viewed it as inappropriately mixing the principle of representation that applied to people and the principle of taxation that applied to property. As stated in *Federalist Paper #54*, Madison felt this compromise morally "debased" the slaves "below the equal level of free inhabitants" and "divested [them] of two fifths of the *man*" because they were considered as property under constitutional law (emphasis in the original).[62] In Madison's analysis, the founders acquiesced to the differences between the Northern and Southern states over slavery instead of ameliorating their sectional interests. In his notes, he wrote: "We took each other with our mutual bad habits and respective evils, for better, for worse; the Northern States adopted us with our slaves, and we adopted them with their Quakers."[63] Notwithstanding the Three-Fifths Compromise, both the Southern and the Northern states remained firm in their irreconcilable demands to protect slavery and to preserve the Union, respectively.[64]

The incorporation of the Three-Fifths Compromise into the 1787 Constitution had extensive effects on American civil rights. This compromise gave constitutional sanction to the USA divided into some persons who were free and others were not free. The Three-Fifths Compromise also established a new republican theory: the free man who lived among the slaves had a greater stake in the election of congressional

[61] Robert W. Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* (New York, NY: W.W. Norton, 1989), 73, 394.

[62] James Madison, "Federalist Paper #54," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 339.

[63] Gay, *American Statesman, James Madison*, 166.

Madison expressed the view of many Southerners who resented the Quakers for their refusal on religious grounds to defend the nation during the Revolutionary War. The Quakers were prominent in establishing the Underground Railroad and in the nineteenth-century abolitionist movement (Siebert 1898).

[64] Gay, *American Statesman, James Madison*, 104.

representatives than the man who did not. Despite disclaimers by its advocates, the Three-Fifths Clause of the Constitution reinforced and rewarded slave holders. By constitutionalizing the irreconcilable sectional interests of the states, Article 1, Section 2 institutionalized an unjust law as well as racial divisions and social inequities in American society. This constitutional provision was abrogated when the Fourteenth Amendment became law in 1868. The presence of the amending clause in Article V of the Constitution is significant. This article contains procedures for altering the Constitution when it goes awry without having the need to replace the entire document.

The third issue that shaped the antebellum narrative concerned the Supreme Court's interpretation of the Bill of Rights in relation to the rights of sovereign states. In the pre-war narrative, the justices narrowed their focus to determine whether the first eight amendments applied exclusively to the federal government or whether they affected the states. Only the language of the First and the Seventh Amendments in the Constitution specifically curbed the power of the federal government: the First Amendment restrained the Congress, and the Seventh Amendment's last clause provided that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In contrast, the remaining six amendments were general statements of civil liberties. In effect, the Constitution remained silent about whether the scope of the Bill of Rights was limited to the federal government.

In 1833, the Supreme Court, under Chief Justice Marshall, established the precedent in *Barron v. Baltimore* that the first eight amendments of the Bill of Rights did not apply to state governments.[65] John Barron, who owned a wharf in Baltimore, sued the city for diverting streams from their natural course during the grading of streets. The city's street-maintenance program caused mounds of sand to clog near Barron's wharf, making it impossible for boats to enter it. The case reached the US Supreme Court after the appellate court reversed a lower court ruling that awarded Barron compensation for the loss of his livelihood. The Marshall Court rejected Barron's claim that the city of Baltimore violated his property rights under the due process clause of the Fifth Amendment. The Court unanimously decided that the Fifth Amendment's due process and just compensation clause applied only to the federal government. More generally, the Court held that the provisions of the Bill of Rights protected citizens only from

[65] *Barron v. Baltimore*. 32 U.S. 243 (1833).

federal actions because: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[66] Although the *Barron* precedent was not a universally accepted view, it remained unchallenged in antebellum America.[67]

The fourth issue shaping the antebellum narrative concerned the meaning of state citizenship under the Constitution's privileges and immunities clause. In Article IV, Section 2, the Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The founders drew this provision from the Articles of Confederation but not completely. The founders omitted the clause contained in the Articles that had the following guarantee: "The people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions of inhabitants thereof respectively"[68] Given this omission, the 1787 Constitution did not specify what privileges and immunities were granted to citizens of any state or to citizens who temporarily resided outside of their home states. Therefore, a judicial decision was necessary to close this substantive gap.

In the case of *Corfield v. Coryell*,[69] Justice Bushrod Washington, sitting in the New Jersey federal circuit court, reviewed a statute that prohibited people outside of the Garden State from harvesting oysters. Washington contended that privileges and immunities "are secured to the citizen solely as a citizen of the United State and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition on State legislation."[70] Thus, Washington concluded that the New Jersey statute did not violate the privileges and immunities clause because the Constitution protected the "fundamental" rights of "citizens of all free governments."[71] Therefore, citizens could enjoy life and liberty, possess property, and pass through or reside in other states for the purposes of trade and profession.[72]

[66] Quoted in Herman C. Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs, NJ: Prentice-Hall, 1984), 5.

[67] Ibid., 6.

[68] Pritchett, *The American Constitution*, 81.

[69] *Corfield v. Coryell.* 6 F. Cas. 546 (1823).

[70] Cited in Pritchett, *Constitutional Civil Liberties*, 14.

[71] Ibid., 7.

[72] Pritchett, *The American Constitution*, 82. According to Pritchett, Justice Washington interpreted the Constitution to mean, "The citizens of each state shall be entitled to all privi-

Nevertheless, in the antebellum narrative, the privileges and immunities clause under the pressure of slavery resulted in constitutional law that denied constitutional protections to black Americans.

The constitutionality of the Fugitive Slave laws was the fifth issue that shaped the antebellum narrative. In 1793, the Federalist-dominated Congress enacted the Fugitive Slave Act (1 Stat. 302) to enforce Section 2 of the Constitution's Article IV:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

In other words, the 1787 Constitution required the return of runaway slaves to their owners. Thus, slave owners were constitutionally sanctioned to enter other states and seize their alleged fugitive slaves upon showing their proof of ownership to a local magistrate. As Smith notes, the 1793 law benefited slave owners by "abrogating virtually all canons of legal due process, including habeas corpus, trial by jury, assistance by counsel, protection against self-incrimination, and time limitations to the vulnerability of arrest."[73] In effect, constitutional law actively perpetuated slavery to placate the slave states to avoid their mobilization to disunify the nation.

Much to the dismay of the Southern states, the Fugitive Slave Act was not vigorously enforced, and its penalty of $500 as a fine did not deter Northern attempts to evade the law. Known as the Underground Railroad,

leges and immunities of citizens of the United States in the several states." However, some public rights of citizens, such as the right to vote, did not transfer across state lines. Moreover, this decision did not preclude a state from treating out-of-state citizens differently from in-state citizens; for example, states can charge lower tuition in state universities for its residents than for non-residents. A contending interpretation of the privileges and immunities clause—and the one intended by the constitutional framers—was that citizens of one state traveling to another state could not be discriminated against by virtue of their out-of-state origin (Pritchett 1984, 7). The emphasis of the second interpretation was as an instrument for interstate adjustment and comity. However, subsequent interpretations of the privileges and immunities clause by the Supreme Court elevated the privileges and immunities clause to a potent civil rights instrument that guaranteed basic rights defined elsewhere in the Constitution as "those more belonging of a right to citizens of all free governments" (Pritchett 1984, 7).

[73] Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997), 143.

the systematic assistance given to fugitive slaves in defiance of the law began with the Pennsylvania Quakers well before 1800.[74] As abolitionist sentiment grew in the North, more than three thousand conductors, station keepers, and agents expanded the lines on the secret Underground Railroad and successfully cared for thousands of fugitive slaves, most of whom escaped to Canada.[75] However, some fugitive slaves remained in the USA. By 1843, hundreds of escaped slaves lived in border states, where they were assisted by the Quakers and had access to low-priced land. Additionally, the courts of the Northern states resisted the enforcement of the Fugitive Slave Act of 1793.[76] This stance of the Northern states was upheld by the Supreme Court in *Prigg v. Pennsylvania*.[77] The Court ruled that state officials did not have to help in recapturing fugitive slaves because one sovereign cannot enforce the penal laws of another sovereign.

Nevertheless, slave owners raided areas in border states that had a concentration of escaped slaves, but they were unsuccessful. These failed raids contributed to Southern demands for the Congress to strengthen the provisions of the 1793 Fugitive Slave Act. Thus, in 1850, the Congress enacted another Fugitive Slave law.[78] Besides requiring the return of escaped slaves to their owners upon their capture, the 1850 statute authorized the imposition of fines and the imprisonment of those officials and citizens in non-slave-holding states that disobeyed. Law enforcement at the time targeted not only escaped slaves but also free blacks, who were then kidnapped and conscripted into slavery. Unfortunately, free black persons who were unlawfully conscripted into slavery could not defend themselves in court because they were not afforded the rights of a jury trial or due process under the Bill of Rights.[79]

The sixth issue contributing to the antebellum narrative concerned the relationship of national citizenship and state citizenship, and the Supreme Court under Chief Justice Roger Taney closed the constitutional gap in favor of the latter. A Jacksonian Democrat from Maryland, Taney blatantly effected his strong advocacy of states' rights

[74] Wilbur H. Siebert, *The Underground Railroad from Slavery to Freedom* (New York, NY: Macmillan, 1898).
[75] Ibid., 87.
[76] Pritchett, *The American Constitution*, 129.
[77] *Prigg v. Pennsylvania*. 41 U.S. 539 (1842).
[78] Fugitive Slave Act of 1850. 9 Stat. 462 (1850).
[79] Pritchett, *Constitutional Civil Liberties*.

and his deep attachments to the slave-based economic interests of the South from the judicial bench.[80] Accordingly, Taney interpreted the Tenth Amendment to mean that state governments had the authority to limit the federal government's delegated powers. In writing the majority opinion in the 1857 decision of *Dred Scott*, Taney accepted the priority of state over national citizenship for persons born in the USA.[81] His justification was that native-born individuals derived their citizenship status as descendants of the persons "who were at the time of the adoption of the Constitution recognized as citizens in the several States [and] became also citizens of this new political body."[82] In contrast, national citizenship was not anterior to state citizenship for foreign-born individuals because national citizenship for them required authorization by the Congress under its naturalization legislation. Taney concluded that the privileges and immunities clause covered only citizens of the USA who were temporarily residing in other states, where they were entitled to the minimum privileges and immunities generally prevailing in that state.[83]

The exception that the Taney Court made to these citizenship principles concerned black Americans such as Dred Scott. Scott was enslaved in Missouri, a slave-holding state. His owner took him to the state of Illinois and to the upper Louisiana territory (Minnesota), where slavery was forbidden by the Northwest Ordinance of 1787 and by the Missouri Compromise of 1820, respectively.[84] When Scott's owner returned to Missouri, Scott sued for his freedom in a Missouri court, given his temporary residence in the free territories. The Missouri Supreme Court denied Scott's claim on the grounds that his legal status was based on the law of the state in which he permanently resided. Subsequently, a citizen of New York took ownership of Scott, and Scott's friends filed a similar law-

[80] Pritchett, *The American Constitution*.

[81] *Dred Scott v. Sandford*. 60 U.S. 393 (1857).

[82] Pritchett, *The American Constitution*, 631.

[83] Pritchett, *Constitutional Civil Liberties*, 9.

Still, as Pritchett points out, a state could grant state citizenship to foreign-born citizens living within its borders, in addition to creating "inequalities in rights among its *own* citizens" (emphasis in the original).

[84] See Chap. 6 for a discussion of the Northwest Ordinance. The Missouri Compromise permitted Missouri to enter the national union as a slave state and also permitted slavery in the Arkansas territories, but it prohibited slavery in the unorganized territory of the Louisiana Purchase.

suit in federal court based on the constitutional principle of diversity of citizenship. The New York judge held that citizenship under the jurisdiction of the federal court meant residence and the power to own property. Consequently, the trial judge ruled against Scott's claim for freedom, and the case was referred to the Taney-led Supreme Court.[85]

In the *Dred Scott* decision, Chief Justice Taney asserted that "a Negro was unable to attain United States citizenship either from a state or by virtue of birth in the United States even if he were a free man descended from a Negro residing as a free man in a state at the date of the ratification of the Constitution."[86] Given that blacks were deliberately not included in the Constitution, Taney held they were not intended to be part of the citizens in the Constitution. Furthermore, Taney opined that the Missouri Compromise did not free Scott because the Missouri Compromise was unconstitutional. In his interpretation, the Congress did not have the authority to restrict the spread of slavery in federal territories. Consequently, Northern states could not free those slaves who came within their boundaries. To do so, he said, would violate the Fifth Amendment protections of the slave owners because their property would be seized without due process. Thus, under Taney's judicial activism, the Supreme Court bolstered the doctrine of dual federalism by ruling that boundaries could not be imposed on the movement of masters and slaves.[87]

Additionally, in the *Dred Scott* decision, the Taney Court ruled that no Negro slave could be a citizen with the power to sue because Negroes, who were not regarded as citizens when the Constitution was adopted, were considered inferior. According to Taney, "persons" of Dred Scott's class were "not a portion of this people" of the American Union or "constituent members of this sovereignty."[88] Thus, all persons of African descent, whether free or enslaved, did not have access to the federal courts under the Constitution. In effect, the Supreme Court's *Dred Scott* decision foreclosed to all African Americans the constitutional protections and privileges of US citizens.

The seventh issue in the antebellum narrative concerned the right of a state to secede from the national union. On a practical level, the Southern states saw secession as a legitimate remedy to protect them from tyrannical

[85] Pritchett, *Constitutional Civil Liberties*, 8.
[86] Pritchett, *The American Constitution*, 632.
[87] Peterson, *The Price of Federalism*.
[88] Cited in Pritchett, *Constitutional Civil Liberties*, 8.

Northern majorities of abolitionists who undermined their slave-holding economic and social life by trampling on their constitutional rights. Thus, prominent Southern political leaders reformulated the dual federalism doctrine of nullification into the constitutional principle of secession. Their arguments asserted that succession was an inherent right of the states under the compact establishing the Constitution as well as a natural right of the people to abolish and form their own governments.[89] For Southerners, the liberties of free white males to own slaves and run their households without governmental interference was more important to their survival than keeping the national union whole.[90] Thus, the societal tensions and political conflicts of antebellum America culminated in the extreme interpretations of constitutional law that favored slavery and secession.

The irreconcilable discord between the North and South underpinning the antebellum constitutional narrative exploded into the Civil War. On the one hand, the pro-slavery *Dred Scott* decision motivated Northern abolitionists to mobilize to elect Lincoln as president in 1860. On the other hand, the election of Lincoln, whom Southern leaders mistook for a fervent abolitionist, influenced the majority of the Southern states to secede from the national union. Besides forming the Confederate States of America, Southern leaders used military means to defend their citizens' slave-holding way of life.[91] After the Confederates bombarded Fort Sumter in April 1861, President Lincoln used his war powers under the Constitution to mobilize a fierce military campaign; his purpose was to

[89] Pritchett, *The American Constitutional System*, 20.

Pritchett, *The American Constitution*, 61–3

Accordingly, Calhoun of South Carolina justified secession as a final remedy to preserve a state's rights because "a State, as a party to the constitutional compact, has the right to secede—acting in the same capacity in which it ratified the constitution as a compact—if a power should be inserted by the amending power, which would radically change the character of the constitution, or the nature of the system" (Pritchett 1959, 61–62). Davis of Mississippi argued that the people could reassume the powers they granted to the federal government in the case of oppression because "The right of the people of the several States to resume the powers delegated to them to the common agency, was not left without positive and ample assertion, even at a period when it had never been denied" (Pritchett 1959, 62–63).

[90] Anthony G. Carey, "Secession," in *New Georgia Encyclopedia* (2014), last modified April 8, 2014, accessed June 25, 2014, http://www.georgiaencyclopedia.org/articles/history-archaeology/secession.

[91] Peterson, *The Price of Federalism*.

repress the rebellion against the USA organized by the eleven states that had seceded from the Union.[92]

The Civil War was the greatest constitutional crisis faced by the USA, and the political ethics of its resolution shaped the constitutional law of the Reconstruction era (1865–1877).[93] As will be discussed in the next chapter, the bloody Civil War achieved what 75 years of political compromise and constitutional law could not—the reconciliation of state rights and civil rights along with the end of slavery by permanently changing the Constitution.

Implications for Career Public Servants

The history of the Constitution and the antebellum narrative of constitutional law have left a contestable legacy. This raises the question of how awareness of this history is relevant to today's career public servants. There are at least two good reasons for them to reflect on this history of constitutional law. The first reason is that the historical analysis clarifies the moral and political implications of the Constitution. Career public servants should not lose sight that the moral and political ideas embedded in the Constitution are significant, and their legal applications have great consequences on the lives of citizens.[94] If career public servants apply constitutional ideas mechanically or are unaware of the implications of these ideas, then they are likely to contribute to the widespread misery and frustration of the people they govern.[95] As discussed in this chapter, the consequences of extreme interpretations of constitutional law that favored

[92] The order of secession during the Civil War was as follows: (1) South Carolina (December 20, 1860); (2) Mississippi (January 9, 1861); (3) Florida (January 10, 1861); (4) Alabama (January 11, 1861); (5) Georgia (January 19, 1861); (6) Louisiana (January 26, 1861); (7) Texas (February 1, 1861); (8) Virginia (April 17, 1861); (9) Arkansas (May 6, 1861); (10) North Carolina (May 20, 1861); and (11) Tennessee (June 8, 1861). As Kelly (2015) points out, the last four states seceded after the battle of Fort Sumter on April 12, 1861. Four slaveholding border states did not secede from the Union: Delaware, Maryland, Missouri, and Kentucky. The western part of Virginia did not secede but broke away to form the separate state of West Virginia on October 24, 1861.

[93] Michael Les Benedict, "Lincoln and Constitutional Politics," *Marquette Law Review* 93 (2010).

[94] Larry D. Terry, "Administrative Leadership, Neo-Managerialism, and the Public Management Movement.," *Public Administration Review* 58, no. 3 (May/June 1998): 198.

[95] Isaiah Berlin, *Concepts and Categories* (New York, NY: Viking Press, 1979), 10.

slavery and secession intensely harmed African Americans by denying them their citizenship and civil rights.

The second reason is that awareness of the antebellum narrative of constitutional law exposes career public servants to the shortcomings of the Constitution. Besides avoiding a romantic view of the Constitution,[96] this exposure to constitutional history highlights Rohr's insight that writing a constitution "is a morally risky business," and the demands of statecraft are "ill at ease in the realm of absolute moral imperatives."[97] The exposure to history also allows reflexive career public servants to criticize constructively the moral and political ideas associated with constitutional shortcomings. According to Spicer (2008), the purpose of this constructive criticism is not for public servants to cast aside the US Constitution, but to avoid recycling ideas that have been tried and found wanting. As constructive critics, career public servants instead focus their attention on the logic of constitutionalism in checking discretionary governmental power, paying particular attention to the Constitution's amending clause. The political ethics of constitutional change in creating a more perfect union is the focus of the next chapter.

[96] Michael W. Spicer and Larry D. Terry, "Legitimacy, History, and Logic: Public Administration and the Constitution," *Public Administration Review* 53, no. 3 (May/June 1993).

[97] John A. Rohr, "Toward a More Perfect Union," *Public Administration Review* 53, no. 3 (May/June 1993): 246.

CHAPTER 8

The Political Ethics of Constitutional Change and Constitutional Stewardship

> *Fellow-citizens,* we cannot *escape history. We, of this Congress and this administration, will be remembered in spite of ourselves.… In* giving *freedom to the* slave, *we* assure *freedom to the* free*—honorable alike in what we give, and what we preserve. We shall nobly save, or meanly lose, the last best hope of earth.*
>
> *Abraham Lincoln, "Annual Message to Congress," December 1, 1862*
>
> *The more you make men free, the more freedom is strengthened, and the … greater is the security of the State.*
>
> *Frederick Douglass, November 17, 1864*

As discussed in the last chapter, the history of constitutional law in the antebellum era showed that federalism introduced tremendous variations in the civil rights of citizens, given that state governments could formulate their own public laws independently of each other. The previous chapter also revealed the explosive dynamic that controlled and determined what was legal and who was free. This chapter focuses on constitutional change as the third feature of constitutional politics (as shown in Fig. 7.1). In their leadership role of constitutional stewards, career public servants are change agents. As constitutional change agents, they address the governance question of who is not free under constitutional law but deserves to be free and afforded constitutional protections.

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The antebellum narrative of constitutional law and the Union victory prepared the ground for the momentous constitutional change that took place after the Civil War. Lincoln noted in his 1862 message to the Congress, the Civil War radically changed the occupations and habits of the American people and forever altered the social conditions in American society.[1] As the nation demilitarized after the Civil War, the federal government became the primary defender of citizen rights against the tyranny of state governments.[2]

Specifically, this chapter discusses the interplay of the constitutional politics and constitutional change from the Reconstruction era to today (2015). It analyzes the constitutional politics that fostered (1) the postbellum constitutional changes securing the liberty and civil rights of all Americans; (2) the constitutional reversals that led to Jim Crow segregation in American society; (3) the "Second Reconstruction" associated with the civil rights movement of the mid-twentieth century; and (4) the extension of civil rights to same-sex couples under postmodern federalism. After discussing the implications of this analysis, this chapter concludes with guidelines to help career public servants balance the constitutional values of liberty and equality as they fulfill their political-ethical leadership role of constitutional stewards.

Constitutional Change in the Reconstruction Era

The political ethics of freedom underpinning the Civil War shaped the three constitutional amendments adopted during the Reconstruction era (1865–1877). These Reconstruction amendments, buttressed by civil rights legislation and a landmark Supreme Court decision, produced major changes in postbellum American society. These changes were of such great significance that scholars consider them "the second American Revolution."[3]

The second American Revolution was a moral cause led primarily by the Republican-controlled Congress. In 1863, the Congress showed its contempt for the notorious *Dred Scott v. Sandford* decision. Specifically, the Congress enacted a court-packing plan designed to increase the size of the federal judiciary. In this way, congressional leaders who were

[1] Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings* (Cleveland, OH: World Publishing Company, 1946), 2:666.

[2] Robert Tannenwald, "Devolution: The New Federalism—An Overview," *New England Economic Review*, May/June 1998, 11.

[3] Herman C. Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs, NJ: Prentice-Hall, 1984),10.

ardent abolitionists shifted the balance of power on the Supreme Court to justices who supported President Lincoln's military campaign and their legislative agenda to end slavery.[4] After the North's victory in the Civil War, the enlarged Supreme Court closed the constitutional debate over secession and the doctrine of dual federalism. In the 1869 case of *Texas v. White*,[5] the Supreme Court, led by Chief Justice Samuel Chase, ruled "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."[6] In the Court's opinion, the incorporation of a state into the national union was perpetual and indissoluble, and the constitutional compact among the growing number of states was as final and permanent as the original union of the thirteen states.

Five days after the Civil War ended, President Lincoln was assassinated, and the reunification of the country rested with Lincoln's successor Andrew Johnson, a Southern Democrat from Tennessee. Johnson, who served in the Senate at the outbreak of the Civil War, was loyal to the Union when Tennessee seceded. Lincoln chose Johnson as his running mate for the 1864 presidential election under the National Union banner, and this bipartisan ticket achieved an overwhelming election victory.[7] However, President Johnson, who was the former military governor of Tennessee during the Civil War, advocated a limited federal intervention in the South. Hence, the Republican-controlled Congress took charge of the Reconstruction process by which the federal government readmitted the eleven states that had seceded from the Union. The reconstruction of the Southern states required them to abolish slavery in their new constitutions and to repeal their secession statutes. To assert dominance over President Johnson, the Congress established the Joint Committee on Reconstruction in 1865. The chair of this committee was Pennsylvania Congressman Thaddeus Stevens, who was a strong advocate of emancipating the slaves and waging total war

[4] Timothy Huebner, "The First Court-Packing Plan," *Supreme Court of the United States (SCOTUS) Blog*, entry posted July 3, 2013, accessed August 28, 2014, http://www.scotusblog.com/2013/07/the-first-court-packing-plan/.

[5] *Texas v. White*, 7 U.S. 700 (1869).

[6] Quoted in Herman C. Pritchett, *The American Constitution* (New York, NY: McGraw-Hill, 1959), 63.

[7] The National Union Party was formed to accommodate the "War Democrats" in loyal border states. In the 1864 election, Lincoln decisively beat his Democratic opponent (and his former Union general) George McClellan in the popular vote by more than 400,000 and in the Electoral College 212 to 21. Lincoln's reelection was the first time an incumbent president achieved a second term since Andrew Jackson was reelected in 1832 (US Electoral College, 2014).

against the states in rebellion. The Committee's mission was to establish the equal civil and political rights for the freedmen (i.e., the former slaves) and to provide constitutional guarantees to protect them when the federal government withdrew its military control of the Southern states.[8]

Of the first three Reconstruction amendments formulated by the Congress, the Thirteenth abolished slavery and involuntary servitude, except as punishment for persons convicted of a crime. Adopted in 1865, this Amendment gave the former slaves the same rights as other free citizens. Thus, the Thirteenth Amendment not only invalidated the Constitution's Three-Fifths Compromise, but it also overturned the Fugitive Slave Act of 1850 discussed in the last chapter. Furthermore, the Thirteenth Amendment constitutionalized Lincoln's 1863 military order, the Emancipation Proclamation could be revoked after the Civil War ended because its legitimacy drew from the presidency's war powers provided in Article II, Section 2 of the Constitution.

Thus, President Lincoln issued the Emancipation Proclamation in his constitutional role as commander-in-chief.[9] Specifically, Lincoln freed the slaves held in areas in rebellion against the USA but not the slaves held in the four loyal slave-holding borders states or the areas of the Confederacy that were under Northern control. Accordingly, Lincoln proclaimed:

> All persons held as slaves within any State, or designated part of a State, the people whereof shall be in rebellion against the United States, shall be then, thenceforward and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom…
>
> That the Executive will, on the first day of January [1863], by proclamation, designate the States and parts of States, if any, in which the people thereof, respectively, shall be in rebellion against the United States, and the fact that any State, or the people thereof, shall on that day be in good faith represented in the Congress of the United States by members

[8] Office of the Historian and the Clerk of the House's Office of Art & Archives, "The Joint Committee on Reconstruction," *History, Art & Archives: United States House of Representatives*, accessed August 25, 2014, http://history.house.gov/Historical-Highlights/1851-1900/The-Joint-Committee-on-Reconstruction/.

[9] Allen C. Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery in America* (New York, NY: Simon & Schuster, 2004).

> chosen thereto, at elections wherein a majority of the qualified voters of such State, shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States…
>
> And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.[10]

In effect, Lincoln emancipated the slaves within the legal bounds of his constitutional authority. The President also gave the states in rebellion 100 days to comply with his executive order, and he enjoined the freedmen not to engage in violence unless protecting themselves was necessary. For the small proportion of the 4.5 million slaves Lincoln freed, the Emancipation Proclamation authorized the Union Army and Navy to accept and compensate suitable persons. By the end of the Civil War, 179,000 black men served in the Union army and 19,000 served in the Navy.[11] However, the freedom Lincoln promised in the Emancipation Proclamation depended on the North's victory in the Civil War.

Although the Emancipation Proclamation did not abolish slavery, it added a moral cause to the Union's military goal. Against the backdrop of the Emancipation Proclamation, Lincoln's military campaign incorporated a struggle for human freedom as well as for suppressing the armed rebellion against the USA. As discussed in Chap. 3, the Emancipation Proclamation was a risky political strategy for Lincoln, but it had international significance. Lincoln's Emancipation Proclamation forestalled European powers, such as Britain and France, from recognizing and helping the Confederate States of America as a new and threatened country. Given that Britain and France had abolished slavery, their intervention in the Civil War on behalf of the pro-slavery Confederacy violated their own domestic policies. By keeping Europe out of the Civil War, Lincoln's Emancipation Proclamation achieved his political goal, and, through the Congress, he achieved his moral purpose.

[10] Basler, *Abraham Lincoln: His Speeches*, 2: 690–91.

[11] Elsie Freeman, Wynell Burroughs Schamel, and Jean West, "The Fight for Equal Rights: A Recruiting Poster for Black Soldiers in the Civil War," *Social Education,* 56, no. 2 (February 1992), 118–20. [Revised and updated in 1999 by Budge Weidman.] http://www.archives.gov/education/lessons/blacks-civil-war/.

In the view of the Congressional Republicans, the moral struggle was not a sectional division between the North and South but a conflict over two contending systems of representative government.[12] Instead of securing liberty based on property rights, the Thirteenth Amendment reestablished the American constitutional system based on human freedom. In Section 2 of the Thirteenth Amendment, the Congress broadly empowered itself to advance human freedom by enforcing the constitutional end of slavery. Furthermore, in 1866, the Congress enacted the Civil Rights Act over the veto of President Andrew Johnson. Johnson objected to this law because it conferred citizenship on the freedman when eleven out of the thirty-six states were unrepresented in the Congress, although eight reconstructed Southern states had ratified the Thirteenth Amendment to make it official.[13] On successfully overriding the presidential veto (for the first time since the adoption of the Constitution), the Congress outlawed race discrimination, and any person under the color of the law who violated it was guilty of a federal offense.[14] Specifically, the 1866 law provided that persons born in the USA were citizens of the USA, and as "such citizens, without regard to color, were entitled in every state and territory to the same rights to contract, sue, give evidence, and hold property as were enjoyed by white citizens, and to the equal benefit of all laws for the security of person and property."[15] The congressional justification referenced the citizenship precedent set by the Supreme Court in the 1823 case of *Corfield v. Coryell*. By enforcing the Thirteenth Amendment, the federal government had the power to control civil rights *within* the several states for the purpose of preventing discrimination against the newly freed slaves.

Apart from its humanitarian purpose, the Civil Rights Act of 1866 had significant partisan political implications. Given its invalidation of the Three-Fifths Compromise, the Thirteenth Amendment required the full population of former slaves to be counted for the purposes of representation in the House of Representatives. Consequently, the Republicans who controlled the Congress were concerned that the readmission of the Southern states, mostly comprised of Democrats, would alter the balance of power in the legislature, thereby imperiling the Northern control of

[12] Michael Les Benedict, "Constitutional Politics, Constitutional Law, and the Thirteenth Amendment," *Maryland Law Review* 71 (2011), 181.

[13] Civil Rights Act of 1866. 14 Stat. 27–30 (1866).

[14] Herman C. Pritchett, *The American Constitution* (New York, NY: McGraw-Hill, 1959), 377.

[15] Pritchett, *Constitutional Civil Liberties*, 11.

the federal government and destroying the Union victory on the battlefield.[16] Thus, the Republican majority in the Congress believed that the Thirteenth Amendment would help them to retain political power by attracting the votes of the freedman.

Notwithstanding the partisan politics, congressional leaders quickly recognized the constitutional inadequacy of the Thirteenth Amendment in protecting the civil rights of the former slaves from oppressive state governments. Although 4.5 million blacks were freed by the North's victory in the Civil War, they were landless and destitute. Thus, the Congress established the Freedmen's Bureau in 1865 to provide food and medical supplies to the former slaves and set up schools to educate their children. In effect, this federal bureau was the nation's first social equity measure. Nevertheless, the freedmen had no protection from the Black Codes enacted by newly formed all-white legislatures in the Southern states in 1865–1866. The Black Codes were harsh and vindictive laws that comprehensively regulated the lives of the former slaves in Southern society. Specifically, these codes forbade colored persons to vote or to own property, denied them access to the courts, prevented them from serving on juries, and restricted them from traveling freely. Black marriages were not recognized, and biracial couples who married were considered outlaws. Moreover, the freedmen were blocked from pursuing the occupation of their choice because the prosperity of the Southern agrarian economy depended on the forced labor of slaves who tended the fields 6 days a week.[17] Consequently, the former slave owners sought to bind their former slaves in oppressive employment and severe land contracts.[18] In this way, Southern plantation owners attempted to continue their unconstrained power over the lives of the freedmen.

Concerned that these Black Codes were tantamount to the restoration of slavery by white Southerners, the Republican Congress refused to seat the Southerners elected to the Congress. The reason was that the reconstructed state governments were drawn up by conventions that excluded black delegates. The concern of the Congress was that the same people who led the Confederacy and the armed rebellion against the USA

[16] William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1988), 46.

[17] Robert W. Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* (New York, NY: W.W. Norton, 1989).

[18] Theodore B. Wilson, *The Black Codes of the South* (Tuscaloosa, AL: University of Alabama Press, 1965).

comprised the congressional delegations of the reconstructed states.[19] Given the inadequacy of the Thirteenth Amendment, congressional Republicans sought stronger constitutional protections for black civil rights rather than to rely on statutory protections and law enforcement authorized by temporary political majorities.[20] Thus, the Congress formulated the Fourteenth Amendment concurrently with its work on its civil rights legislation.

Congressman John Bingham of Ohio and Senator Jacob Howard of Michigan facilitated the passage of the Fourteenth Amendment in the Congress. Adopted in July 1868, the Fourteenth Amendment was the longest and the most significant of the three Reconstruction-era constitutional changes. In particular, the four clauses of Section 1 addressed citizenship rights and provided additional constitutional protections of civil liberties against state action, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person within its jurisdiction the equal protection of the laws.

Thus, the citizenship clause of Section 1 defined US citizenship for the first time in constitutional law and clarified that state citizenship signified residence within a state.[21] The legislative intent was to overturn the Supreme Court's *Dred Scott* decision.[22]

[19] "The Thirteen Amendment, Ratification and Results," *Harp Week*, last modified 2008, accessed September 6, 2014, http://13thamendment.harpweek.com/HubPages/CommentaryPage.asp?Commentary=05Results.

[20] Lawrence Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903* (New York, NY: Walker and Company, 2011).

[21] Pritchett, *The American Constitution*, 644, 640.

However, one does not have to reside in a State to hold national citizenship, as in the case of children born to American citizens living in foreign countries. This is the constitutional principle of *jus sanguinis* established in the Immigration and Nationality Act of 1952 (66 Stat. 63). Based on the Thirteenth Amendment, the 1952 statute gave the Congress complete discretion over the naturalization process, the power to exclude aliens, and the power to determine various classes of persons who are citizens by birth (*jus soli)* or by blood (*jus sanguinis*) (Pritchett 1959, 633, 640).

[22] Pritchett, *Constitutional Civil Liberties.*

In its privileges and immunities clause, Section 1 of the Fourteenth Amendment prevented state governments from interfering with the protected civil rights of US citizens. The congressional sponsors intended to eliminate the Black Codes by reversing the Supreme Court's *Barron* decision. Under the due process clause of the Fourteenth Amendment, the Republican Congress incorporated the procedural guarantees of the first eight amendments expressed in the Bill of Rights into the laws of state governments.[23] Together the Fifth and Fourteenth Amendments established procedural and substantive due process: procedural due process guaranteed US citizens with a fair legal proceeding. This provision expressed a political and moral conception of justice as fairness within the American political system.[24] Substantive due process guaranteed that no American government will abridge or deny the constitutionally protected rights of US citizens. Nevertheless, the due process and privileges and immunities clauses in the Fourteenth Amendment remained vague concepts without "precise contours" until the Congress and the Supreme Court gave them constitutional meaning in the mid-twentieth century.[25]

The equal protection clause of the Fourteenth Amendment's Section 1 provided the most specific of the new constitutional protections. Senator Howard used the equal protection clause in conjunction with the due process clause to restrain the power of the states. His intent was to disable state governments from "depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, property without due process of law or from denying to him the equal protection of the laws of the State."[26] In the House of Representatives, Congressman Bingham elaborated that the legislative intent was to protect the "inborn rights of every person"—both citizen and stranger.[27] Thus, this clause protected the freedmen from unfair treatment under state laws, such as the Black Codes, and the Congress reinforced it in Sections 2 and 3 of the Fourteenth Amendment. Furthermore, Section 2 reduced the size of the congressional delegations of the former Confederate states if their state laws disenfranchised the freedmen. Section 3 gave the Congress the

[23] Robert L. Cord, "The Incorporation Doctrine and Procedural Due Process Under the Fourteenth Amendment: An Overview," *Brigham Young University Law Review* 3(1987).

[24] John Rawls, "Justice as Fairness: Political Not Metaphysical," *Philosophy & Public Affairs* 14, no. 3 (Summer 1985).

[25] Pritchett, *Constitutional Civil Liberties*, 15.

[26] Ibid., 14.

[27] Ibid., 14.

right not to seat the newly elected legislators or members of the Electoral College from the states whose constitutions were not in conformity with the US Constitution.

Politically, most Southern leaders did not see Sections 2 and 3 of the Fourteenth Amendment as totally banning their discriminatory state laws so that they willingly paid the penalty for continuing to deny the vote to black citizens.[28] Furthermore, the Southern states, except for Johnson's Tennessee, refused to ratify the Fourteenth Amendment. Their refusal led the Congress to enact the Reconstruction Acts that allowed the federal government to replace the newly restored civil governments established in the former Confederate states with military rule. In particular, the Congress passed the first Reconstruction Act of 1867 over President Johnson's veto.[29] Also known as the Military Reconstruction Act, this statute attempted to secure equal rights for blacks by requiring the Southern states to change their constitutions to conform with the US Constitution. In other words, no state constitution could disenfranchise any person qualified to vote (i.e., male citizens of any race who met the residency requirement) nor prevent a qualified voter from holding an elective office. This 1867 statute also required the Southern states to ratify the Fourteenth Amendment as a condition for the Congress to seat their congressmen and senators.

Adopted in 1870, the Fifteenth Amendment was the last of the Reconstruction-era constitutional amendments. As a political compromise, the Fifteenth Amendment diluted a broad congressional proposal that prohibited voting not only on the basis of race but also on nativity, education, property, and religious beliefs. A separate proposal to ban literacy tests, however, was rejected.[30] Some Northern legislators, where nativism was prominent, wanted to deny the franchise to foreign-born citizens; similarly, some Western legislators wanted to deny the franchise to Chinese-born citizens.[31] Radical Republicans in Congress wanted to continue temporarily to disenfranchise the Southerners who supported the Confederacy in order to preserve their legislative majority.[32]

[28] Eric Foner, *Reconstruction: America's Unfinished Revolution* (New York, NY: Harper Collins, 1988).

[29] Reconstruction Act of 1867 (March 2). 14 Stat. 428-30 (1867).

[30] Lawrence Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865–1903* (New York, NY: Walker and Company, 2011).

[31] Foner, *Reconstruction: America's Unfinished Revolution*, 446.

[32] Ibid., 447.

Ultimately, the Fifteenth Amendment that emerged from the negotiations provided "the right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of race, color or previous condition of servitude." Despite its narrow focus to prevent Southern black voters from disenfranchisement, the Fifteenth Amendment, nevertheless, closed a gap left vacant in Section 2 of the Fourteenth Amendment.

At the social level, resentful Southerners retaliated against the Fifteenth Amendment by forming the Ku Klux Klan (KKK), and this racist organization used paramilitary means to terrorize and kill blacks who exercised their right to vote. The Klan also attacked white people who assisted the former slaves in exercising their right to vote. Furthermore, Southern legislatures passed poll taxes and literacy tests to prevent black Americans from voting, but these legal provisions also affected poor or illiterate white men unless the latter were covered by the Grandfather Clause. This Grandfather Clause permitted any Southern male to vote if he had an ancestor who voted prior to the adoption of the Thirteenth Amendment. Given that black men could not vote before 1865, the Grandfather Clause excluded them. The judicial interpretation of the Fifteenth Amendment eliminated the grandfather clauses and all-white primaries. Thus, black politicians were elected to congressional and state offices for the first time in American history.

To enforce Section 2 of the Fifteenth Amendment, President Ulysses Grant used the Union army and relied on the newly created US Department of Justice to insure the voting rights of Southern blacks. Grant also lobbied the Congress to readmit the three remaining Confederate states that did not have representation in Congress (Virginia, Mississippi, and Texas) upon their ratification of the Fifteenth Amendment. Given the rise of terror instigated by the Klan, the Congress enacted the Enforcement Act of 1871, also known as the Civil Rights Act or the Ku Klux Klan Act.[33] The statute's controversial Section 1983 provided that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[34]

[33] Civil Rights Act of 1871. 17 Stat. 13 (1871).
[34] "Civil Action for Deprivation of Rights." Codified at 42 U.S. Code §1983 (1982).

Grant used this law not only to suspend habeas corpus in South Carolina but to mobilize federal troops under a companion law to suppress racial violence in the South. Under the banner of the 1871 Civil Rights Act, the federal government prosecuted members of the KKK who were convicted in federal courts by mostly black juries and fined or imprisoned. In this way, Grant successfully dismantled the original KKK.[35] Although Section 1983 provided redress in terms of monetary damages for violations, the first substantial awards for violations of the rights of speech and assembly did not occur until 1975.[36]

Subsequently, the Congress passed the Civil Rights Act of 1875[37] that forbade racial separation or discrimination in public conveyances, hotels, and theaters, and also required equality in jury service. Pritchett identified two major achievements of the 1875 Act.[38] The first achievement was that this law targeted the discriminatory actions of private individuals whose services were subject to public regulations. The second achievement identified by Pritchett was that the 1875 civil rights legislation gave the equal protection clause of the Fourteenth Amendment stronger enforcement power. In particular, the Congress granted the federal government the authority to punish official acts of omission or the failure to enforce the law as well as the discriminatory actions of private officials. Consequently, the Congress asserted its power to legislate affirmatively on behalf of a racial group that state governments neglected to protect from the harmful actions of private persons, such as the KKK.[39] In effect, state governments denied equal protection under the law by tolerating widespread abuses against a class of citizens because of their color. Under this circumstance, the federal government could coerce state officials into undertaking an active program of civil rights law enforcement.

In 1877, Rutherford B. Hayes became the President in a highly controversial election, also known as the 1877 Compromise. Three Southern Democratic states voted for Hayes, the Republican candidate, over Samuel Tilden, the Democratic candidate, in the Electoral College, after Hayes pledged to withdraw the federal military from the South and to appoint at least one Southern Democrat to his cabinet. Furthermore,

[35] H. W. Brands, "Presidents in Crisis: Grant Takes on the Klan," *American History*, December 12, 2012.

[36] Pritchett, *Constitutional Civil Liberties*, 57.

[37] Civil Rights Act of 1875. 18 Stat. 335–337 (1875).

[38] Ibid., 251.

[39] Ibid., 252.

President Hayes refused to enforce the postbellum civil rights legislation. Then, by withdrawing federal troops from the South, Hayes ended the era of Reconstruction. When the federal troops left the reconstructed South, the states gained control over their own laws and social customs. Under home rule, the Southern states redeemed their distinct way of life, and Southern conservative Redeemers pledged to protect the freedmen's constitutional rights. Against the backdrop of Republican acquiescence, these pledges were neglected and violated, and the South turned sharply to extremism. This extremism advocated by Southern Radicals found expression in the "Jim Crow" laws designed to segregate the races and maintain the political disenfranchisement of black Americans.[40]

According to C. Vann Woodward, the Jim Crow statutes "constituted the most formal and elaborate expression of sovereign white opinion."[41] On returning to "normalcy," the Southerners established a comprehensive and rigid system of segregation in both the public and private sectors of their societies.[42] Although lacking the harshness and inconsistent enforcement of the Black Codes, this new system of segregation combined laws and customs to extend racial ostracism to churches and schools, eating and drinking establishments, all forms of public transportation, organized sports, and recreational activities, as well as hospitals, orphanages, prisons, asylums, funeral homes, morgues, and cemeteries.[43] The pervasiveness of Jim Crow in Southern life reinforced the illusion that the South was restored as "a White man's country."[44]

Constitutional Reversals and the Political Recapitulation to Racism

After 1877, the Supreme Court entered a phase that gave the sanction of constitutional law to the Jim Crow South. Given that the civil rights statutes of the Reconstruction era were loosely drawn, it was up to the federal judiciary to give them their meaning. With the era of Reconstruction over, the Supreme Court shifted its emphasis from its support of civil rights to

[40] C. Vann Woodward, *The Strange Career of Jim Crow*, commemorative ed. (Oxford, UK: Oxford University Press, 2002), 70.

[41] Ibid., 7.

[42] Lucius J. Barker and Twiley W. Barker, *Civil Liberties and the Constitution: Cases and Commentaries*, 2nd ed. (Englewood Cliffs, NJ: Prentice-Hall, 1975), 355.

[43] Woodward, *The Strange Career of Jim Crow*, 7.

[44] Ibid., 8.

the protection of state rights, and the justices produced a series of decisions that bolstered the South's "recapitulation to racism."[45]

Specifically, the Supreme Court ruled in the *Civil Rights Cases* of 1883[46] that the Congress was wrong in its understanding of the equal protection clause of the Fourteenth Amendment and the congressional powers under it. By declaring the Civil Rights Act of 1871 unconstitutional, the Supreme Court stripped the Congress of any power to correct or punish individual discriminatory action. In the Court's opinion, the Civil Rights Act of 1871 inappropriately created a code of conduct for the regulation of private rights that ignored state laws and, therefore, provided unauthorized modes of redress against the actions of state officers. In short, the Court declared that the Civil Rights Act of 1871 subverted the fundamental rights of citizens specified in the Fourteenth Amendment. By narrowly interpreting the Fourteenth Amendment as applying only to the actions of state government, the Supreme Court severed the connection of the Civil Rights Act of 1871 to the Thirteenth Amendment.[47] Given the Court's "state action" doctrine, the federal government did not have the right to intervene until a state, through its officers or agents, had taken an infringement action.

Subsequently, in 1896, the Supreme Court, in its landmark decision of *Plessy v. Ferguson,* established the "separate but equal" doctrine by upholding a Louisiana statute requiring the segregation of blacks and whites on public carriers.[48] The Court held Louisiana did not violate the Fourteenth Amendment because no discriminatory intent was evident in the statutory text. In delivering the Court's opinion, Justice Henry Billings Brown argued the Fourteenth Amendment provided "absolute equality before the law," but it did not abolish social distinctions or require the enforcement of "the co-mingling of the two races under terms unsatisfactory to either."[49] In his summary, Justice Brown denied that the enforced social segregation of the races stamped black citizens with a "badge of inferiority." Under this judicial interpretation, the Fourteenth Amendment permitted the enforced segregation of the races and injustice as a matter of public policy.[50] This decision set the precedent for states to adopt additional segregation laws.[51]

[45] Ibid., ch. 3.
[46] *Civil Rights Cases of 1883.* 109 U.S. 3 (1883).
[47] Pritchett, *Constitutional Civil Liberties,* 253.
[48] *Plessy v. Ferguson.* 163 U.S. 537 (1896).
[49] Ibid.
[50] Barker and Barker, *Civil Liberties and the Constitution*, 355.
[51] David Bishop, "*Plessy v. Ferguson*: A Reinterpretation," *Journal of Negro History* 62, no. 2 (April 1977).

In effect, a "hostile Supreme Court and apathetic public" overturned most of the civil rights legislation of the Reconstruction era, and what was left was "largely ignored and unused by federal enforcement authorities."[52] This neglect, combined with the loss of restraints from the opposition, enabled the South's adoption of legal (de jure) segregation and extreme racist practices. According to Woodward,

> All the elements of fear, jealousy, proscription, hatred, and fanaticism had long been present, as they are present in various degrees of intensity in any society. What enabled them to rise in dominance was not so much cleverness or ingenuity as it was a general weakening and discrediting of the numerous forces that had hitherto kept them in check. The restraining forces included not only Northern liberal opinion in the press, the courts, and the government but also internal checks imposed by the prestige and influence of Southern conservatives as well as by the idealism and zeal of Southern radicals.[53]

Moreover, the leadership of the Republicans who controlled the legislative and executive branches of the federal government abandoned their civil rights agenda as they engaged in imperialistic wars in the Philippines and Cuba. At the conclusion of those wars, eight million people of color fell under American jurisdiction, and their situation created ambiguity concerning the rights they possessed under the Constitution. Against the backdrop of American imperialism, the doctrine of racism became popular and widely acceptable. To help American society grapple with "the White Man's burden," national political leaders at the turn of the twentieth century embraced the principle of Anglo-Saxon superiority, and Southern white supremacists grasped the political implications of American imperialism for their domestic policies.[54] Therefore, as Woodward concludes, "the wave of Southern racism came in as a swell upon a mounting tide of national sentiment and was very much a part of that sentiment. Had the tide been running the other way, the Southern wave would have broken feebly instead of becoming the wave of the future."[55]

Furthermore, the rise of the South's rigid system of de jure segregation and political disenfranchisement of blacks carried into the North. The Northern states enabled de facto segregation of blacks through the

[52] Pritchett, *Constitutional Civil Liberties*, 280.
[53] Woodward, *The Strange Career of Jim Crow*, 69.
[54] Ibid., 73.
[55] Ibid., 74.

implementation of discriminatory housing covenants, bank lending policies, and employment practices. Additionally, the Populist and Democratic Parties had planks in their presidential platforms of 1904 and 1908, respectively, that endorsed the disenfranchisement of black voters and promoted white supremacy. By the end of the Progressive Era in 1929, Jim Crow was firmly entrenched in American society.[56] Thus, the civil rights agenda started under the second American Revolution during the Reconstruction era was shelved until the mid-twentieth century.

Constitutional Change: The Second Reconstruction in the Mid-Twentieth Century

According to Bruce Ackerman (2007), Americans' sense of justice became stronger after black and white combat troops fought together on the battlefields of World War II. Following the war, the economic prosperity and the rapid urbanization of the USA facilitated changes in the cultural and social lives of Americans. These conditions turned the constitutional tide in the direction of favoring racial justice and the expansion of civil rights in political, economic, and social settings.[57] Although the constitutional change in favor of human freedom occurred in cycles, no cycle exactly replicated another.[58] Nevertheless, the mid-twentieth century's Second Reconstruction addressed all aspects of race relations, including areas that the nineteenth-century Reconstruction avoided or neglected, such as racially segregated public schools.[59]

In Ackerman's view, the Second Reconstruction involved a sustained process built on four stages: (1) the signal of the new civil rights revolution, (2) the "revolutionary" civil rights proposal, (3) the consent of "the People" for the civil rights agenda, and (4) the ratification of the civil rights agenda. Accordingly, the first stage of the Second Reconstruction in Ackerman's framework was the 1954 landmark decision of *Brown v. Board of Education of Topeka*.[60] This legislation signified the beginning of a pro-civil rights phase of the federal government. In two opinions, Supreme Court Chief

[56] Ibid.

[57] Ibid.

[58] Bruce Ackerman, "The Living Constitution," *Harvard Law Journal* 120, no. 7(2007), 1757–1758.

[59] Woodward, *The Strange Career of Jim Crow*, 9–10.

[60] *Brown v. Board of Education of Topeka*. 347 U.S. 483 (1954); 74 S. Ct. 686; 74 S. Ct. 753.

Justice Earl Warren declared that state-sponsored racial discrimination in public education was unconstitutional because separate educational institutions were inherently unequal.[61] Although the *Brown* decision overturned *Plessy's* "separate but equal" doctrine, the Supreme Court avoided ruling on the constitutionality of racial segregation.[62] Moreover, the Brown decision provoked a segregationist backlash in the South, and it failed to integrate many Southern schools. All the same, *Brown* was significant because it catalyzed a national debate about racial equality. This national debate, in turn, mobilized support for constitutional change through deliberation and decision through popular sovereignty.[63] In other words, it was up to the Congress to close this gap in constitutional law.

According to Ackerman, the second stage of the Second Reconstruction involved the formulation of the "revolutionary proposal"—the Civil Rights Act of 1964.[64] It is important to note that this revolutionary legislation would not have happened without the congressional enactment of the Civil Rights Act of 1957. As the first civil rights legislation to pass in the Congress since the Reconstruction era, the 1957 Act renewed the legislative commitment to civil rights.[65] Yet, one cannot underestimate the singular leadership of Senate Majority Leader Lyndon Johnson, a Democrat of Texas, who stood apart from his Southern roots and built the unusual bipartisan majority to pass the 1957 civil rights legislation. As the "master of the Senate," Johnson used his extraordinary political skills to overcome powerful opposition from Southern leaders within his legislative majority who sought to preserve state-enforced racial segregation.[66] To insure its passage, Johnson narrowed the scope of the 1957 legislation to focus on the voting rights of all Americans; in this way, he forestalled the advocates of states' rights in the Senate from killing the bill.[67] The 1957 Act also established a Civil Rights division within the US Department of Justice to

[61] Ibid.

[62] Barker and Barker, *Civil Liberties and the Constitution*, 356.

[63] Ackerman, "The Living Constitution," 1763.

[64] Civil Rights Act of 1964. 78 Stat. 241 (1964).

[65] Civil Rights Act of 1957. 71 Stat. 634–638 (1957).

[66] Robert Caro, *The Years of Lyndon Johnson: Master of the Senate* (New York, NY: Alfred A. Knopf, 2002).

Robert A. Caro, "Johnson's Dream, Obama's Speech," editorial, *The New York Times*, August 27, 2008, accessed July 4, 2014, http://www.nytimes.com/2008/08/28/opinion/28caro.html?pagewanted=all&_r=0.

[67] Caro, *The Years of Lyndon*.

prosecute individuals who conspired or abridged anyone's right to vote. Furthermore, the 1957 Act created a separate Civil Rights Commission to investigate allegations of voter infringement. Despite these provisions, the federal government had difficulty enforcing the legislation. Thus, to overcome these limitations, the Congress passed the Civil Rights Act of 1960.[68] This companion act expanded the authority of federal judges to protect voting rights by imposing penalties on those who obstructed voter registration. The 1960 legislation also required local election officials to maintain comprehensive records so that federal government inspectors could ascertain whether patterns of discrimination existed against certain populations.

Building on the civil rights legislation of 1957 and 1960, the Congress produced the comprehensive Civil Rights Act of 1964.[69] Known also as the Public Accommodations Act, this law guaranteed all citizens the Fourteenth Amendment's equal protection of the law and the federal government's protection of their voting rights under the Fifteenth Amendment. Accordingly, the 1964 legislation outlawed discrimination on the basis of race, color, religion, sex, and national origin as well as racial segregation in public schools and public accommodations. Echoing the Civil Rights Act of 1875, the 1964 statute guaranteed full and equal access without discrimination or segregation in hotels and motels, restaurants and catering establishments, gas stations, and bars and barber shops within the premises of covered establishments. However, private clubs and boarding houses with fewer than five rooms for rent were outside the scope of the 1964 legislation.[70] Although the 1964 Act excluded many employers and imposed strict procedural requirements, it met with resistance from Southern business owners.[71]

Furthermore, Title IV of the Civil Rights Act of 1964 authorized the Attorney General to bring school desegregation suits in the name of the USA. Title V expanded the powers of the Civil Rights Commission

[68] Civil Rights Act of 1960. 74 Stat. 89 (1960).

[69] Civil Rights Act of 1964. 78 Stat. 241 (1964).

[70] Pritchett, *Constitutional Civil Liberties*, 277.

[71] Charges of discrimination must be filed first with a state or a local fair employment practices agency within 60 days if such an agency existed. After that, charges can be filed with the federal Equal Employment Opportunities Commission (EEOC). The EEOC was empowered to take cases to federal district court for a finding of discrimination when they were not settled through conciliation. Complainants also had the option of pursuing class action suits for the enforcement of the Civil Rights Act. The leading case was *Griggs, et al. v. Duke Power Company* (401 U.S. 424) (1971).

established in the 1957 statute. Title VI prohibited racial discrimination in any local or state program receiving federal financial assistance, and an agency violating this title could lose its federal funding. In fact, Title VI sanctions were used in conjunction with the Elementary and Secondary Education Act of 1965 to extend Johnson's civil rights agenda to the public schools.[72] For public schools to receive federal aid, they had to certify that they were integrated or were engaged in plans to implement desegregation.[73] Title VII of the 1964 Civil Rights Act made it unlawful for employers to deprive any individual of employment opportunities "because of such individual's race, color, religion, sex, or national origin." Title VIII required the compilation of voter registration data and voting data in areas specified by the Civil Rights Commission. (The Equal Employment Opportunities Act of 1972 strengthened Title VII of the 1964 Civil Rights Act.) Title IX made it easier to move cases from segregationist state courts and all-white juries to the federal judiciary, and Title X established a Community Relations Service to assist in the dispute resolution of discrimination cases. The rights of accused were extended in Title XI.

Shortly after the enactment of the Civil Rights Act of 1964, three civil rights workers were murdered as they registered voters in Philadelphia, Mississippi. The three murders and the violence against black workers involved in voter registration drives spawned a public outcry for stronger criminal prosecutions of civil rights violations. In *United States v. Price*[74] and *United States v. Guest*,[75] the Supreme Court overturned decisions by a federal district judge to dismiss the indictments against the eighteen murder suspects. In addition, the Supreme Court broadened the interpretation of the Civil Rights Act of 1870 to cover the protected rights of citizens under the due process and equal protection clauses of the Fourteenth Amendment.[76] These Court's rulings made possible the trial and conviction of the men responsible for murdering the Mississippi civil rights workers.

According to Ackerman, the third stage of the Second Reconstruction was the decisive support of "the People" for the federal civil rights agenda. In his view, the American people expressed their consent for the federal civil rights agenda by giving Lyndon Johnson a landslide victory in the

[72] Elementary and Secondary Education Act of 1965. 79 Stat. 27 (1965).
[73] Pritchett, *Constitutional Civil Liberties*, 268.
[74] *United States v. Price*. 383 U.S. 787 (1966).
[75] *United States v. Guest*. 383 U.S. 745 (1966).
[76] Ibid., 281.

1964 presidential election. The major party candidates in this race—Johnson and Barry Goldwater, a Republican from Arizona—were on opposite sides on the issue of the constitutionality of the Civil Rights Act of 1964. During the campaign, Goldwater "savagely attacked" the Civil Rights Act of 1964 as unconstitutional, and he expected electoral support from Northern whites and Southern segregationists.[77] Ultimately, Goldwater received 38.5 % of the popular vote and carried only six states in the Electoral College.[78]

Given Johnson's victory with 61 % of the popular vote and forty-four states (plus Washington, DC), the voters elected the first president from the Deep South in over a century. Johnson claimed his huge electoral margin constituted a clear civil rights mandate from "the People." His claim gained credence in that the 1964 national electorate swept a record number of liberal Democrats into congressional offices. The Democratic majorities in both congressional chambers were ready to support the President's civil rights mandate. In this way, popular sovereignty played a significant role in the mid-twentieth-century civil rights revolution.[79]

The fourth and final stage of the Second Reconstruction culminated in the ratification of the federal civil rights agenda. After the 1964 election, there was considerable evidence that the enfranchisement of black Americans was not secured. In many places of the South, the elections machinery was controlled by state and local officials, many of whom opposed black voting rights.[80] After massive public demonstrations, Johnson used his political skills to lead the Congress to enact the comprehensive Voting Rights Act of 1965.[81] Besides guaranteeing voter registration, this legislation suspended the use of literacy tests and poll taxes as conditions for voting. This act also imposed criminal sanctions on anyone threatening or blocking persons from voting or harming civil rights workers who were assisting potential voters. Extensions of the Voting Rights Act in 1970 and 1975[82] struck down lengthy residency requirements for

[77] Ackerman, "The Living Constitution," 1883.

[78] National Archives and Records Administration, "Electoral College Box Scores, 1787–1996," NARA, accessed August 31, 2014, http://www.archives.gov/federal-register/electoral-college/scores.html#1864.

[79] Ackerman, "The Living Constitution," 1778.

[80] Barker and Barker, *Civil Liberties and the Constitution*, 374.

[81] Voting Rights Act of 1965. 79 Stat. 437 (1965).

[82] Voting Rights Act of 1970. 84 Stat. 314 (1970).
Voting Rights Act of 1975. 89 Stat. 402 (1975) (Amended 1982).

voting in presidential elections, permanently eliminated literacy tests, required bilingual voting information to prevent discrimination against members of a language group, and developed a formula for effectively breaking down the barriers to black voting.[83] The 1982 extension prohibited the use of discriminatory redistricting plans or voter registration procedures and authorized the Department of Justice to use federal voting observers to monitor elections.[84] Finally, the 1982 law empowered individuals to sue in federal court for violations of their voting rights.[85]

The final ratification of Johnson's civil rights mandate was the Civil Rights Act of 1968. Also known as the Fair Housing Act, the Congress provided for equal housing opportunities regardless of race, creed, or national origin and empowered the federal government to enforce the Civil Rights Act of 1968.[86] The 1968 law made housing discrimination a federal crime if it involved the use of force or the threat of force to intimidate, injure, or interfere with anyone by reason of their race, color, religion, or national origin.[87]

Overall, the Second Reconstruction of the mid-twentieth century was more successful than the Reconstruction-era civil rights legislation. Its success rested on a broad foundation of constitutional and statutory law as well as public understanding and popular support.[88] In this cycle of constitutional change, the synchronized efforts of the federal government's three political pillars—the Presidency, the Congress, and the Supreme Court—along with the expressed will of "the People" reinforced constitutional law and solidified American civil rights. In effect, the mid-twentieth-century

[83] The Voting Rights Act of 1970 precluded state governments from closing voter registration more than 30 days prior to a presidential election because these requirements had no "reasonable relationship to a compelling state interest" (Barker and Barker 1975, 378). Also, the 1970 law reduced the voting age from 21 to 18 for national, state, and local elections. However, in *Oregon v. Mitchell* (400 U.S. 112), the Supreme Court ruled that the lowering of the voting age for state and local elections was unconstitutional. Ultimately, the voting age for all elections was reduced to 18 under the Twenty-Sixth Amendment in 1971.

[84] Voting Rights Act of 1982. 96 Stat. 131 (1982).

[85] Jody Feder, "Federal Civil Rights Statutes," *Congressional Reference Service Web*, last modified September 9, 2005, accessed September 15, 2014, http://fpc.Stat.e.gov/documents/organization/53772.pdf.

[86] Civil Rights Act of 1968. 82 Stat. 73 (1968).

[87] Pritchett, *Constitutional Civil Liberties*, 280.

[88] Pritchett, *Constitutional Civil Liberties.*

Ackerman, "The Living Constitution."

Reconstruction balanced the key American values of liberty, equality, and justice 200 years after the adoption of the US Constitution.[89]

Postmodern Federalism and Constitutional Change

In postmodern American society (1980–present), the balance between the federal government and the states shifted back to the states. At the heart of postmodern federalism was the policy politics of devolution aimed at reducing the federal government's role in American society and the size of the national debt. Welfare reform was the political motivation for devolving federal responsibility to states (and their political subdivisions), and this devolution movement was led by Rep. Newt Gingrich of Georgia in 1994. Devolution involved the statutory granting of the federal government's functions to the states and the curtailment of many federal mandates. Thus, states had greater flexibility to implement federal programs and were encouraged through federal block grants to become engines of economic development.[90] Under devolution, the federal government temporarily relinquished its role as the primary defender of civil rights against the tyranny of state governments.[91]

Given numerous federal-state overlaps, career public servants can become constitutionally confused and not know at what level or in what capacity they are functioning. A good example of this constitutional confusion occurred in marriage law because of the existence of a combination of contending federal and state statutes. Competing interpretations of postmodern federalism sparked the political-ethical controversy over whether to extend the legal definition of marriage to same-sex unions.

Traditionally, the governance of marriage fell into the bailiwick of state governments, and the interest of the states was to enforce morals to protect the nuclear family—a heterosexual couple and its dependent

[89] Barker and Barker, *Civil Liberties and the Constitution*, 354.

As Barker and Barker argue, the continuous struggle of black Americans for liberty, justice, and equality opened new dimensions in constitutional law that extended to women's rights (including the adoption of the Nineteenth Amendment in 1921). Furthermore, the Supreme Court's expansive interpretations of the Constitution and congressional legislation extended the rights of people with disabilities. However, the political ethics of the women's movement and the Americans with disabilities movement are beyond this book's scope.

[90] Tannenwald, "Devolution: The New Federalism."

[91] Paul Peterson, *The Price of Federalism* (Washington, DC: Brookings Institution, 2012).

(legitimate) children.[92] In a series of decisions, the Supreme Court established a set of "fundamental rights" known as "the freedom of intimate association."[93] In *Griswold v. Connecticut*,[94] the Supreme Court upheld marriage (or intimate conjugal association) as a constitutional right that fell within a "zone of privacy" under the First, Third, Fourth, Fifth, and Ninth Amendments.[95] In the *Griswold* opinion, Justice William Douglas broadly interpreted marriage as follows:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[96]

Subsequently, in the case of *Loving v. Virginia*,[97] the Court upheld the right to marry across racial lines as a fundamental right. This ruling was based on expansive interpretations of the Fourteenth Amendment's due process and equal protection clauses to prevent racial discrimination.[98] In *Zablocki v. Redhail*, the Supreme Court upheld the fundamental right to marry by declaring a Wisconsin statute unconstitutional. Wisconsin prohibited divorced residents who paid court-ordered child support for noncustodial minors from marrying without court approval.[99] In the majority opinion, Justice Thurgood Marshall asserted the right to marry was constitutionally protected under a "rigorous scrutiny-compelling state interest test."[100] Despite the myriad state laws governing marriage and divorce, American constitutional law reinforced a strong preference for the traditional nuclear family.[101]

However, the public discussion around same-sex marriage began in 1993. At that time, the Hawaii Supreme Court ruled that the state's statutes

[92] Pritchett, *Constitutional Civil Liberties,* 329.

[93] Kenneth L. Karst, "The Freedom of Intimate Association," *Yale Law Journal* 89, no. 4 (March 1980), 624.

[94] *Griswold v. Connecticut*. 381 U.S. 479 (1965).

[95] Ibid., 624–5.

[96] Quoted in Karst, "The Freedom of Intimate," 624.

[97] *Loving v. Virginia*. 388 U.S. 1 (1967).

[98] Pritchett, *Constitutional Civil Liberties.*

[99] *Zablocki v. Redhail.* 1978. 434 U.S. 374 (1978).

[100] Ibid., 328.

[101] Ibid., 329.

denying gay and lesbian couples the right to marry violated their constitutional protection under the equal protection clause unless a compelling state interest existed for this discrimination. Perceiving that Hawaii was about to legalize same-sex marriages, Bob Barr, a freshman Republican of Georgia elected to the US House of Representatives as part of the Gingrich devolution movement, successfully sponsored the 1996 Defense of Marriage Act (DOMA) on the grounds of federalism. Specifically, his legislation invoked Article IV, Section 1, the full faith and credit clause of the Constitution that governed interstate commerce:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.[102]

Enacted as a general law, DOMA's purpose was "to define and protect the institution of marriage."[103] In Section 3, DOMA specified marriage as "a legal union between one man and one woman as husband and wife," and the word "spouse" referred "only to a person of the opposite sex who is a husband or a wife." At that time, American public opinion was not supportive of legalizing same-sex marriage (with only 27 % in favor), and clear divisions along partisan lines were evident; 16 % of Republicans supported same-sex marriage as compared with 33 % of Democrats and 32 % of Independents in 1996.[104] Barr (2009) intended the narrow definition of marriage in Section 3 only to apply to federal law related to the eligibility of spouses for federal programs, and he expected DOMA to save the federal government considerable sums of money. Barr also saw DOMA as a strategic move to forestall the need for a constitutional amendment banning same-sex marriage in the wake of the Hawaii decision. Although the congressional Republicans were wary of Hawaii's legalization of same-sex marriages, Hawaii, after the enactment of DOMA, restricted legal marriages to heterosexual unions but granted same-sex couples civil protections.[105]

[102] Quoted in Pritchett, *Constitutional Civil Liberties,* 360.

[103] Defense of Marriage Act (DOMA). 110 Stat. 2419 (1996).

[104] Justin McCarthy, "Same-Sex Marriage Support Reaches New High at 55 %," Gallup, last modified May 21, 2014, accessed September 9, 2014, http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx.

[105] National Conference of State Legislatures (NCSL), "Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage," NCSL, last modified September 5, 2014,

Similarly, President Bill Clinton approved the DOMA legislation 2 months before his 1996 reelection. On signing the legislation, the President said:

> The Act confirms the right of each state to determine its own policy with respect to same gender marriage and clarifies for purposes of federal law the operative meaning of the terms "marriage" and "spouse." This legislation does not reach beyond those two provisions… I also want to make clear to all that the enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination, violence or intimidation against any person on the basis of sexual orientation.[106]

The "divisive rhetoric" referenced by the President centered on contending constitutional values—liberty under the First Amendment, fairness under the Fifth Amendment, and equality under the Fourteenth Amendment. The supporters of DOMA emphasized the value of liberty to exercise their constitutionally protected First Amendment religious beliefs of marriage as a heterosexual union. The preferred legal status given to traditional marriage secured heterosexual unions as "principled" and "essential to furthering society's compelling procreative interest."[107] The opponents of DOMA asserted that gay and lesbian couples had the right to marry as a fundamental civil right, and they shared this right with heterosexual couples.[108] The opponents of DOMA also saw marriage equality as a political struggle against state-sponsored discrimination.[109]

Meanwhile, the American family changed dramatically from traditional conceptions embedded in constitutional law. In postmodern American

accessed September 7, 2014, http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx.

[106] William Jefferson Clinton, "President's Statement on DOMA," Carnegie Mellon University School of Computer Science, last modified September 20, 1996, accessed September 9, 2014, http://www.cs.cmu.edu/afs/cs/user/scotts/ftp/wpaf2mc/clinton.html.

[107] Richard G. Wilkins, "The Constitutionality of Legal Preferences for Heterosexual Marriage," in *Marriage and Same-Sex Unions: A Debate*, ed. Lynn D. Wardle, et al. (Westport, CT: Praeger, 2003), 227.

[108] Lyle Denniston, "Two More Bans Fall," *Supreme Court of the United States (SCOTUS) Blog*, entry posted October 7, 2014, accessed October 7, 2014, http://www.scotusblog.com/2014/10/two-more-bans-fall.

[109] Andrew Koppelman, "Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional," *Iowa Law Review* 83, no. 1 (1997).

society, non-traditional family structures included gay and lesbian couples, single-parent households, and extended families (such as grandparents) raising minor children. Additionally, the Gallup Poll tracked a dramatic shift in public opinion away from supporting the traditional family structure toward marriage equality. Specifically, the 2014 Gallup Poll revealed that 55 % of Americans supported same-sex marriage legislation, with eight out of ten young adults in favor of gay and lesbian marriages.[110] This finding was the third successive national opinion survey in which marriage equality reached above the majority level. Nevertheless, the Gallup Poll found significant regional variations. Public opinion in the South, where every state had a constitutional ban on same-sex marriage, was the only region where the results fell below the majority level, at 48 %.[111]

This shift in public opinion in support of same-sex marriage mirrored an evolution in constitutional law that reflected a new judicial ideology about civil rights. Due to expansive Supreme Court interpretations of due process and equal protection, the justices extended the racial equality secured under the Reconstruction-era amendments to that of equal liberties protected under the Fourteenth Amendment. This postmodern extension of civil rights gave "every citizen a right to be treated as a respected and reasonable participant in community public life."[112] As the constitutional principle of equal liberties, it emphasized "the right to be respected as a human being."[113] This shift in judicial ideology reinforced "American identity politics."[114]

DOMA's incongruence with changes in American society and the new judicial ideology prompted the legal community to repudiate the congressional interpretation of postmodern federalism. In particular, Andrew Koppelman identified two adverse consequences that flowed from DOMA's Section 2 regarding "the powers reserved to the States."[115] Section 2 permitted states to refuse to recognize same-sex unions performed in other states. Thus, the first adverse consequence identified

[110] McCarthy, "Same-Sex Marriage Support Reaches," Gallup.

[111] The Gallup Poll, conducted May 8 to May 11, 2014, reported the following regional variations in support of same-sex marriage: East—67 %; West—58 %; Midwest—53 %; and South—48 % (McCarthy 2014).

[112] Kenneth L. Karst, "The Liberties of Equal Citizens: Groups and the Due Process Clause," *UCLA Law Review* 55(2007), 102.

[113] Ibid., 102.

[114] Ibid., 142.

[115] Koppelman, "Dumb and DOMA: Why the Defense."

by Koppelman was that legally married gay and lesbian couples were denied the same federal benefits as legally married heterosexual couples. In effect, this provision delved into the arena of state law because the states regulated marriages. The second adverse consequence identified by Koppelman was that DOMA contradicted the full faith and credit clause of the Constitution because this law broadly targeted, discriminated against, and injured legally married same-sex couples. Given its unconstitutional discriminatory intent, Section 2 invalidated the entire act.[116]

Interestingly, as retired public officials, both Congressman Barr and President Clinton retracted their support of DOMA. In an *LA Times* article, Barr (2009) concluded that his DOMA legislation was effective neither in meeting the principle of federalism nor in limiting its impacts to federal law. In retrospect, Barr realized that DOMA's Section 2 provided "one-way federalism" by protecting only those states that did not want to accept the same-sex unions legalized in other states. Given the federal government's enforcement of the heterosexual definition of marriage in determining social security and veterans' benefits, DOMA unwarrantedly intruded into the private lives of citizens. By meddling in decisions that by law and policy remained with the people, DOMA should be overturned, said Barr.

The former president's repudiation of DOMA focused on Section 3's constitutional violation of equality under the law. In a *Washington Post* op-ed article, Clinton (2013) noted that legally married same-sex couples were denied the benefits of more than 1,100 federal statutes and programs available to other married couples.[117] These same-sex couples, Clinton said, were citizens who paid their taxes (but not jointly), contributed to their communities, and deserved protection under the law; but DOMA deemed them ineligible to take unpaid leave to care for a sick or injured spouse or to receive equal family or health pension benefits as other federal civilian employees. Given these discriminatory impacts, Clinton advocated the repeal of DOMA.

Furthermore, DOMA presented challenges to federal agencies involved in administering the law when same-sex couples who were legally married

[116] Ibid., 1.

[117] William Jefferson Clinton, "It's Time to Overturn DOMA," *Washington Post*, March 7, 2013, accessed September 9, 2014, http://www.washingtonpost.com/opinions/bill-clinton-its-time-to-overturn-doma/2013/03/07/fc184408-8747-11e2-98a3-b3db-6b9ac586_story.html.

in one state lived in another state. Besides ordering Veterans Administration hospitals to permit visitation rights for all gay couples, President Barack Obama also instructed the Justice Department to cease defending Section 3 of DOMA in federal court after the Second Circuit Court ruled it unconstitutional in 2011.[118] Despite the President's belief in the unconstitutionality of DOMA, his administration continued to enforce the law until the Supreme Court delivered a definitive verdict on the constitutionality of the entire statute.[119]

In 2013, the Supreme Court delivered a verdict on DOMA, but the justices did not provide the hoped-for definitive verdict. In *U.S. v. Windsor,* the Court invalidated only Section 3 of DOMA.[120] In a 5-4 decision, the Court recognized the dominance of state law in defining marriage and therefore required the federal government to grant same-sex couples who were legally married equal rights to federal marital benefits.[121] In the Court's view, DOMA existed only to degrade legally married gay and lesbian couples. As stated by Justice Anthony Kennedy in the majority opinion of *U.S. v. Windsor*:

> No legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statue is in violation of the Fifth Amendment.[122]

Nevertheless, the *Windsor* ruling was silent about Section 2 and the power of state governments to ban same-sex marriage under any

[118] Eric Holder, "Statement of the Attorney General on Litigation Involving the Defense of Marriage Act," U.S. Department of Justice Office of Public Affairs, last modified February 23,2011,accessedSeptember24,2014,http://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act.

[119] Peter Baker, "For Obama, a Tricky Balancing Act in Enforcing Defense of Marriage Act," *The New York Times*, March 28, 2013, accessed August 1, 2015, http://www.nytimes.com/2013/03/29/us/politics/for-obama-tricky-balancing-act-in-enforcing-defense-of-marriage-act.html?ref=topics.

[120] *United States v. Windsor*. 50 U.S. ___ (2013).

[121] "Same-Sex Marriage Laws," National Conference of State Legislatures (NCSL), last modified June 26, 2015, accessed August 1, 2015, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#2.

[122] *United States v. Windsor,* 50 U.S., ___ (2013). (Kennedy, A., concurring).

circumstance.[123] In the wake of the *Windsor* decision, many cases pended in federal and state courts at both the trial and appeal levels.

The momentum for same-sex marriage equality grew dramatically since the enactment of DOMA. Four years after the enactment of DOMA in 1996, forty states adopted constitutional provisions or statutory language that limited marriage to heterosexual couples. In the ensuing decade, the issue was in flux because the states enacted new legislation or held public votes that permitted same-sex marriage. By 2014, nineteen states permitted same-sex marriage, but they differed widely on the protections they provided; thirty-one states retained their constitutional or statutory bans on same-sex marriage and all had some pending judicial challenges. Five of those legal challenges were pending before the Supreme Court. On October 6, 2014, the Supreme Court chose not to hear those five cases, and, by stepping aside, the justices let stand the rulings of federal appeals courts in five circuits that invalidated state bans on same-sex marriage. Given the Supreme Court's inaction, additional rulings from federal and state courts favorable to same-sex marriage "poured in."[124] Thus, by January 2015, thirty-six states permitted same-sex couples to marry.[125] The remaining fourteen states, located primarily in the South and the upper Midwest, had cases pending that challenged their constitutional bans against same-sex marriage.[126]

Another turning point occurred on November 6, 2014, when the Sixth Circuit Court of Appeals, known for its moderation, in a two-to-one ruling, upheld the same-sex marriage bans in four states—Ohio, Kentucky, Michigan, and Tennessee. Consequently, the lawyers representing the six challengers in the Sixth Circuit cases each agreed to file appeals directly to the US Supreme Court. Given the conflicting court decisions, ambiguity existed in American government and society over the constitutionality of

[123] Lyle Denniston, "Same Sex Marriage Reaches the Court Early," *Supreme Court of the United States (SCOTUS) Blog*, entry posted August 5, 2014, accessed September 7, 2014, http://www.scotusblog.com/2014/08/same-sex-marriage-issue-reaches-the-court-early/.

[124] Lyle Denniston, "Analysis: Path to Same-Sex Marriage Review (Update)," *Supreme Court of the United States (SCOTUS) Blog*, entry posted November 7, 2014, accessed November 8, 2014, http://www.scotusblog.com/2014/11/analysis-pathsto-same-sex-marriage-review/.

[125] Rochelle Finzel and Susan Frederick, "Same-Sex Marriage Laws," National Conference of State Legislatures, last modified February 9, 2015, accessed February 27, 2015, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx.

[126] According to Finzel and Frederick (2015), the remaining fourteen states that banned same-sex marriage were Arkansas, Alabama, Georgia, Kentucky, Louisiana, Mississippi, Michigan, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas.

same-sex marriages. Thus, thirty-two states, evenly split on the issue of same-sex marriage, filed briefs to request the US Supreme Court to end the constitutional confusion by providing a definitive judicial ruling on DOMA.

On June 26, 2015, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment required a State to issue marriage licenses to same-sex couples as a "fundamental right to marry" and to recognize same-sex marriages that other states had lawfully licensed.[127] Thus, the *Obergefell* decision protected gay and lesbian couples that married under the court rulings not considered final until the Supreme Court decided and nullified constitutional and statutory bans on same-sex marriages.[128] Moreover, the decision also made gay and lesbian couples eligible to receive federal benefits, including better tax treatment and equal status as parents.[129]

Specifically, the Court's five-to-four decision did not create a new right but enabled gay and lesbian couples to exercise an existing right and gave them access to the timeless institution of marriage. Writing for the *Obergefell* majority, Justice Kennedy said that state governments cannot deny to same-sex couples the fundamental liberties granted under the due process and equal protection clauses of the Fourteenth Amendment. The majority's decision in *Obergefell* echoed the precedents set by the Supreme Court in *Loving v. Virginia, Griswold v. Connecticut,* and *Zablocki v. Redhail*. Justice Kennedy also referenced his *Windsor* opinion in the *Obergefell v. Hodges* decision when he stated, "Without the recognition, stability, and predictability marriage offers, [the] children [of same sex-couples] suffer the stigma of knowing their families are somewhat lesser."[130] In closing the majority opinion, Justice Kennedy wrote, the hope of gay and lesbian people "is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[131]

Although the *Obergefell* decision legalized same-sex marriage in the USA, the Supreme Court's decision provided a temporary settlement.

[127] *Obergefell v. Hodges*. 576 U.S. _____. (2015).

[128] Lyle Denniston, "Opinion Analysis: Marriage Now Open to Same-Sex Couples," *SCOTUSblog*, entry posted June 26, 2015, accessed July 3, 2015, http://www.scotusblog.com/2015/06/opinion-analysis-marriage-now-open-to-same-sex-couples/.

[129] Ibid.

[130] *Obergefell v. Hodges,* 576 U.S., _____, 3 (2015) (5-4 decision).

[131] Ibid., 33.

According to Denniston, the majority opinion was "curious" in two aspects: it did not specify what constitutional test the five justices applied to make a claim of gay and lesbian equality, and so, it failed to specify what burden those challenging the constitutional bans on same-sex marriages had to satisfy before gaining the right to equality.[132] In fact, Chief Justice John Roberts, in his dissenting opinion, argued that the "Constitution does not enact any one theory of marriage"; rather, "[t]he people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition."[133] In other words, Justice Roberts saw the majority as usurping the democratic process by which the people acting through their elected representatives in state governments decide the issue of marriage equality.

Related to this argument, the Chief Justice criticized the majority for acting inappropriately like a legislature because

> Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law … Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.[134]

Roberts also raised the concern that the *Obergefell* decision could be used to support plural marriages.[135]

All four dissenting justices in their separate opinions discussed the impact of the marriage equality decision on the First Amendment's freedom of religion.[136] Their concern was over the intrusive effect of the *Obergefell* ruling on the religious liberty of those whose faith rests on marriage as

[132] Denniston, "Opinion Analysis: Marriage Now Open," *SCOTUSblog*.

[133] *Obergefell v. Hodges*, S. Ct., (2015) (Roberts, C.J. dissenting).

[134] Ibid., 2.

[135] Brian Resnick, Lauren Fox, and Dustin Volz, "Why Four Justices Were against the Supreme Court's Huge Gay Marriage Decision," *National Journal*, last modified June 26, 2015, accessed July 4, 2015, http://www.nationaljournal.com/domesticpolicy/marriage-same-sex-gay-supreme-court-dissent-20150626.

[136] Lawrence Hurley, "Supreme Court's Landmark Ruling Legalizes Gay Marriage Nationwide," *Reuters*, last modified June 27, 2015, accessed July 3, 2015, http://www.reuters.com/article/2015/06/27/us-usa-court-gaymarriage-idUSKBN0P61SW20150627.

an institution that is open only to heterosexual couples.[137] Under separate cover, the First Amendment protects clergy members from having to officiate at gay or lesbian marriages or from making the sanctuaries in their houses of worship available for same-sex couples to marry.[138] However, what is unclear, according to Masci, is whether the non profit organizations belonging to religious institutions that oppose same-sex marriages, such as hospitals, universities, and charities, can legally decline to accommodate gay and lesbian couples. For example, Chief Justice Roberts, in his dissenting opinion, said, "Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples."[139] Moreover, Denniston reports that several state legislatures have begun to enact measures to give businesses and others the legal right not to accommodate same-sex couples.[140] Given these conflicting judicial interpretations of liberty and the political backlash to the Supreme Court's *Obergefell* decision, the constitutional debate over the moral, social, and political dimensions of marriage in the USA is far from over.

Implications for the Constitutional Stewardship of Career Public Servants

Postmodern federalism makes a difference to citizens where they live because states vary in their civil rights protections and standards of public morality. Furthermore, the uncertainties of their rights under postmodern federalism as well as the judiciary's expansion of tort law have generated a tendency for the willingness of Americans to sue for their rights. Since the 1980s, the federal courts have held career public servants legally liable for constitutional torts.[141] Constitutional torts are "acts committed by public

[137] Denniston, "Opinion Analysis: Marriage Now Open," *SCOTUSblog*.

[138] David Masci, "How the Supreme Court's Decision for Gay Marriage Could Affect Religious Institutions," Pew Research Center, last modified June 26, 2015, accessed July 4, 2015, http://www.pewresearch.org/fact-tank/2015/06/26/how-a-supreme-court-decision-for-gay-marriage-would-affect-religious-institutions/.

[139] *Obergefell v. Hodges*, S. Ct. 2015, 28 (2015) (Roberts, C.J., dissenting).

[140] Denniston, "Opinion Analysis: Marriage Now Open," *SCOTUSblog*.

[141] To enforce liability, the Supreme Court shifted from the standard of absolute immunity to the standard of qualified immunity for the official actions of public servants (except legisla-

officials or public employees within their official responsibilities that violate the constitutional rights of individuals in ways that can be remedied by civil suits for money damages."[142] The Supreme Court used Section 1983 of the 1871 Civil Rights Act, as amended by the Congress in 1982, to vindicate citizens' privacy rights and to protect individuals from unconstitutional administrative actions.

At the same time, the federal judiciary adopted the deterrent of personal liability to achieve broad social goals rather than corrective justice among litigants.[143] Thus, civil liability has been expanded throughout the legal system so that anyone can be sued—doctors or public officials, landlords or social hosts, or government agencies or product manufacturers.[144] This impact of postmodern federalism reinforced the litigious spirit of the American people. Moreover, the federal judiciary became the institutional shelter for securing their liberty and equality in the early twenty-first century.[145]

Therefore, knowledge of American constitutional law is a minimum requirement for all career public servants to develop constitutional competence necessary to fulfill the leadership role of constitutional stewards.[146] However, the Supreme Court's expansion of tort law may influence public servants to perform their duties without duly caring for the important task of securing the constitutional freedoms of all Americans. In particular, Rosenbloom identifies two limits of constitutional law that may discourage career public servants from acting as constitutional stewards.[147] The first

tors and judges). This interpretation meant that public officials cannot be sued for monetary damages if they acted in good faith. The federal courts also expanded the constitutional rights of public employees, customers or clients, prisoners, mental health patients, property owners, and governmental contractors (including non profit agencies), thereby increasing the potential for tort violations (Rosenbloom 2012, 108).

[142] David H. Rosenbloom, "Public Employees' Liability for 'Constitutional Torts'," in *Public Personnel Management: Current Concerns, Future Challenges*, ed. Norma M. Riccucci, 5th ed. (Glenview, IL: Longman, 2012), 105.

[143] Ibid., 115.

[144] Peter Schuck cited in Rosenbloom, "Public Employees' Liability for 'Constitutional," in *Public Personnel Management: Current*, 106.

[145] Peterson, *The Price of Federalism*.

[146] David H. Rosenbloom and James D. Carroll, *Toward Constitutional Competence: A Casebook for Public Administrators* (Englewood Cliffs, NJ: Prentice Hall, 1990).

[147] David H. Rosenbloom, "The Constitution as the Basis for Administrative Ethics," in *Essentials of Government Ethics*, ed. Peter Madsen and Jay M. Shafritz (New York, NY: Meridian Book, 1992).

limit is that career public servants who are not direct parties to a case may not adjust their practices to comply with evolving constitutional law. For example, a ruling of one federal circuit court does not extend to another federal circuit. Thus, career public servants in one circuit do not have to change their practices to comply with the decisions of another circuit. Although non-compliance may be a safe tactic when the federal circuit courts disagree, it is unethical if the conditions found as unconstitutional in one circuit exist in another.[148] The second limit of constitutional law identified by Rosenbloom is that it only provides the minimum of acceptable behavior at a particular moment, and it can be revoked decades later. In other words, future generations can evaluate the civil rights interpretations of the Second Reconstruction or the Supreme Court's marriage equality ruling as unethical. The second limit inheres in constitutional law. For this reason, Rosenbloom advises career public servants to view the Constitution as an important but incomplete moral and political guide.[149]

Given these limits of constitutional law, the constitutional thinking of career public servants is vital. Figure 8.1 presents a constitutional stewardship action planner. Specifically, the action planner provides guidelines on how to apply the values of liberty, justice (due process as fairness), and equal protection based on the First, Fifth, and Fourteenth Amendments. It draws their attention to prevent discriminatory impacts on groups in American society caused by arbitrary, capricious, or malicious governmental action. Finally, the action planner helps career public servants balance their contending obligations to individuals and the general public (who authorized the Constitution) with the institutional interests of government.

As shown in Fig. 8.1, the constitutional thinking of career public servants begins with an assessment of whether a policy, program, or practice treats a group of individuals differently, and if so, whether this different treatment constitutes a violation of equal protection under the Fourteenth Amendment. [150] This assessment uncovers the possibility of an

[148] Ibid.

[149] Ibid., 64.

[150] Classification and intention are critical to an assessment of equal protection. Based on Title VII of the 1964 Civil Rights Act, the Supreme Court in its *Griggs* ruling developed the standards of disparate treatment and disparate impact. Disparate treatment occurs when discrimination affects a particular individual because of race, color, religion, sex, national origin, or other protected trait. Disparate impact occurs when discrimination affects an entire category of individuals who are members of constitutionally protected classes, and the disparate

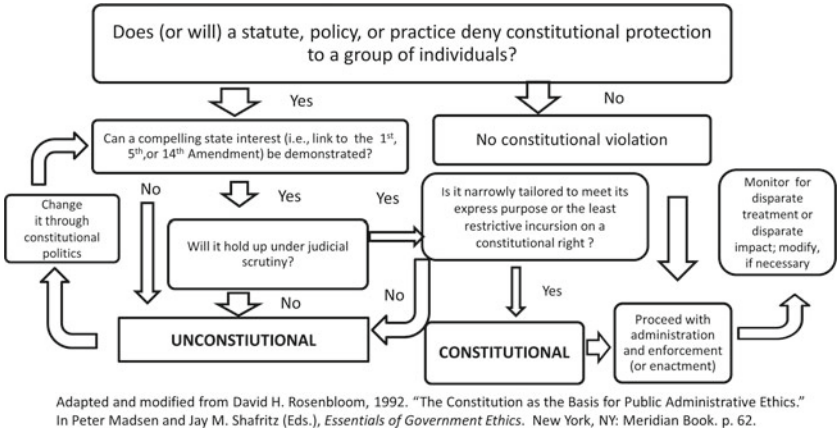

Fig. 8.1 Constitutional stewardship action planner (Adapted and modified from David H. Rosenbloom, 1992. "The Constitution as the Basis for Administrative Ethics." In Peter Madsen and Jay M. Shafritz (Eds.), *Essentials of Government Ethics*. New York, NY: Meridian Book, p. 62)

unconstitutional (and immoral) basis for taking government action against individuals. If different treatment exists, then career public servants are obliged to determine if a compelling state (i.e., government) interest exists. To determine a compelling state interest, the statute, policy, or practice must be scrutinized strictly in relation to the prevailing judicial precedents and interpretations of constitutional liberties, due process procedures, and equal protection requirements. Strict judicial scrutiny also includes an assessment of whether the statute, policy, or practice is narrowly tailored to meet its expressed purpose.[151] If the statute, policy, or practice survives strict judicial scrutiny, then it may be unconstitutional if it is not the least restrictive incursion on a constitutional right.[152]

effect is intentional (Dresang 2009). If evidence exists that two individuals are identically situated but treated differently, then the remedy is due process, not equal protection (Rosenbloom 1992, 61).

[151] Norma M. Riccucci, "Affirmative Action," in *Handbook of Human Resource Management in Government*, ed. Stephen E. Condrey, 3rd ed. (San Francisco, CA: Jossey-Bass, 2010).

[152] Rosenbloom, "The Constitution as the Basis," in *Essentials of Government Ethics*, 59.

Besides stimulating their constitutional thinking, Fig. 8.1 prompts career public servants to act. Action, says Cook, is vital because democratic public service is not a "contemplative enterprise"; the constitutional knowledge gathered by career public servants carries the obligation to act.[153] If their thinking indicates that the statute, policy, or practice is not a constitutional violation, then career public servants can proceed to enforce or implement it. Nevertheless, they are obliged to monitor the effects. If the implementation or enforcement process yields discriminatory effects, then they are guided to modify their behavior so that the statute, policy, or practice conforms to constitutional standards. Similarly, if the constitutional thinking of public servants reveals that the statute, policy, or practice is unconstitutional, they are prompted to engage in constitutional politics to change it. Career public servants who shirk constitutional politics may weaken democratic freedoms as well as law and order in American society, thereby potentially destabilizing not only their agencies but the American constitutional polity.

Another dimension of constitutional thinking may draw from the thick and thin morality of Americans (see Chap. 3). The analysis of DOMA revealed the effects of legal arguments that espoused the personal beliefs of legislators over the need to regulate deviant relationships. With the enactment of DOMA, the Congress legislated against gay and lesbian conduct in American society. By codifying heterosexual marriage as morally right conduct, DOMA signaled same-sex relationships were morally wrong and posed a societal danger, justifying the government regulation of the conduct of gays and lesbians.[154] Legal arguments focusing on personal conduct, such as intimate conjugal relations, not only draw on First Amendment protections securing liberty but also tap into the thick moralities about how Americans can freely run their personal lives.

Thus, governmental intrusions into the domain of thick morality are controversial and likely to provoke a backlash. As Koppelman reports, violence against gays and lesbians is a fact of American life.[155] In contrast,

[153] Brian J. Cook, "Regime Leadership and New Public Governance," in *New Public Governance: A Regime Perspective*, ed. Douglas F. Morgan and Brian J. Cook (Armonk, NY: M.E. Sharpe, 2014), 236–7.

[154] Toni M. Massaro, "Gay Rights, Thick and Thin," *Stanford Law Review* 49 (November 1996).

[155] Andrew Koppelman, "Discrimination against Gays in Sex Discriminati," in *Marriage and Same Sex Unions: A Debate*, ed. Lynn D. Wardle, et al. (Westport, CT: Praeger, 2003), 216.

the repudiation of DOMA by its federal sponsors—Congressman Barr and President Clinton—and the Supreme Court's *Windsor* ruling all invoked thin moral arguments. These legal expressions associated with the constitutional value of equality and equal protection of citizens under the Fourteenth Amendment. This shift from thick to thin morality transformed and moderated the public debate over DOMA. As discussed in Chap. 3, thick morality wrapped in thin moral expressions can ameliorate social conflicts by facilitating temperate political responses in pluralist American society.[156]

The discussion of DOMA also showed that changes in social conditions and the empirical facts associated with legislation may alter constitutional law. Findings from the Gallup Poll yielded verifiable evidence of a significant shift in American society toward marriage equality. The authoritative decisions permitting same-sex marriage happened in twenty-nine states (out of thirty-six) between 2012 and 2014, after empirical poll data revealed demonstrable public support for marriage equality. Acknowledging the shift in American society toward marriage equality, the Supreme Court narrowly ruled in favor of marriage equality, but this decision was a temporary settlement over a controversial social and political issue.

Given the evolution of American society and the dynamics of constitutional law, career public servants may engage in thought experiments using the constitutional stewardship action planner. To illustrate, I will use the constitutional confusion over marriage equality that existed prior to the Supreme Court's *Obergefell* decision. Given that the Supreme Court ruled in *Windsor* that DOMA Section 3's intentionally discriminated against gay persons, career public servants must determine if a compelling state interest exists. The growing acceptance of same-sex marriage in American society suggests that gay and lesbian couples are no longer viewed as posing a social danger requiring intrusive government regulations. Therefore, career public servants must determine if DOMA meets the standard of strict judicial scrutiny. According to Koppelman, surviving strict judicial

[156] Similarly, when Lyndon Johnson narrowed the scope of the seminal 1957 Civil Rights Act, he removed from the law the thick morality associated with the freedom of Southerners to practice their racially segregated way of life under the states' rights doctrine. Instead, Johnson crafted the legislative majority around the thin morality of advancing the voting rights of all Americans. In this way, Johnson mitigated the conflict over civil rights and overcame the political resistance of Southern Democratic leaders, thereby facilitating its passage.

scrutiny is unlikely for DOMA, rendering the entire law as unconstitutional.[157] Given this assessment, the constitutional stewardship action planner guides them to engage in constitutional politics within their sphere of action to change the law in their jurisdictions.

In conclusion, the three chapters of Part III discussed the great political ideas and the normative values of the collective American identity institutionalized in the US Constitution. Part III also showed the history of political-ethical progress to secure and extend the civil rights of Americans. This historical analysis revealed the challenges of balancing the contending constitutional values of liberty and equality, addressing changing legal interpretations of federalism, and overcoming explosive political backlashes to controversial judicial interpretations of democratic freedoms. Given these challenges, the work of career public servants to protect and extend the constitutional freedoms of Americans is ongoing and never fully realized. Furthermore, career public servants must remain mindful and dedicated to defending and nurturing the US constitutional system not just in the legal and political arenas of American government but in the bureaucratic governance processes of administrative agencies. Consequently, the focus of Part IV of this book is on the political ethics of public service in bureaucratic governance.

[157] Koppelman, "Discrimination against Gays in Sex Discriminati," in *Marriage and Same Sex Unions*, 217.

PART IV

Political Institutions and Democratic Public Service: Balancing Liberty and Authority in Bureaucratic Governance

CHAPTER 9

Bureaucratic Governance Perspectives and Democratic Public Service: Institutional Ideals and Threats

The [public] administration of government, in its largest sense, comprehends all the operations of the body politic, whether executive, legislative, or judiciary; but in its most usual and perhaps its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department.

Publius (Alexander Hamilton), Federalist Paper #72

Miles' Law: Where you stand depends on where you sit.

Rufus E. Miles, Jr.

Part IV of this book focuses on the political ethics of public service in bureaucratic governance. Its three chapters examine the constitutional debate concerning the liberty of citizens against the backdrop of how career public servants exercise governmental power in the political institutions of bureaucratic governance. As noted in Hamilton's epigraph, governmental power operates through democratic public service (also known as public administration), most precisely in the executive-branch bureaus of the US constitutional system.[1] As Goodsell argues, democratic public administration emerges "organically" rather than directly from the US Constitution by anticipating the creation of America's first viable national system of

[1] Clinton Rossiter, ed., *The Federalist Papers: Alexander Hamilton, James Madison, John Jay* (New York, NY: Mentor Books, 1961), 435.

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V. Vogelsang-Coombs, *The Political Ethics of Public Service*,
DOI 10.1057/978-1-137-49400-9_9

governance.[2] According to Norton Long, the American public service, as a political institution, is more democratic in its composition and more representative of the American people than the popularly elected Congress.[3]

This chapter analyzes the institutional relationships of office holding within the democratic public service. Specifically, it looks at the ways in which career public servants function inside the executive-branch agencies in governing the American people. Three assumptions underpin this chapter. The first assumption is that all sizes and types of agencies have moral responsibilities, as do all of the public servants who hold the offices within them. The second assumption is that career public servants exercise moral thinking and political judgment whether they govern from the perspective of the top, the middle, or the street-level of their agencies. The third assumption is that the political ethics of public service takes into account the institutional ideals and dilemmas as well as the ethics and accountability relationships peculiar to bureaucratic governance.

The bureaucratic institutions of American public service arrange the public offices of the executive branch hierarchically. Thus, every bureaucratic official has superiors, subordinates, and equals. For Anthony Downs, the superior-subordinate relationship is the most important because supervisors inside the bureaucracy control their subordinates' chances of a higher salary, promotions, and success in advancing their preferred policies, practices, or programs.[4] Consequently, this chapter concentrates on the working relationships between career public administrators and their politically appointed superiors inside the executive-branch bureaus of American government.

Also known as public administrators or civil servants, career public servants are permanent (tenured) officials hired or selected into the classified civil service systems of their agencies. Given their permanence, they are the workhorses of American government. By contrast, their superiors are short-

[2] Charles T. Goodsell, *The New Case for Bureaucracy* (Thousand Oaks, CA: CQ Press/Sage, 2015), 140.

Goodsell's argument is the crux of the document, known as the Blacksburg Manifesto that was formulated by the public administration faculty of Virginia Tech in 1982. The Blacksburg Manifesto has stimulated scholarship centered on the refounding of democratic public administration as a constitutional profession, despite the anti-government rhetoric prevalent in the late twentieth century. A noteworthy example is the article by Richard Green et al. (1993) about reconstituting a profession in American public administration.

[3] Norton E. Long, "Bureaucracy and Constitutionalism," in *The Polity*, ed. Charles Press (Chicago, IL: Rand McNally, 1952), 71–2.

[4] Anthony Downs and Rand Corporation, *Inside Bureaucracy* (Boston, MA: Little, Brown & Co., 1967), 80.

term (temporary) political executives; most are the appointees of elected officials placed into the unclassified offices above the civil service system. Given that governmental hierarchies are complex organizations, they are not the same from top to bottom.[5] Thus, political executives at the top of hierarchical executive-branch bureaus live in a world different from that of their subordinate career public servants. The vocation of political executives is politics, and they fight for causes inside their assigned bureaus, based on the partisan agenda of the elected officials who appointed them. By contrast, career public servants are full-time bureaucratic officials dedicated to impartial and nonpartisan administration, and, in theory, they do not fight back against their political superiors. According to Max Weber, the honor of career bureaucrats is vested in their ability to follow the orders of their superior authorities, even if incorrect, as though those orders agreed with their personal convictions.[6] This vocational difference leads to a clash of governing perspectives.

On the one hand, the perspective of political executives is that of organizational change-agents, and they strategically adapt their bureaus to accommodate political, economic, and cultural changes occurring in American pluralist society, based on the mandates of their partisan-political sponsors. On the other hand, the perspective of career public servants is to maintain the stability and continuity of the day-to-day functions of government. The interplay between career public servants and their politically appointed superiors in bureaucratic governance is fraught with conflicts concerning operating values, time frames, and controls over administrative processes. Moreover, these tensions inhere in the institutional structure of democratic public service, creating dual governance centers inside the executive branch agencies.[7] This dualism may generate such distrust and conflict between career public servants and their political superiors that they become institutional strangers.[8] Nevertheless, career public servants need political executives in bureaucratic governance, and vice versa.

The plan of this chapter is as follows. First, the constitutional heritage and the institutional ideals, and the ethics and accountability relationships of

[5] James D. Thompson, *Organizations in Action: Social Science Bases of Administrative Theory* (New Brunswick, NJ: Transaction Publishers, 2003).

[6] Max Weber, "Politics as a Vocation," in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills, trans. H. H. Gerth and C. Wright Mills (New York, NY: Oxford University Press, 1958), 95.

[7] Vera Vogelsang-Coombs and Marvin J. Cummins, "Reorganizations and Reforms: Promises, Promises," *Review of Public Personnel Administration* 2, no. 2 (Spring 1982).

[8] Hugh T. Heclo, *A Government of Strangers: Executive Politics in Washington* (Washington, DC: The Brookings Institution, 1977).

office holding associated with democratic public service are analyzed because they are an integral part of the interplay between career public servants and their political superiors in bureaucratic governance. Second, the chapter analyzes the clash of governing perspectives and the necessity for career public servants to engage in administrative politics, thereby exacerbating the conflict and estrangement between them and their political superiors—and the public. Next, the chapter discusses the ethical and political dilemmas peculiar to bureaucratic governance that threaten the institutional ideals of democratic public service. These threats underpin partisan-driven civil service reforms that transform the estranged relationship between career public servants and their political superiors into institutional enemies. The chapter's last section analyzes the dilemmas emerging from the representational and organizational characteristics of bureaucratic office holding that may breed institutional pathologies threatening the liberty of American citizens.

Understanding Democratic Public Service

Before career public servants can ease the governance differences, they have with their political superiors, understanding how democratic public service fits under American constitutionalism is necessary for them. As shown in Fig. 9.1, democratic public service has three components: the constitutional heritage, political institutions, and the ethics ideals and accountability relationships of institutional office holding. Each component is discussed in turn.

The American Constitutional Heritage

The first component of democratic public service is the American constitutional heritage. As discussed in Part III of this book, the constitutional system provides practices from past generations that have established the American constitutional heritage of political freedom. This constitutional heritage is much more than the literal text of the Constitution or constitutional laws. The Constitution is both a contract and a covenant by which career public servants conduct "the people's business."[9] As a contract, the Constitution gives career administrators the rules of the game designed to secure the blessings of freedom for all Americans.[10] Given that career

[9] John A. Rohr, *Ethics for Bureaucrats: An Essay on Law and Values*, 2nd ed. (New York, NY: Marcel Dekker, 1989).

[10] Michael W. Spicer, *In Defense of Politics in Public Administration: A Value Pluralist Perspective* (Tuscaloosa, AL: University of Alabama Press, 2010).

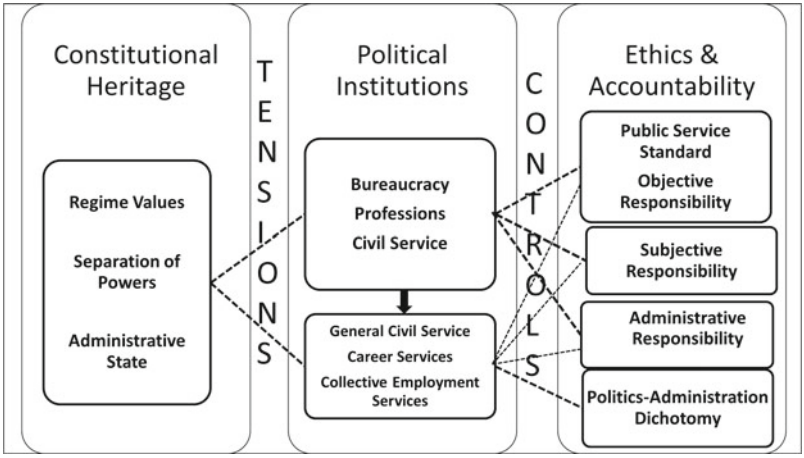

Fig. 9.1 Understanding democratic public service

public servants take an oath to defend the Constitution, their promise to uphold the American constitutional regime is paramount.

As a covenant, the Constitution expresses the core substantive and procedural values of American society—liberty, equality, property (or happiness), and justice, as well as the rule of law, individual rights, and due process, respectively.[11] These regime values shape the expectations that Americans have about the purpose of government and the methods by which they are governed. At a deeper level, the regime values reflect the beliefs, passions, and principles that tie Americans together as free citizens.[12] What is most important, the regime values of the American constitutional heritage connote what Americans believe it means to be a civilized human being. For these reasons, the Constitution's regime values are normative for career public servants and supplement the operational values of administration, such as efficiency and effectiveness. Most importantly, the Constitution's regime values give career public servants second-order reasons on which to base their moral thinking and political judgments on the job (see Chap. 4).

[11] David H. Rosenbloom and Joshua Chanin, "What Every Public Personnel Manager Should Know about the Constitution," in *Public Personnel Management*, ed. Richard C. Kearney and Jerrell Coggburn, 6th ed. (Los Angeles, CA: Sage/CQ Press, 2016).

[12] Rohr, *Ethics for Bureaucrats: An Essay.*

Whereas the Constitution's regime values are the moral foundation of democratic public service, the constitutional separation of powers is its political foundation. As discussed in Chap. 6, the US Constitution (and most state constitutions) institutionally separates the three functions of the federal government—to legislate, execute, and adjudicate—in different branches: the Congress, the bureaucratic agencies headed by the President, and the Supreme Court, respectively. The separation of powers, however, is not absolute because the constitutional checks and balances result in institutional power sharing among the three branches of government.[13]

Although the constitutional checks and balances place the three branches in tension with each other, the Constitution is silent about how to prioritize them.[14] In fact, the three branches of government are not co-equal because of macro-level political power shifts over time. As discussed in Part III of this book, the Congress was the preeminent branch at the federal level and eclipsed the Presidency in the nineteenth century, while the Supreme Court was at its lowest point in its history.[15] In the twentieth century, the industrialization and urbanization of the USA, along with the nationalization of American politics, dramatically expanded the scope, size, and power of the executive agencies of the federal government, making it the preeminent branch. This executive-branch hegemony over the other two branches has created what Dwight Waldo (1984) calls "the administrative state."[16] A similar phenomenon exists at the state and local levels of American government due to the explosive growth in scope and employment stimulated in part by the federal government's policy of devolution in the late twentieth century. The dynamic relationship of the three branches in the American administrative state is an institutional expression of the living Constitution.[17]

[13] Richard P. Nathan, *The Administrative Presidency* (New York, NY: John Wiley & Sons, 1983).

[14] David H. Rosenbloom, "Reflections on Public Administration Theory and the Separation of Powers," *American Review of Public Administration* 43, no. 4 (May/June 2013): 386.

As Rosenbloom notes, overlapping governmental functions also exist in the judiciary when the justices formulate remedial law or set standards for institutional reform, and then oversee their execution; similarly legislatures have adjudicatory functions in their impeachment power and managerial functions in their personnel systems and internal budgeting.

[15] Herman C. Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs, NJ: Prentice-Hall, 1984), 12.

[16] Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration*, 2nd ed. (New York, NY: Holmes & Meier Publishers, 1984).

[17] Rohr, *Ethics for Bureaucrats: An Essay.*

Michael W. Spicer, "Public Administration, the History of Ideas, and the Reinventing Government Movement," *Public Administration Review* 64, no. 3 (May/June 2004).

Political Institutions

Political institutions are the second component of democratic public service in the USA. As the infrastructure of democratic public service, political institutions give meaning to the constitutional principle of the people as the democratic sovereign.[18] Thus, citizens participate in bureaucratic governance in and around the offices of political institutions; their encounters with bureaucratic officials affect how much (or how little) freedom and mobility citizens have in their daily living (see Chap. 10). As shown in Fig. 9.1, three political institutions prevail in democratic public service—the bureaucracy, the professions, and the civil service system. The following discussion analyzes each institution as an ideal type.

Bureaucracy The qualitative and quantitative expansion of the administrative state has stimulated the bureaucratization of twentieth-century governments.[19] According to Weber, bureaucracies in the modern nation-state function on the basis of rational-legal authority as opposed to charismatic or traditional authority.[20] In the US context, the bureaucratization of executive branch agencies at all levels of government is a part of the evolution of the American constitutional polity.[21] The specific missions and organizational functions of executive-branch bureaus are assigned by the legislative branch. In effect, all public offices in the executive branches of American governments are set up to achieve public purposes consistent within the requirements of American constitutionalism.[22]

Despite the vast range in purposes and functions, executive branch agencies share the following internal bureaucratic characteristics. First, the public offices of executive bureaus are organized hierarchically with a specialized division of labor, and their jurisdictional boundaries are set in

[18] James G. March and Johan P. Olsen, *Rediscovering Institutions* (New York, NY: Free Press, 1989), 160-2.

[19] Johan P. Olsen, "Maybe It Is Time to Rediscover Bureaucracy," *Journal of Public Administration Research and Theory* 16, no. 1 (March 2006).

[20] Max Weber, "Bureaucracy," in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills, trans. H. H. Gerth and C. Wright Mills (New York, NY: Oxford University Press, 1958).

[21] Long, "Bureaucracy and Constitutionalism," in *The Polity*, 817.

[22] Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (New York, NY: Oxford University Press, 1982), 23.

statutes or administrative regulations. Given the hierarchical arrangement of offices, the executive bureaus have personnel systems of graded positions in which higher-level bureaucrats supervise, motivate, and control the performance of lower-level subordinates. Second, bureaucratic officials are hired by a superior authority, and their work life is separated from their private lives.[23] As depersonalized officials, bureaucrats are trained as impartial experts; they use their technical expertise and knowledge of the files (written documents and institutional history) to execute their duties based solely on functional (objective) considerations.[24] The means of production, that is, administration, are concentrated in and belong to the bureaucratic offices.[25] Due to the insular nature of bureaucracy, many operations are not visible to the general public. The incognito functions separate bureaucratic officials from outsiders. The separation of bureaucrats from outsiders is exacerbated by the former's tendency to monopolize information and to keep their intentions about how they will use their knowledge a secret.[26] For this reason, bureaucrats are often criticized for their lack of responsiveness.

Third, bureau management uses standardized operating procedures and legal rules to establish categories for activities, cases, and encounters with citizens as clients.[27] This rational-technical management includes rating procedures by which bureaucratic supervisors discipline and control the performance of their subordinates. At the same time, bureau management creates a stable work environment so that line bureaucrats can perform their jobs efficiently and without outside interference.[28] Weber uses the metaphor of a permanent machine to describe the technical superiority and stability of bureaucracies.[29]

Fourth, bureaucratic officials enjoy lifetime employment, have organized career paths, and receive salaries and pensions. In contrast, political executives located at the top of executive-branch bureaus have short-term periodic appointments that match election cycles. The bureaucrats' tenure for life reinforces their independence and separation not just from society but also

[23] Thompson, *Organizations in Action*.
[24] Weber, "Bureaucracy," in *From Max Weber: Essays*, 198–204.
[25] Ibid., 221–4.
[26] Ibid., 233.
[27] Olsen, "Maybe It Is Time."
[28] Thompson, *Organizations in Action*.
[29] Weber, "Bureaucracy," in *From Max Weber: Essays*, 228–30.

from the political executives at the top of their agencies.[30] By accepting their positions, bureaucrats are obligated to perform their official duties impartially, and in exchange, they enjoy job security and an esteemed (elite) position in society. Given these characteristics of bureaucracy, office holding by bureaucrats, according to Weber, is not only a career but also a way of life.[31]

The Professions Collectively, the professions are the second political institution shaping democratic public service in twenty-first-century America. The professions are distinctive from other occupational groups. According to Magali Larson, the cognitive, normative, and evaluative dimensions of the professions distinguish them.[32] The cognitive dimension in Larson's framework emphasizes the specialized knowledge and techniques that professionals apply in their work. Professionals develop expertise in their fields through intensive academic preparation (that includes a theoretical component), continuing education, and the achievement of certifications and licenses. They qualify for professional status based on peer-reviewed objective tests to demonstrate their competence.

The normative dimension of Larson's professionalism framework covers the service orientation of professionals toward their clients that includes the strict adherence to a code of ethics adopted by their professional associations, licensing boards, and accrediting organizations. These ethics codes define the behavioral standards by which the competence of professionals can be judged. They also specify the ethical duty of professionals to put the interests of their clients ahead of their own. Included in this ethos is the expectation for professionals to hold themselves accountable and to correct their own mistakes. The purpose of this service orientation is to give clients the confidence to empower professionals to advise them in situations where they are confused or feel incompetent.[33] In practice, the service orientation of the professions emphasizes unique personal interventions.

[30] Ibid., 202.
Thompson, *Organizations in Action*.
[31] Weber, "Bureaucracy," in *From Max Weber: Essays*, 198.
[32] Magali Sarffati Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley, CA: University of California Press, 1977), xi–xiii.
[33] Ibid.

The evaluative dimension of Larson's professionalism framework underscores the autonomy and prestige that American society gives to the professions. In particular, political authorities grant the privilege of self-regulation to those professions, such as doctors and lawyers, which are dedicated to serve the public. Consequently, most professions not only control their own work, but also have the power to set the standards for including (or excluding) practitioners in their membership. Furthermore, professionals get protection from outside evaluation due to their professional hegemony. Professional hegemony assumes that "no one outside—no amateur—is equipped to judge or even to understand the true content of the profession or the ingredients of merit in its practice."[34] Larson notes that the safeguards offered to the public in exchange for the public trust bestowed on self-governing professions are inseparable from the moral character of individual practitioners.

In the US context, most professionals are connected to government as employees of the executive branches of government. Specifically, the growth of professional occupations in government grew dramatically after World War II as a result of military-related technological innovations and the development of new occupational specializations.[35] In fact, the Bureau of Labor Statistics reports that 821 occupations exist in American governments, and the federal government alone employs 441 different professions.[36] Specifically, five occupations dominate at the national, state, and local levels of government in 2014—K-12 teaching professionals, police officers, fire service personnel, postal workers, and correction officers. For these occupational groups, public administration is not their primary professional affiliation. Therefore, it is no surprise that Judith Gruber's study revealed that career public servants rarely connected their work to the operation of democracy and the public service.[37] In effect, loyalty to democratic public service as a profession resides in the secondary moral identity of most public servants (see Chap. 3).

[34] Mosher, *Democracy and the Public*, 134.

[35] Dennis L. Dresang, *Personnel Management in Government Agencies and Nonprofit Organizations*, 5th ed. (New York, NY: Pearson Education, 2009).

[36] Bureau of Labor Statistics (BLS), "Occupational and Wage News Release," U.S. Department of Labor, last modified April 1, 2014, accessed December 7, 2014, http://www.bls.gov/news.release/ocwage.htm.

[37] Judith E. Gruber, *Controlling Bureaucracies: Dilemmas in Democratic Governance* (Los Angeles, CA: University of California Press, 1986), 101–2.

The Civil Service System The civil service system is the third political institution shaping democratic public service of the USA. Specifically, the bureaucratization and professionalization of the executive branches of American governments are funneled into their civil service systems. Also known as the merit system, the civil service system provides for a set of permanent, protected, and specialized bureaucratic officials, whose full-time employment is based on their demonstrated fitness to perform the assigned jobs of their agencies. Three merit principles underpin the civil service system—position classification, merit hiring, and equal pay for equal work.[38] Moreover, the civil service system operates on a non-discriminatory basis consistent with American constitutionalism. Accordingly, the hiring, promotion, and compensation of civil servants occur without reference to their political party affiliation, national origin, religion, sex, or physical disability.[39] Recognizing its public value, many states and local governments have adopted variations of the federal civil service system.

Ethics and Accountability Relationships of Bureaucratic Office Holding

Associated with democratic public service is a set of ethics standards and accountability relationships that routinize the institutional connections between career public servants and their political superiors. These standards also express the ideological reasons for legitimating the appointed

[38] Mosher, *Democracy and the Public*.

The following merit principles are the foundation of the civil service system. First, each civil service position is classified according to its occupational group based on the knowledge, skills, and abilities necessary to perform the job tasks, the level of difficulty, the level of discretion, and the responsibilities, including supervisory duties. Second, after positions are classified, the hiring of civil service employees is conducted on the basis of open and competitive examinations; the certification of fitness based on examinations avoids patronage and favoritism in hiring decisions (Dresang 2009). Third, the compensation principle means that civil servants engaged in comparable jobs receive equal pay (Berman et al. 2013).

[39] Donald F. Kettl, *The Politics of the Administrative Process*, 6th ed. (Thousand Oaks, CA: Sage-CQ Press, 2015).

members of the bureaucracy, the professions, and the civil service in bureaucratic governance. Most importantly, these standards aim at reinforcing public trust by instilling confidence into the American people in the worth of non-elected career public servants to govern them. However, as shown in Fig. 9.1, career public servants are governed by a panoply of ethical standards and accountability relationships that may pull them in opposite directions. Each ethical standard cited in the last column of Fig. 9.1 is discussed in turn.

Public Service Ethics and Accountability Relationships

The ethical standard to serve the public associates with the American constitutional heritage. This public service standard derives from the Constitution's Preamble and Tenth Amendment, wherein "the People" are cited as the ultimate source of sovereign authority. Consequently, the offices inside the executive-branch bureaus belong to the general public, not to the incumbents who hold them, and the accountability of all executive-branch office holders is to the constitutional system.[40] Loyalty to the interests of the citizenry as a whole (i.e., the democratic sovereign) is articulated as serving the public, and this standard has normative priority for all career public servants.[41] Therefore, all career public servants, as the government agents of "the People," hold their offices to care for the public and public interests.[42]

For example, Janet Denhardt and Robert Denhardt suggest that "service to the public" includes "helping people in trouble, making the world safer and cleaner, and helping children to learn and prosper, literally going where others would not go."[43] For the Denhardts, career public servants operationalize this public service standard by their willingness to be open to the needs of others. Furthermore, George Frederickson posits that social equity is a normative administrative priority for all career public servants in twenty-first-century governance. Career public servants give meaning to the value of social equity by acting as the moral agents for the

[40] Rohr, *Ethics for Bureaucrats: An Essay.*

[41] Mosher, *Democracy and the Public.*

[42] John Dewey, *The Public and Its Problems* (Athens, OH: Swallow Press, 1954).

[43] Janet Vizant Denhardt and Robert B. Denhardt, *The New Public Service: Serving, Not Steering* (Armonk, NY: M.E. Sharpe, 2007), xii.

public at large.[44] As moral agents for the public at large, career public servants are obliged to serve "the vulnerable, the dependent, and the politically inarticulate" in American society.[45]

In practice, the public service standard requires career public servants to explain and justify their decisions to the citizenry by going on the record.[46] Besides receiving praise or blame for their actions, career public servants, under this normative standard, are willing to correct their mistakes and accept sanctions for their misbehavior and abuse of power. According to James March and Olsen (1995), the assignment of causal praise or blame to bureaucratic office holders not only increases the frequency of administrative success but also reduces the frequency of failures in democratic governance.

Objective Responsibility and Bureaucratic Ethics

Based on their function as technically neutral instruments to administer the political decisions of elected officials, career bureaucrats are expected to uphold the standard of "objective responsibility." According to Weber, "a system of rationally debatable 'reasons' stands behind every act of bureaucratic administration, that is, either subsumption under norms or a weighing of ends and means."[47] Weber's interpretation of objective responsibility translates into procedural justice as long as the doctrines of "equality before the law" and the "demand for constitutional guarantees against arbitrariness" maintain an impersonal and rational character. For Herman Finer, objective responsibility means that there are external legislative controls over the conduct of career public servants: they act responsibly by following the directives of the elected representatives of the public "to the most minute degree that is technically feasible."[48] Mosher defines objective responsibility as "the responsibility of a person or an organization *to* someone else, outside of self, *for* something or some kind

[44] Dewey, *The Public and Its Problems.*

Terry L. Cooper, *An Ethic of Citizenship for Public Service* (Englewood Cliffs, NJ: Prentice-Hall, 1991).

[45] Carol W. Lewis and Stuart C. Gilman, *The Ethics Challenge in Public Service: A Problem-Solving Guide*, 2nd ed. (San Francisco, CA: Jossey-Bass, 2005), 79.

[46] Ibid., 92.

[47] Weber, "Bureaucracy," in *From Max Weber: Essays*, 220.

[48] Herman Finer, "Administrative Responsibility in Democratic Government," *Public Administration Review* 1, no. 4 (Summer 1941): 336.

of performance" (emphasis in the original).[49] The crux of this standard is that career public servants are prohibited from using their governmental authority to manage their own positions from a personal sense of right and wrong.[50] The reason is that the public offices of career bureaucrats belong to their agencies and the American people who authorized them through their legislative assemblies.[51]

Thus, career public servants are expected to follow the rules of their offices, the orders of their hierarchical superiors, and the organizational change initiatives of political executives appointed by elected officials, in addition to avoiding arbitrary actions based on their own personal preferences. However, Weber has a dim view of the objective responsibility standard because he describes the individual bureaucrat as "chained" to his rule-bound, specialized activities "by his entire material and ideal existence.[52] In the great majority of cases, he is only a single cog in an ever-moving mechanism which prescribes to him an essentially fixed route of march." Nevertheless, if career bureaucrats fail to follow the rules, disregard top-down directives, or personalize their performance, then their superiors can judge them as irresponsible and penalize them.[53] Still, as Olsen notes, the impartial technical solutions developed by bureaucratic agencies to address societal problems can produce multiple, contradictory, and socially disastrous outcomes.[54] Nevertheless, career public servants who impersonally execute the rules and follow the orders of their bureaucratic superiors may not be held responsible for adverse consequences of their actions.

Professional Ethics and Subjective Responsibility

The legitimacy of professionals to govern themselves rests on the foundation that their expertise is both socially recognized and politically sanctioned.[55] As discussed earlier, the professions vest trust in individual practitioners who are given freedom from external controls, except for

[49] Mosher, *Democracy and the Public*, 9.
[50] Goodsell, *The New Case for Bureaucracy*, 140.
[51] Larson, *The Rise of Professionalism*.
Rohr, *Ethics for Bureaucrats: An Essay*.
[52] Weber, "Bureaucracy," in *From Max Weber: Essays*, 228.
[53] Mosher, *Democracy and the Public*, 9.
[54] Johan P. Olsen, "Maybe It Is Time to Rediscover Bureaucracy," *Journal of Public Administration Research and Theory* 16, no. 1 (March 2006).
[55] Larson, *The Rise of Professionalism*, xvii.

peer-reviewed, state-sponsored entry examinations. According to Larson, the outside evaluation of professional practice is deemed "intolerable" and "illegitimate."[56] As a result, the individualism and autonomy of professional hegemony translate into the ethical standard of subjective responsibility. This standard allows professionals to hold themselves accountable to those to whom they feel personally responsible and to act consistently with what they feel is appropriately responsible conduct.[57] On applying the standard of subjective responsibility, professionals expect obedience from their clients. If clients trust and defer to the authority of professionals, then they are likely to receive exceptional service; if clients challenge the authority of professionals, then the latter may use their discretion to ignore or punish those whom they perceive as untrustworthy. For instance, Steven Maynard-Moody and Michael Musheno find that cops, teachers, and social workers apply this subjective responsibility standard as the street-level professionals of public bureaucracies.[58]

The licensing boards and professional associations of professionals are powerful influences in compiling and codifying the ethical standards and accountability relationships governing individual practitioners. Specifically, the licensing of professionals is done by the delegation of legal power to state boards composed almost exclusively of the members of the profession being regulated.[59] Consequently, Mosher finds that the human resource functions of executive-branch agencies play no part in the licensing process and exercise little influence on the professional standards and content of non-competitive, entry-level licensing examinations. Moreover, the biggest influence in teaching professional ethics and preparing professionals for licensing examinations is higher education. Thus, governmental agencies defer to university faculties to determine the knowledge, skills, and abilities appropriate for their graduates who deserve professional appointments.[60] In effect, the determination of the standards of subjective responsibility and professional ethics rests with professional elites, their professional associations and licensing boards, and the program faculty of professional programs of higher education, all of whom vigorously oppose

[56] Ibid., xii.

[57] Larson, *The Rise of Professionalism*.

Mosher, *Democracy and the Public*.

[58] Steven Maynard-Moody and Michael C. Musheno, *Cops, Teachers, Counselors: Stories from the Front Lines of Public Service* (Ann Arbor, MI: University of Michigan Press, 2003).

[59] Ibid., 137.

[60] Ibid., 140.

democratic politics as violating the creeds of professional hegemony or academic freedom.[61]

Administrative Responsibility and Civil Service Ethics

The American civil service (merit) system expresses the ideals of the American people as the democratic sovereign.[62] According to Mosher, the civil service system rests on the ideological foundation of American individualism (liberty) and egalitarianism. For Mosher, individualism connotes that career civil servants are measured on their own "merits" in competition with everyone else. Egalitarianism refers to a system in which civil servants provide equal treatment to all citizens regardless of the latter's family background, race, religion, social status, formal education, or political affiliation. Additionally, for Mosher, the civil service system rests on a faith in scientism, separatism, and unilateralism. By faith in scientism, Mosher means that career civil servants are working in correctly classified positions, and their merit-based performance is based on verifiable facts. Thus, as civil servants work to discover objective or technically correct solutions to public problems, they cast aside technical, legal, or scientific facts that are out of date or unrelated to their job performance. Separatism isolates the human resource function of the civil service system from other governmental functions so that civil servants can conduct their work "disinterestedly, scientifically, and independently."[63] Finally, the faith in unilateralism, for Mosher, means that the decisions of civil servants are final if they have reached them through proper procedures.

Furthermore, at the federal level, the civil service system is the institutional expression of the Protestant ethic.[64] The establishment of the civil service system in 1883 under the Pendleton Act made the merit-based work of the executive branch a moral imperative as well as a practical

[61] Ibid., 141.

[62] Ibid., 218–20.

[63] Ibid., 220.

[64] Drawn from Calvinism, the Protestant Ethic made it a religious duty for individuals to work hard and to use their secular resources efficiently and frugally; worldly success signified the eternal salvation of individuals. Max Weber argued that the Protestant Ethic's spirit of individualism and its ethos of self-help contributed to the economic success of Protestant groups and shaped the early stages of European capitalism.

Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (New York, NY: Scribner & Sons, 1958).

necessity.[65] Civil service advocates in the Progressive movement of the early twentieth century translated this moral imperative into the urgent need for government to eliminate patronage politics from public service because the spoils system granted political parties victorious in the election process the power to install unqualified partisan supporters into an array of bureaucratic offices. Once in office, these unqualified appointees engaged in discriminatory practices involving public works, the enforcement of laws, the granting of contracts, franchises and charters, as well as the distribution of benefits and subsidies to the campaign supporters of their political party.[66] Besides the Pendleton Act, the Congress institutionalized the morality of the merit principles into the Budget & Accounting Act of 1921 and the Hatch Act of 1939.[67]

Together, the three federal laws aimed at cleansing the national government of "the evils" of the spoils system that bred official corruption and produced administrative inefficiencies. Thus, as good government reforms, the three laws, respectively, centralized federal hiring to prohibit the placement of unfit (patronage) employees into the civil service, insured the neutral direction of the executive-branch bureaus, and protected qualified civil servants from arbitrary dismissal resulting from political influence. The congressional legislation also established the ethos of the American civil servant as a neutral, competent, and anonymous bureaucrat whose loyalty was to democracy and the public service as a whole.[68] This ethos signified that the civil service system functions as an apolitical institution with the duty to advance the general public interest rather than partisan political interests.

The Politics-Administration Dichotomy

The apolitical ethos of the American civil service has been generalized into the politics-administration dichotomy, and this dichotomy associates with the ethical standard of administrative responsibility. The dichotomy's intellectual roots are drawn from Woodrow Wilson's (1887) seminal essay, "The Study

[65] Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2, no. 2 (1887).

Mosher, *Democracy and the Public.*

[66] Herbert Kaufman, "Emerging Conflicts in the Doctrines of Public Administration," *American Political Science Review* 50, no. 4 (1956).

[67] Mosher, *Democracy and the Public.*

[68] Ibid., 67–70.

of Administration." Wilson argues that public administration is a science that must be "Americanized" and "inhale much free American air" by fitting into the great political ideas and the constitutional system of the USA. Specifically, Wilson defines American public administration as the systematic and neutral execution of public laws, and this administrative function is distinct from the political function of formulating public policies in legislatures. In effect, Wilson separates policy making—the political work of shaping public decisions—and administration—the detailed activities necessary to execute those policies.[69] Based on this conceptualization, elected politicians first determine the choices of what government does to address public problems, and they, then, delegate to impartial administrators the responsibility to determine the specific tasks necessary to execute the intent of their policy choices efficiently.[70] Furthermore, Wilson empowers responsible civil servants to use their "large powers" and "unhampered discretion" in impartial scientific administration under two conditions: first, they are accountable to the rule of law as set by elected officials; and second, their authority is hierarchically controlled by their supervisors and their agency heads.[71]

The politics-administration dichotomy is significant because its apolitical ethos is both time-bound and timeless. On the one hand, Wilson, the Progressive reformer, used this dichotomy to advocate for establishing a strong civil service corps at the local level of government. In Wilson's view, a strong civil service corps could countervail the corrupt political bosses whose patronage machines flourished in the nation's major cities in the early twentieth century.[72] By empowering neutral, protected, and efficiency-oriented career administrators in their apolitical reforms, Wilson and other Progressives sought not only to deprive the political machines of governmental outlets for their patronage resources but also to make public offices available to like-minded, morally oriented, civil service reformers.[73]

On the other hand, the politics-administration dichotomy is timeless in that its apolitical orientation has shaped generations of government officials.[74] Furthermore, as Cook observes, the American people have

[69] Ibid., 210–11.
[70] Kettl, *The Politics of the Administrative*.
[71] Wilson, "The Study of Administration," 213–14.
[72] Ibid., 201.
[73] Ibid., 210.
Kettl, *The Politics of the Administrative*, 61.
[74] Brian J. Cook, "Regime Leadership and New Public Governance," in *New Public Governance: A Regime Perspective*, ed. Douglas F. Morgan and Brian J. Cook (Armonk, NY: M.E. Sharpe, 2014).

accepted the apolitical ethos of the politics-administration dichotomy. By accepting this dichotomy as the ideal of good governmental administration, Americans perceive the executive-branch bureaus as "the pure instruments of the public will as expressed through other political institutions."[75] Consequently, career public servants and the general public both view politics and patronage in bureaucratic governance as a common enemy that must be opposed by a strong, neutral civil service corps.

Governance Perspectives and Administrative Politics

On shifting the analytical focus from the organizing ideals to the realities of democratic public service, a different picture emerges—the comingling of politics and administration. Although they loathe politics, career public servants are, nonetheless, steeped in administrative politics in their daily work lives. This section focuses on two sources of administrative politics in democratic public service: one stems from a clash of occupational perspectives and the other from a clash of functional perspectives. These perspectival clashes not only separate career public servants from their political superiors in bureaucratic governance but also weaken the institutional accountability of executive-branch agencies to the citizenry as a whole.

The Clash of Occupational Perspectives and Administrative Politics

The clash of occupational perspectives and administrative politics is due to the decentralization of the civil service system. For example, at the federal level, the civil service system has evolved into three merit systems—the general civil service, the career services, and the collective employment services. As will be shown, the career services and the collective employment systems are governed by a set of work rules that compete with those of the general civil service system.[76]

Specifically, the general civil service is composed of white-collar agency personnel whose positions are classified into fifteen grades under the General Schedule. These tenured civil servants are mostly involved in the

[75] Cook, "Regime Leadership and New Public," in *New Public Governance*, 199.
[76] Mosher, *Democracy and the Public*, ch. 6.

routine housekeeping or the back-office functions of government; their employment is administered in accordance with the previously discussed merit principles that emphasize rank-in-the-job. Thus, employment of general civil servants is determined by the level and difficulty of their positions.

The second merit system refers to the career services. The career services are composed of white-collar personnel in specialized careers within the general civil service. These tenured career public servants often function as autonomous elite professional corps within their agencies; two notable examples are health professionals of the Public Health Service are in the Department of Health & Human Services, and law enforcement professionals of the FBI are in the Department of Justice. In addition, the classification system within the federal career services has a track for the hiring of scientists and technical specialists engaged in non-administrative work. Thus, it is no surprise to find that the career services employ the majority of public administrators in the federal government and are the fastest growing sector of the federal civil service. According to the Partnership for Public Service and Booz Allen Hamilton, nearly two-thirds (or 65 %) of the 2.1 million of the federal civilian workforce in 2013 were employed in professional or administrative occupations. Besides growing by approximately 10 % between 1998 and 2013, most federal professional and administrative personnel were employed in defense- and security-related agencies.[77]

The collective employment services are the third merit system within the federal government. The collective employment services are composed of tenured blue-collar and some white-collar civil servants covered under collective bargaining agreements. Their employment is governed by the negotiations between representatives of public employee unions and their agencies or governmental jurisdictions. The emergence of organized labor within the executive-branch bureaus occurred in the 1960s and 1970s as a result of the increasing professionalization of governmental occupations. Concomitant to the legal recognition of employee organizations, civil servants gained the right to bargain collectively. The justification was that the general merit system deprived civil servants of the employment rights and privileges available to lay citizens.[78]

[77] Partnership for Public Service and Booz Allen Hamilton, "Building the Enterprise: A New Civil Service Framework," *Partnership for Public Service*, last modified April 1, 2014, accessed March 14, 2015, http://ourpublicservice.org/publications/viewcontentdetails.php?id=18.

[78] Mosher, *Democracy and the Public*, 194.

A hallmark of twenty-first-century democratic public service is the explosive growth of public employee unions. According to the Bureau of Labor Statistics, public-sector workers have a union membership rate (36 %) that is five times higher than that of private sector (7 %).[79] Specifically, in 2013, approximately one-third of the federal and state work forces were unionized (31 % and 34 %, respectively), as compared with 42 % of the local government workforce.

The Clash of Functional Interests and Administrative Politics

Administrative politics also pervades the executive-branch bureaus because of a clash of functional interests stemming from the survival needs of career public servants. In practice, career public servants are immersed in administrative politics to survive on a day-to-day basis.[80] Political conflict is pervasive inside the executive bureaus because career public servants have to compete for scarce budgetary allocations in order to implement the public policies, programs, and laws assigned to them. In other words, career public servants cannot depend on their subordinate positions in hierarchical bureaus to do their jobs effectively. Therefore, they may often find it necessary to cultivate political contacts outside their bureaus, such as friendly legislators or legislative staff on congressional oversight committees, in order to build an independent power supply.[81] In this way, career public servants can secure additional budgetary resources and authority from their legislative friends, while the latter can receive information from their agency allies to help with their reelection, policy, or political goals. Furthermore, in the twenty-first century, many executive-branch bureaus are involved in networks dedicated to shared public purposes. These networks connect career public servants with outside people, groups, and organizations that can provide them with resources and support unavailable through their agencies' formal chain of command. In

[79] Bureau of Labor Statistics (BLS), "Occupational and Wage News Release," U.S. Department of Labor, last modified April 1, 2014, accessed December 7, 2014, http://www.bls.gov/news.release/ocwage.htm.

[80] Hugh T. Miller, "Everyday Politics in Public Administration," *American Review of Public Administration* 23, no. 2 (June 1993).

Stephen K. Bailey, "Ethics and the Public Service," *Public Administration Review* 24, no. 4 (1964).

[81] Harold Seidman, *Politics, Position, and Power: The Dynamics of Federal Organization*, 5th ed. (New York, NY: Oxford University Press, 1998), 65–6.

effect, politics is, as Long aptly observes, the "lifeblood" of American public administration.[82] The significance is that politics insures the organizational success of career public servants in bureaucratic governance.[83]

Administrative politics also stems from what Bailey calls the "shifting sands of context."[84] Career public servants work under conditions that may change suddenly for a variety of reasons. One reason is the elections process produces new cohorts of politically appointed executives who arrive in the executive-branch bureaus with fresh policy mandates; the other reason is due to a dramatic shift in public opinion or interest group support for specific policies, programs, or services in their sphere of operations. Hence, a clash of functional interests emerges. On the one hand, the laws and ethos of the civil service require career administrators to provide loyal service to elected officials through their agency appointees regardless of their political affiliation and to carry out new top-down directives efficiently and impartially. On the other hand, it is common for elected officials to use their powers and resources, including their appointees in the executive-branch agencies, to advance their political causes and enhance their reelection prospects. This clash of functional interests raises the practical problem of conflicting personal and organizational loyalties for career public servants. If career public servants personally disagree with the policies or management practices of their politically appointed superiors, then the former may engage in "guerrilla government." Career public servants who engage in guerrilla government use their discretion to sabotage the wishes of their political superiors whom they perceive as disrespecting their expertise, illegitimately meddling with their professionalism, and immorally politicizing their agencies' public service missions.[85]

The Collapse of the Separation of Powers

Finally, politics stems from the "collapse" of the separation of powers in public administrative practice.[86] Given that the public policy purposes

[82] Norton E. Long, "Power and Administration," *Public Administration Review* 9, no. 4 (July/August 1949): 257.

[83] Kettl, *The Politics of the Administrative*, 3.

[84] Bailey, "Ethics and the Public," 238.

[85] Rosemary O'Leary, *The Ethics of Dissent: Managing Guerrilla Government* (Washington, DC: CQ Press., 2006), xi.

[86] David H. Rosenbloom, "Reflections on Public Administration Theory and the Separation of Powers," *American Review of Public Administration* 43, no. 4 (May/June 2013): 387.

codified in legislation are frequently ambiguous, it is up to the permanent career public servants in the executive-branch agencies to translate them into organizational priorities, administrative rules, and enforcement procedures.[87] A complicating factor is that the politically appointed executives at the top of executive-branch agencies often lack the technical knowledge and the capacity to control career public servants as the latter make this translation. Consequently, a continuous struggle exists between political executives and career public servants in bureaucratic governance because, as Weber posits, "The 'political master' finds himself in the position of the 'dilettante' who stands opposite the 'expert,' facing the trained official who stands within the management of administration."[88]

Frequently, as career bureaucrats translate laws and legislative policies into administrative actions, they may modify or create public purposes. Furthermore, under the authority of program implementation, career public servants may use their professional discretion to decide which segments of the public to include or exclude in the scope of governmental action. As Miller (1993) notes, they may use their independent professional judgment to classify citizens as either reassuring or threatening the status quo. Thus, career public servants may displace the legislative intent of public policies with bureaucratic interests, creating "a bureaucratization effect." Weber describes the bureaucratization effect as follows: "The final result of political action often, no, even regularly, stands in completely inadequate and often even paradoxical relation, to its original meaning."[89] This displacement of legislative interests for bureaucratic interests reflects Weber's concern over the "practically unshatterable" power of established bureaucracies that operate like "permanent machines."[90] Given their permanence, bureaucratic organizations not only maintain their own institutional interests but also expand their controlling influences in society. In effect, those who control bureaucratic performance, in turn, control the quality of the life for the mass of citizens.[91]

[87] Kettl, *The Politics of the Administrative*.

[88] Weber, "Bureaucracy," in *From Max Weber: Essays*, 232.

[89] Max Weber, "Politics as a Vocation," in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills, trans. H. H. Gerth and C. Wright Mills (New York, NY: Oxford University Press, 1958), 117.

[90] Weber, "Bureaucracy," in *From Max Weber: Essays*, 220.

[91] Ibid., 229.

Institutional Dilemmas that Challenge Democracy and the Public Service

The trends toward the professionalization and unionization of the civil service raise the institutional dilemma over the difficulties of harmonizing the principles and practices of the general merit system with those of the specialized career services and collective bargaining.[92] For example, the career services weaken the merit system's position classification and selection processes. Instead of vesting rank-in-the-job as in the general civil system, the career services vest "rank-in-the-person" consistent with the individualism of professional practice. In addition, the screening process for professional occupations dilutes the general civil service system because it emphasizes the "career promise" of individuals rather than their specific qualifications for their first position.[93] After they are hired into the career services, professional administrators advance based on planned employee development, in-service training, and progressive promotional opportunities, and they enjoy job security until they die or retire.[94] These features of the career services reinforce the creation of separate agency-centered executive systems within the civil service agencies. Thus, it is no surprise to find that professional civil servants in these elite corps identify more closely with their career service than with their agency employers or the public service as a whole. This "oneness" between career services and professional public servants is strongest in those agencies for which government is the single, if not the monopoly, employer.[95] For instance, career diplomats are more likely to see themselves as a part of the nation's

[92] Mosher, *Democracy and the Public*.

[93] Ibid., 165.

In the 1970s, the federal government established the Professional and Administrative Career Examination (PACE) for entry-level hiring in 118 occupations. After a successful court challenge, the federal government replaced the centralized PACE with the decentralized Administrative Careers with America (ACWA) examination. Dissatisfaction with ACWA led the federal government to establish the Federal Career Intern Program (FCIP). The FCIP program permits the federal government to hire career civil servants for 2 years in positions at grades 5, 7, or 9, after which the incumbents may qualify for permanent appointments. In 2008, 50 % of the professional and administrative hires in the federal government were through the FCIP program (Ban 2012, 140).

[94] Mosher, *Democracy and the Public*, 124.

Partnership for Public Service and Booz Allen Hamilton (PPS & BAH), "Building the Enterprise: A New Civil," *Partnership for Public Service*.

[95] Mosher, *Democracy and the Public*, 154.

Foreign Service instead of employees of the State Department. Similarly, at the local level, police forces are more likely to identify themselves as sworn peace officers rather than the public employees of a particular municipality.

The institutional challenges that unionization poses to the merit system are similar to the institutional challenges posed by the professionalization of the civil service. For example, the bilateral philosophy of the collective employment services eschews the unilateralism of the merit system because collective bargaining gives employees an equal voice to that of agency management in setting the terms, conditions, and rewards of employment. Unionization also modifies the merit system's ideal of individualism because the terms of employment are based on collective considerations rather than considerations of each person's merit in comparison with and in competition with others. Furthermore, in the extreme, unionization shifts the role of civil service agencies. Instead of protecting the public service from patronage politics, civil service agencies have become the defenders of industrial democracy and labor interests.[96]

Industrial democracy involves workers in sharing the decisions and governance of their workplaces. In the civil service, industrial democracy is a double-edged sword. On the one hand, unionization juxtaposes a system of employee participation against the mind-numbing effects of routinized work under authoritarian (hierarchical) rule.[97] By having employees participate in collective bargaining over the terms, conditions, and rewards associated with their employment, unionization, according to Michael White, has had two major positive impacts.[98] The first positive impact is that public employee unions have achieved improvements in the compensation, benefits, shift hours, caseloads, and physical working conditions of many public-sector employees, in addition to providing due process protections when they are involved in grievance and disciplinary proceedings. The second positive impact identified by White is that the unions provide a degree of accountability by preventing agency management from making arbitrary changes in the terms and conditions of employment.

On the other hand, industrial democracy displaces the constitutional heritage's broad regime values with narrower organizational interests,

[96] Ibid., 21.

[97] Ibid., 21, 212.

[98] Michael D. White, *Current Issues and Controversies in Policing* (Boston, MA: Prentice Hall, 2007), 137.

that is, those of public employees and public employers. Mosher identifies three dangers associated with industrial democracy's displacement of regime values. The first danger derives from the bilateral philosophy that underpins the collective services. This bilateral philosophy challenges the long-standing principle in constitutional law that a public job is a privilege and not a right as a private-sector job is a right.[99] Historically, the Supreme Court has ruled that public-sector employees had no right to public employment; therefore, public-sector employers could condition employment on reasonable terms, including the relinquishment of certain constitutional rights.[100] Thus, career public servants are held to a higher standard by requiring them to sacrifice some rights as private citizens in order to protect the sovereign will of the people. However, concomitant with the unionization of the civil service, the Supreme Court has shifted its stance, recognizing that public-sector employees retain certain constitutional rights when they entered public employment.[101] This shift in the legal interpretation of a public job from a privilege to a right weakens the merit system's principle of unilateralism because it challenges the finality of decisions reached through proper procedures. This shift also weakens the principle of equal treatment of each employee based on their merits because the terms of employment are determined upon collective considerations.[102]

The second danger identified by Mosher is that industrial democracy represents "*democracy within administration*" or "personal democracy," and it also challenges the principle of the people as the democratic sovereign (emphasis in the original).[103] Under the popular sovereignty principle, public organizations are set up to achieve public purposes, that is, the people's business; public organizations are authorized, legitimized, and empowered by external authorities comprising the people's elected

[99] Mosher, *Democracy and the Public*, 212.

[100] Rosenbloom and Chanin, "What Every Public Personnel," in *Public Personnel Management*.

[101] Specifically, the Supreme Court recognized that public employees retained the following constitutional rights—the freedom of speech, procedural due process, the freedom of association, and equal protection of the law (Rosenbloom and Chanin 2016). At present, the Court applies a public service model; while balancing employer and employee interests, this model defers to government's need to manage its workforce effectively and to provide public services efficiently (Hartman et al. 2010, 441–42).

[102] Mosher, *Democracy and the Public*, 213.

[103] Ibid., 23.

representatives. As Mosher points out, unionization undermines the ultimate power of citizens through their elected representatives "to control the destinies of government and the conditions whereby it employs its personnel."[104] In other words, collective bargaining gives public-sector employees and employers as administrative insiders the potential power to modify public purposes and to relax hierarchical arrangements that promote their self-interests and organizational interests over public interests.[105]

The third danger of unionization to democracy, for Mosher, is the significant political powers of public sector labor unions, such as the endorsements of candidates for elective office and the weapon of the strike.[106] As their political influence has grown, public employee organizations have pressed for changes in public policy, including changes in wages, hours, caseloads, and work conditions, all of which require legislative bodies to increase expenditures (and taxes). What Mosher finds remarkable is that the unions of professionals—school teachers, social workers, and police and fire personnel—are the most aggressive politically.[107] These unions, which prevail at the local level, are disposed to use their political powers militantly when faced with unresponsive elected officials and governing bodies. Through their political powers, militant employee organizations fighting for employee rights subvert the prerogatives of elected officials.[108] Chester Newland argues that the militancy of public employee unions has converted the culture of democratic public service in many jurisdictions into a culture of partisan political bargaining, clientele (patronage) interests, and self-interests.[109]

The last institutional dilemma challenging democracy and democratic public service derives from the representational and organizational characteristics of bureaucratic office holding. According to Dennis Thompson, career public servants "act *for* us" and simultaneously "act *with* others,"

[104] Ibid., 214.

[105] Ibid., 23.

As Kettl notes, collective bargaining at the federal level cannot cover matters of public law, government-wide rules or regulations, or an agency rule for which a "compelling need" exists.

[106] Mosher, *Democracy and the Public*, 207.

[107] Ibid., 213.

[108] Ibid., 215.

[109] Chester A. Newland, "Reclaiming Constitutional Government and Public Administration Space," *Public Administration Review* 73, no. 4 (July/August 2014): 655.

often placing opposing obligations on them.[110] On the one hand, in their representational capacity, career public servants, as agents for the public, have power, rights, and obligations that private citizens do not have. However, for the sake of those for whom they act, career public servants may interpret their official duties as requiring them to lie, break promises, and manipulate citizens. Thompson calls this moral dilemma "the problem of dirty hands."

On the other hand, in their organizational capacity, career public servants are expected to act with others to get their work done. For example, Carl Friedrich argues that the responsible career public servants, who are self-disciplined and self-directed, may use their technical expertise and professional judgment to make the legislative policies of elected officials workable and responsive to popular sentiment.[111] For Friedrich, the accomplishments of career public servants are based on collaboration rather than coercion in administering programs, enforcing laws, and upholding precedents.[112] However, the hierarchical structure of office holding in the executive-branch bureaus makes it difficult to attach moral responsibility to a single individual for the actions of government. Thompson calls this the moral dilemma of "many hands." Thus, the opposing obligations of career public servants as office holders may lead them to act in ways that not only are unethical and illegal but also weaken democratic accountability, causing Americans to lose faith in government (see Chap. 10).

Institutional Threats and the Politicization of Democratic Public Service

The necessity for career public servants to engage in administrative politics and the Weberian "bureaucratization effect" have threatened high-level elected officials who successfully advocate for partisan-drive reforms designed to dismantle democratic public service. As the professional career services appear resistant to changing direction and public-employee unions assert their political power, elected officials claim that the career

[110] Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), 4.

[111] Carl J. Friedrich, "Public Policy and the Nature of Administrative Responsibility," *Public Policy* 1 (1940): 13, 17.

[112] Ibid., 17.

bureaucracy is out of control.[113] At the federal level, the most vocal and powerful critics of the out-of-control bureaucracy are US presidents, who assert that their position at the top of the executive branch makes them the preeminent institutional actor to control bureaucratic governance.[114] To assert their authority over the allegedly powerful unions and recalcitrant career public servants, newly elected presidents from both major parties have implemented reforms to modernize the civil service system by deinstitutionalizing it.

For example, President Ronald Reagan took extreme measures to rein in public employee unions. In 1981, the Professional Air Traffic Controllers Organization (PATCO) called for a strike to press President Reagan and his appointees at the Federal Aviation Administration (FAA) for higher wages, better working conditions, and a shorter work week. Approximately, 12,000 air traffic controllers walked off the job. Instead of negotiating with PATCO, like his predecessors, President Reagan not only fired the strikers for violating a 1976 federal law (5 U.S.C., Section 7311) and their "no strike" oath (5 U.S.C. 3333) but also barred them from being rehired at the FAA forever.[115] Furthermore, President Reagan reversed a long-standing labor relations practice by permanently replacing the strikers with new air traffic controllers. For nearly two decades since the Reagan administration, the FAA has struggled in rebuilding the nation's air traffic control system.[116]

Similarly, President Bush took steps to bypass not only the unions but also the general civil service system.[117] After September 11, the Congress established the Department of Homeland Security (DHS), and the Bush administration moved this newly created department out of the general civil service system. The president's move permitted the DHS to establish its own personnel rules and pay systems. Secondly, the Bush administration

[113] Herbert Kaufman, "The Fear of Bureaucracy: A Raging Pandemic," *Public Administration Review* 41, no. 1 (January/February 1981).

[114] Vogelsang-Coombs and Cummins, "Reorganizations and Reforms: Promises."

[115] Bernard D. Meltzer and Cass R. Sunstein, "Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers," *University of Chicago Law Review* 50, no. 2 (Spring 1983).

[116] Kettl, *The Politics of the Administrative*, 223, 233.

In 1996, the Congress approved reforms that exempted the FAA from civil service laws regarding the hiring, compensation, and firing of employees, thereby bypassing the federal government's central merit system.

[117] Ban, "Hiring in the Federal," in *Public Personnel Management: Current*, 142.

made extensive use of contracting public services to the private sector. For example, the Transportation Security Administration (TSA) in DHS hired non-union contractors to screen passengers at the nation's airports, some of whom used aggressive methods that violated the constitutional rights of the flying public.[118] Furthermore, the Bush administration modified the rules on the selection process in the career services so that his political appointees in the executive branch agencies could hire individuals who were loyal to the president's agenda rather than qualified for the job; the upshot was that political goals supplanted public purposes.[119]

Apart from efforts by presidents to weaken public employee unions, President Jimmy Carter adopted idealized private-sector reforms to dismantle the civil service system under the banner of modernizing government. To mobilize public support for his reform, President Carter characterized the civil servants in the national bureaucracy as "the enemy of the people." Specifically, he said:

> The word 'bureaucrat' has become a purely pejorative term, connoting in the public mind, inefficiency, ineptitude, and even callous disregard for the rights and feelings of ordinary people … It shouldn't be that way.[120]

The thrust of the Carter reform enacted by the Congress was the Civil Service Reform Act (CSRA) of 1978.[121] Its unstated purpose was to strip the power of the career public servants who set the leadership tone of the executive branch agencies.[122] Based on a narrow view of operational efficiency and responsiveness to presidential mandates, CSRA strengthened the political controls over the federal bureaucracy at the expense of the civil service system extant in six ways.

First, CSRA gave the untenured and short-term political executives carrots and sticks to recognize "good" and "bad" agency management, that is, those who were responsive to the Carter administration's policy agenda and those who were not, respectively. Second, CSRA established

[118] Kettl, *The Politics of the Administrative*, 185-5.

[119] Donald P. Moynihan and Alasdair S. Roberts, "The Triumph of Loyalty Over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency," *Public Administration Review* 70, no. 4 (July/August 2010).

[120] Quoted in Vogelsang-Coombs and Cummins, "Reorganizations and Reforms: Promises," 24.

[121] Civil Service Reform Act (CSRA) of 1978. 92 Stat. 1111 (1978).

[122] Mosher, *Democracy and the Public*.

a new category of professional public managers; these professional public managers were removed from the civil service system and placed in the newly formed Senior Executive Service (SES). Specifically, the SES covers approximately 2,000 executive positions (above grade 15) that are just below presidential appointees and whose managerial, policy or supervisory duties are specified in law.[123] Third, the SES reform decentralized the management of public programs by vesting authority in "good" managers. Thus, political executives used the personal characteristics of applicants in their decisions about whom to hire as program managers in the SES. Fourth, the assignments and pay of the SES personnel were determined by their political hiring authorities, who rewarded exceptionally "good" performance with salary increases and cash bonuses and punished "bad" unsatisfactory performance with demotions, removal from the SES, or forced retirements.[124] Fifth, to weaken the separate agency-centered career corps extant in the federal bureaucracy, the SES promoted rotation in office; this provision was an effort to remove upper-level career public servants from their home agencies. Last, CSRA reserved less than half (45 %) of the SES positions for upper-level career public servants; the remaining 55 % of the SES positions were reserved for top-level private sector managers (who were supporters of the president's agenda).[125]

However, the political management reforms of the SES did not achieve their stated purposes. Data gathered in 2013 show that 92 % of SES members were promoted from within the federal bureaucracy, 81 % came from the same agency they worked in before they joined the SES, and only 8 % moved to a different agency.[126] Furthermore, the Partnership for Public Service and Booz Allen Hamilton (2014) report that many senior executives were selected and promoted for their technical expertise instead of their managerial excellence. In effect, the career civil service leadership of

[123] U.S. Office of Personnel Management (OPM), *Guide to the Senior Executive Service* (U.S. Office of Personnel Management, 2014), last modified April 2014, accessed June 12, 2015, http://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf.

[124] Mosher, *Democracy and the Public*, 107.

[125] Apart from the establishment of the SES, CSRA listed in law for the first time both the merit principles of the career service system and the prohibited personnel practices; additionally CSRA strengthened the protections of civil servants from arbitrary dismissal, discriminatory actions, or reprisals against whistleblowers by their supervisors (Mosher 1982, 107).

[126] U.S. Office of Personnel Management (OPM), *Guide to the Senior.*

the executive-branch bureaus was in 2013 as it was before the enactment of CSRA in 1978.

In 1993, President Clinton sponsored a civil service reform known as the "reinventing government movement." Unlike President Carter, President Clinton did not invoke the vituperative rhetoric of CSRA, but his reform was similarly oriented to weakening the civil service system. The Clinton reform was led by Vice President Albert Gore, and its thrust was to downsize the allegedly ballooning federal bureaucracy. By using private-sector management tools to remove unnecessary layers of red tape and streamline administrative processes to achieve faster customer service, reinvention managers were expected to save money and reduce expenditures in the executive-branch bureaus. One way these goals were accomplished was by eliminating the field offices of the federal agencies. Another way was to result from giving political appointees the flexibility to adopt policy changes and run public programs apart from civil service rules. Moreover, President Clinton used the promises of his reinventing government reform to revive his struggling 1995 reelection campaign. Specifically, he advocated using the savings accrued from a smaller and less expensive civil service bureaucracy to fund the Clinton plan for a middle-class tax cut.[127]

While the reinventing government promises may have helped President Clinton win reelection, the administrative changes in the federal bureaucracy did not occur from the implementation of its reform measures. According to Donald Kettl, the significant reduction of the federal workforce occurred because agency heads offered their civil service employees buyout packages that included financial incentives for early retirement; the buyouts temporarily reduced the civil service by 365,000 (or 17 %).[128] Also, congressional politics associated with downsizing the federal government limited the growth of executive-branch spending and reduced tax revenues in the USA. Given the availability of fewer resources, the Congress cut the funding for executive-branch agencies. Thus, career civil servants struggled to deliver government services for a larger American population by running their federal programs with fewer employees and by sacrificing long-term goals for immediate short-term needs.[129] Despite the reformers' claims of successfully cutting the size of the federal civilian

[127] Kettl, *The Politics of the Administrative*, 168.
[128] Ibid., 168.
[129] Ibid., 168.

bureaucracy, the number of federal civilian employees was approximately 2.8 million in 2014;[130] this is nearly the same level as in 1980.[131] By contrast, the growth in government employment over the same period grew dramatically at the state and local levels (see Fig. 9.2).

The steady dismantling of the federal civil service system by presidents has undermined the role of democratic public service in the American constitutional system. Instead of easing the tension between public administrators and their political superiors built into the constitutional

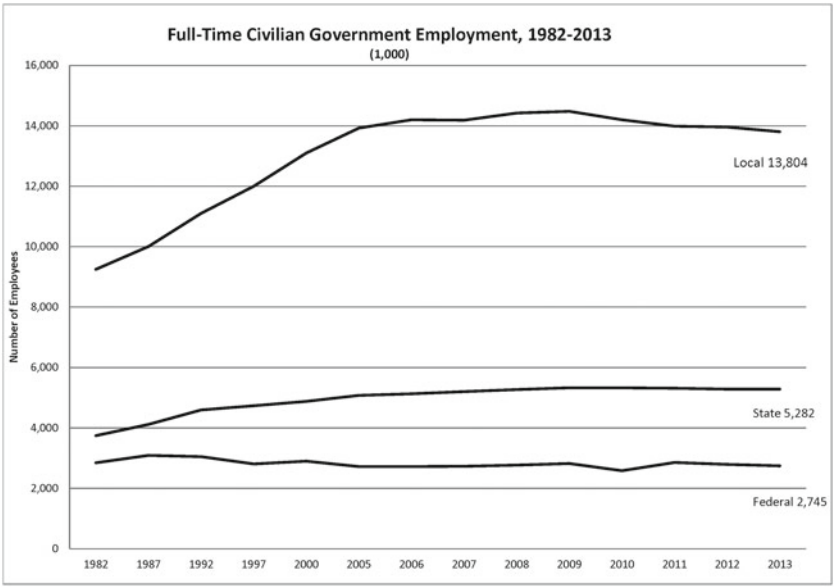

Fig. 9.2 Full-time civilian government employment, 1982–2013 (U.S. Census Bureau. 2014. "Government Employment and Payroll, Historical Data. Accessed December 7, 2014 from https://www.census.gov//govs/apes/)

[130] U.S. Census Bureau, "Government Employment & Payroll, Historical Data," U. S. Census Bureau, last modified 2014, accessed June 10, 2015, http://www.census.gov//govs/apes/.

[131] Kettl, *The Politics of the Administrative*, 26.

system, the series of partisan-based private sector reforms designed to create a government run by business-minded managers have exacerbated it. However, the structural tension between elected officials and career public servants cannot be eliminated, only ameliorated. Thus, the "bureaucracy problem" is a recurring theme and civil service reform is a recurring remedy in presidential politics.[132] As the previous discussion of civil service reforms showed, top elected officials advocate the same idealized private-sector management reforms even though the empirical evidence indicated that they did not work in the ways intended by the reformers.

In effect, the cycle of bureaucrat bashing and civil service reforms is a perpetual conflict in bureaucratic governance because top-level elected officials react unfavorably to the permanence and the independent power of the public bureaucracies. According to Weber, "democracy seeks to replace the arbitrary disposition of hierarchically superordinate 'master' by the equally arbitrary disposition of the governed and the party chiefs dominating them."[133] Consequently, elected officials install their political appointees, who are their trusted personal or professional friends or campaign consultants, deeper and deeper into executive branch hierarchies, and expand their powers to use private-sector management "sticks," such as union busting, to fight back against the allegedly insubordinate and tenured civil servants. However, the causal chain from command to compliance is long and uncertain.[134] For instance, insubordination may not be the reason career public servants are unresponsive to elected officials or their political appointees in the executive bureaus. As Kaufman (1969) argues, career civil servants cannot ignore the accumulation of laws and prior directives under which they operate and with which newly elected officials and their political appointees are unfamiliar.[135]

Nevertheless, the ongoing politicization of the civil service system is extensive within the federal bureaucracy. To analyze the depth of politicization, Mosher identifies four echelons of political appointees at the federal level, and he suggests that his classification, in varying degrees, is germane to state governments and local jurisdictions.[136] The first echelon of political appointees covers the immediate associates of the president

[132] Kaufman, "The Fear of Bureaucracy."
Vogelsang-Coombs and Cummins, "Reorganizations and Reforms: Promises."
[133] Weber, "Bureaucracy," in *From Max Weber: Essays*, 242.
[134] Olsen, "Maybe It Is Time."
[135] Herbert Kaufman, "Administrative Decentralization and Political Power," *Public Administration Review* 29, no. 1 (January/February 1969).
[136] Mosher, *Democracy and the Public*, 177–85.

who are appointed without confirmation to White House positions. The second echelon includes political appointees with generalist qualifications and experience assigned to head cabinet departments and major agencies or commissions. These political appointments require Senate confirmation. Mosher's analysis reveals that these second-echelon political appointees are often wealthy individuals who are not only supporters of the president's party but also advocates of the latter's ideology and political agenda. Mosher views these second-echelon political appointments as the most important ones that a president (or a governor, mayor, or city manager) makes because these appointees "strongly indicate the quality and the nature of [the] public administration which will follow."[137]

The third echelon of political appointees identified by Mosher occurs at the subcabinet level, including assistant secretaries, assistant administrators of non-cabinet agencies, chief administrators of large commissions, and general consuls. Most third echelon political appointees have law degrees, and they are loyal to the president's partisan ideology even though they are not active politicians. The fourth echelon of political appointees in Mosher's classification is also the largest group, and it includes deputies and assistants to cabinet secretaries, assistant secretaries, influential advisors, as well as chiefs of administration, services, and bureaus within the executive branch. At the federal level, these appointees have non-career positions in the SES.

Mosher suggests that the political-administrative governance differences in the executive branches of government look like "a farm on a steep hill protected from violent damage in a political storm by a series of terraces, each interrupting and delaying a downpour and thus saving the farm."[138] For him, the topmost terrace is political, and these appointees cultivate activities to win the next election, while career civil servants are at the bottom where they work the farm. Between the highest and lowest terraces are the political appointees who provide guidance, oversight, and two-way communication to prevent the destruction of the farm during a cloud burst. Each echelon has a distinct view of responsiveness, responsibility, and the public interest.

Although Mosher recognizes that his farm allegory is imperfect, it does connote an important bridge between politics and administration. As he points out, this politics-administration nexus may work nowhere all of

[137] Ibid., 178.
[138] Ibid., 184.

the time, and in some places, not at all.[139] What is important says Mosher is that where irreconcilable differences exist between political appointees and career public servants over ideology, the metaphorical terraces may slow down the destruction of the farm and the flight of career civil servants but not prevent them. On a practical level, Mosher's farm allegory provides guidelines to top-level elected officials. If new presidents (or state and local chief executives in large jurisdictions) fail to fill the middle two terraces or fill them with unqualified political appointees, then the consequences are "poor communication both ways, failures of understanding; suspicion and mistrust; uninformed decisions on top and conflicting decisions down below; and misdirection or outright sabotage of programs, sometimes subtle or sometimes overt."[140]

The internecine institutional relationships underpinning civil reforms are not apparent to outsiders. Although the claims of civil service reforms may resonate with the voters, the political and moral ideas of private-sector management driving them are often incompatible with the constitutional heritage as well as the civil service system. By design, the executive-branch bureaus are not market organizations but are set up by legislatures to achieve public purposes, often in the areas of market failures. Furthermore, these partisan-driven civil service reforms rest on a narrow and more self-interested conception of loyalty instead of the broader loyalty of democratic public service to the citizenry as a whole. Moreover, presidential reforms implemented by the top two echelons of political appointees treat change management as a priority value for which they may willingly sacrifice regime values and the rule of law, as well as the contributions that career civil servants contribute in providing continuity in bureaucratic governance.[141] Unaware of the moral and political implications of their private sector, change-management initiatives, civil service reformers may become captive to ideas that destroy the values that bind Americans together.[142] Thus, the biggest loser is the general public.

Consequently, Miller argues that the public needs a champion to stand up to private interests and problematic partisan-driven reforms, and, for him, career public servants are the most appropriate institutional actors

[139] Ibid., 184.

[140] Ibid., 185.

[141] Johan P. Olsen, "The Institutional Basis of Democratic Accountability," *West European Politics* 36, no. 3 (2013).

[142] Michael W. Spicer, "The History of Ideas and Normative Research in Public Administration: Some Personal Reflections," *Administrative Theory & Praxis* 30, no. 1 (2008): 67.

to protect the American people and public interests.[143] As the public's champion, career public servants uphold the American constitutional heritage, especially the rule of law. For Rohr, "To stress the constitutional character of …[democratic public service] is to establish the proper role of administration as governance that includes management but transcends it as well."[144] If, however, a disconnect exists in the functioning of constitutional processes within executive branch agencies, then the interplay of bureaucracy, the professions, and the civil service may transform the institutional challenges of democratic public service into institutional pathologies. Therefore, citizens are doomed because the people's champion—career public servants—may use their clouded ethical judgments, professional autonomy, and bureaucratic authority to "act above the law," with disastrous effects on the life and liberty of Americans.[145] How and why these institutional pathologies arise in bureaucratic governance are analyzed in the next chapter.

[143] Miller, "Everyday Politics in Public," 107.

[144] John A. Rohr, *Civil Servants and Their Constitutions* (Lawrence, KS: University Press of Kansas, 2002), xiii.

[145] Jerome H. Skolnick and James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York, NY: Free Press, 1993).

CHAPTER 10

Racial Profiling: Abuses of Bureaucratic Authority That Threaten the Liberty of Citizens

The people have always some champion whom they set over them and nurse into greatness … This and no other is the root from which a tyrant springs; when he first appears above ground he is a protector.

… And he, the protector of whom we spoke, is to be seen, 'not larding the plain' with his bulk, but himself the overthrower of many, standing up in the chariot of the State with the reins in his hand, no longer protector, but tyrant absolute.

Plato's Republic, Book VIII

This is the second of three chapters in Part IV focusing on the political ethics of the public service in bureaucratic governance. The last chapter focused on the institutional ideals, tensions, and challenges associated with office holding within democratic public service. Specifically, Chap. 9 analyzed how career public servants and their politically appointed superiors may work together as institutional friends or at cross purposes as institutional strangers in the executive branches of American government. Its conclusion raised the possibility that the institutional challenges of democratic public service can transform into institutional pathologies because a disconnection exists between the exercise of bureaucratic authority and the constitutional rule of law.

Consequently, this chapter analyzes the impact of the institutional pathologies of the professionalization and unionization of civil service

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bureaucracies on the governance behavior of career public servants. Its focus is on the institutional pathologies that breed abusive administrative practices undermining the life and liberty of citizens, especially minorities. Instead of serving and protecting citizens under the requirements of American constitutionalism, career public servants may engage in institutionally sanctioned authoritarian behaviors that are above the law.[1]

The unlawful behavior of government officials resulting in an illegitimate seizure of power over citizens is not a new phenomenon, as shown in Plato's warning cited in the chapter's epigraph. Similarly, the American founders were worried about this phenomenon. A recurring theme of Publius in *The Federalist Papers* is that the American constitutional polity, as a republican government, was susceptible to the "diseases" that emanate from the ethical degradation of constitutions and the ethical decline of its political institutions.[2] In particular, Hamilton specified in *Federalist Paper #6* that the diseases of republican governments associated with "the imperfections, weaknesses, and evil incidents in [every] society."[3] The worst disease, according to Plato, was the transformation of "the people's champion" into an "absolute tyrant."[4]

Specifically, this chapter examines the ongoing tension between liberty and authority in bureaucratic governance and the ways in which this tension translates into the restrictions on the freedom of America's diverse citizenry in routine encounters with administrative authorities.[5] In his essay "On Liberty," John Stuart Mill argues that the only purpose for which representative governmental authorities can legitimately exercise their power against the will of citizens is to prevent harm to others.[6] Therefore, in this chapter, I analyze how and why administrative practices in routine encounters with unarmed citizens may become pathological such that career public servants govern citizens as tyrants.

[1] Jerome H. Skolnick and James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York, NY: Free Press, 1993).

[2] Clinton Rossiter, ed., *The Federalist Papers: Alexander Hamilton, James Madison, John Jay* (New York, NY: Mentor Books, 1961), xiv.

[3] Alexander Hamilton, "Federalist Paper #6," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 59.

[4] Benjamin Jowett, "Analysis of Book VIII," in *Plato: The Republic* (New York, NY: Limited Editions Club, Heritage Press, 1944), 448-9.

[5] Ronnie A. Dunn and Wornie L. Reed, *Racial Profiling: Causes and Consequences* (Dubuque, IA: Kendall Hunt, 2011).

[6] John Stuart Mill, "On Liberty," in *The Basic Writings of John Stuart Mill*, (1859; Reprint, New York, NY: Modern Library, 2002), 4.

The plan of this chapter is as follows. First, I examine the local law enforcement practice of racial profiling as an example of pathological bureaucratic governance that tips the institutional balance away from liberty toward authority, causing harm to lay citizens. Next, I analyze the institutional roots of racial profiling that breed unlawful administrative practices. After discussing how police chiefs can strengthen the rule of law and citizen participation in their departments, I discuss the implications of the analysis of racial profiling for career public servants in police departments. These implications pertain not just to police administrators but also to any career public servant in an executive-branch bureau where unlawful and abusive administrative practices toward citizens are tolerated.

Racial Profiling: Law Enforcement Above the Law

The central argument of this chapter is that racial profiling is an authoritarian practice rooted in the triple institutional pathologies of democratic public service, that is, the bureaucratization, professionalization, and unionization of the civil service systems in police departments (see Chap. 9). Instead of serving and protecting citizens, police departments using racial profiling unhinge the rule of law in their organizational cultures and bureaucratic practices. The upshot is that these police departments work against undefended minority citizens in involuntary encounters, recasting them inappropriately into "the enemies of the people." As will be shown, racial profiling not only suppresses the liberty and civil rights of minorities, especially black Americans, but also disregards the public safety of all citizens.

In essence, police departments are professionalized and unionized civil service bureaus. The institutional cross-pressures of the civil service bureaucracy, the professions, and collective employment services create a complex and insular environment in police departments. The institutional complexity and environmental insularity are breeding grounds for scurrilous discretionary police practices, such as racial profiling and its extreme form known as "driving while black." Well-known examples of police misconduct, including the brutal beating of Rodney King in 1991, started as the law enforcement of routine traffic violations. Public outrage over police brutality in the King case (and the acquittal of the police officers who used excessive force) fueled the 1992 Los Angeles riots.[7]

[7] Michael D. White, *Current Issues and Controversies in Policing* (Boston, MA: Prentice Hall, 2007).

Racial profiling is an informal crime-fighting policy that treats African Americans, Latinos, and other minority groups as criminal suspects to increase the police's chances of catching criminals.[8] It uses the racial characteristics of citizens as a proxy for their involvement in criminal activity.[9] It is a form of discrimination because police officers exercise their discretion to detain (or seize) citizens in traffic stops based solely on their skin color.[10] According to Michael White, the police justify using the policy of racial profiling because they view "minorities [as] more heavily involved in crime, especially drug offenses, and racial profiling is an effective tool in fighting the war on drugs."[11] Advocates argue that racial profiling is based on rational law enforcement.[12]

Racial profiling is also a tactic that the police use in their fieldwork, but it is built on a controversial interpretation of constitutional law regarding pretextual stops. Under the Fourth Amendment's protections of citizens from "unreasonable search and seizure" by the government, police officers are required to obtain a search warrant that contains evidence a suspect has committed (or is about to commit) a crime.[13] In *Terry v. Ohio*,[14] the Supreme Court held that police officers may briefly stop and

[8] David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York, NY: New Press, 2003), 11.

[9] Dunn and Reed, *Racial Profiling: Causes and Consequences.*

White, *Current Issues and Controversies*, 257-8.

As White points out, racial profiling is significantly different from other forms of profiling that are established and accepted in law enforcement. White gives the example of the FBI's practice of psychologically profiling serial murderers. Psychological profiling focuses on specific types of people and helps detectives to rule categories of people in or out during their investigations. In contrast, racial profiling involves direct and arbitrary action against a specific person because of his or her racial characteristics. Another significant difference is that psychological profiling is a time-consuming process requiring intensive research. In contrast, racial profiling is based on prejudice and the police officers' preconceived notions of motorists.

[10] Ibid., 259.

White notes that a new form of racial profiling emerged after the terrorist attacks on September 11—"driving while brown or Middle Eastern." Although the racial, ethnic, and religious characteristics of citizens involved in this new form of racial profiling may be different from driving while black, the legal issues are the same—police officers are still bound by the Constitution and constitutional law.

[11] Ibid., 256.

[12] Harris, *Profiles in Injustice*, 11.

[13] Herman C. Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs, NJ: Prentice-Hall, 1984), 179.

[14] *Terry v. Ohio*. 392 U.S. 1 (1968).

frisk pedestrians without probable cause to arrest if they have a reasonable suspicion that the detained citizens have committed (or are about to commit) crimes, in addition to being armed and dangerous. Later, the standard known as the "Terry frisk" was applied to traffic stops.[15] In other words, the *Terry* decision ruled that brief stops by the police were reasonable, constitutionally valid, and exempt from the Fourth Amendment's protections of citizens, as long as the officers used them to prevent a crime or to protect themselves from bodily harm.[16] Subsequently, in *Whren v. United States*,[17] the Court ruled that any traffic offense committed by a driver was a constitutionally valid reason to stop that person to search for evidence of a crime. Under constitutional law, police officers must have a legitimate reason to stop motorists, but the drivers' skin color alone does not meet this constitutional standard. In effect, the Court said that police officers cannot apply traffic stops selectively against minorities.[18]

However, the use of racial profiling breaches the constitutional prohibition against selective law enforcement.[19] This infringement occurs because the tactic of racial profiling combines the legal leeway given to police officers to conduct pretextual traffic stops and the professional discretion they have while working in the field. In the racial profiling practice known as "driving while black," police officers engage in selective law enforcement against African-Americans. As Ronnie Dunn (2004) found in his study of four cities, police officers used the tactic of "driving while black" to target and detain black motorists whether or not they committed an observable moving violation. Specifically, Dunn analyzed traffic ticket data from one urban police department and three surrounding suburban departments. Overall, he found extreme racial disparities in ticketing, and

[15] In practice, nearly every driver violates some traffic law at some point, such as going 1 mph over the speed limit or changing lanes without signaling with enough notice. Thus, patrol officers do not need the *Terry* decision to stop drivers because they can almost always find a race-neutral probable cause to detain them.

Mead, Joseph. 2015 (June 10). "Comments on Chapter Eight." Personal email communication.

[16] The Supreme Court held unanimously in *Whren v. United States* (116 S Ct. 1769) if a probable cause or reasonable suspicion exists for a traffic stop, then courts will not hear cases of race discrimination by patrol officers under the Fourth Amendment.

[17] *Whren v. United States*. 517 U.S. 806 (1996), 116 S. Ct. 1769.

[18] White, *Current Issues and Controversies*, 170.

[19] Ronnie A. Dunn, "Racial Profiling: A Persistent Civil Rights Challenge Even in the 21st Century" (working paper, Cleveland State University, Cleveland, OH, n.d.), 33-4.

his findings were consistent with those of A.J. Meehan and M.C. Ponder's (2002) study showing extreme racial disparities in traffic enforcement. In Dunn's study, police officers ticketed white drivers most frequently for speeding, a primary offense under Ohio law; black drivers were most frequently ticketed for primary offenses involving head- or tail-light violations and drivers' license offenses, as well as for the secondary offense of driving without a seatbelt. Patrol officers have much discretion in enforcing equipment violations, and drivers' license offenses are not detectable by visual observation. Dunn also uncovered that the police officers stopped and searched the vehicles of black drivers at higher rates than white drivers for guns, drugs, and other contraband. Similarly, Charles Epp and associates found that black drivers in metropolitan Kansas City were disproportionately stopped for secondary offenses as a part of criminal investigations, whereas white drivers experienced conventional traffic stops for moving violations.[20]

Furthermore, "driving while black" distorts the Fourteenth Amendment's principle of equal protection of the law into selective law enforcement on minorities.[21] In his study, Dunn (2004) discovered that police officers used their professional discretion not only to "fish" for evidence in traffic stops involving black drivers but also to "hunt" for black motorists who had non-observable violations, such as license offenses, like driving under restriction, suspension, or revocation. The hunt for black drivers with non-observable offenses involved the practice of anonymous "rolling checks." In conducting rolling checks, police officers gathered information on the drivers' license plates and the status of their licenses from a dispatcher or electronically from a computer in their patrol cars. These rolling checks not only revealed traffic-related violations but also gave police officers access to the drivers' social security numbers. Attached to the social security numbers were data on whether the drivers had outstanding warrants, past convictions, penalties associated with failure to pay child support, or restrictions placed on them as former prisoners reentering into the community.[22] Police

[20] Charles R. Epp, Steven Maynard-Moody, and Donald P. Haider-Markel, *Pulled Over: Racial Profiling: How Police Stops Define Race and Citizenship* (Chicago, IL: University of Chicago Press, 2013), 8.

[21] Harris, *Profiles in Injustice*, 126.

[22] Dunn, "Racial Profiling: A Persistent," 31.

officers then used this information unrelated to the operation of a motor vehicle as the valid pretext for a traffic stop.[23]

Moreover, Dunn found that the anonymous rolling checks yielded a higher number of positive "hits" showing collateral legal problems for black drivers than for white drivers, prompting police officers to detain black drivers disproportionately. The cumulative effect of the disproportionate number of traffic encounters between black drivers and the police increased the likelihood of infractions on the records of African-Americans, resulting in the latter's deeper negative involvement in the criminal justice system.[24] As Dunn concluded, the cumulative effect of the twin tactics of "driving while black" and anonymous rolling checks created a vicious cycle of escalating legal and costly financial consequences for the black drivers in his study.

Institutional Pathologies in Bureaucratic Governance Undermining Liberty

Underlying the bureaucratized practice of racial profiling is the ongoing struggle to balance liberty and authority. Through the practice of racial profiling, police officers use their discretionary authority to control the liberty of ordinary people so that the former can maintain society's need for order, but they use unlawful means. Racial profiling is also an unethical professional practice of crime fighting that is woven into the institutional culture of police departments. One explanation for racial profiling is that it reflects the prejudice of individual police officers. As Harris points out, most police officers are not racists, but they are socialized as a part of their professional development into believing that racial profiling is the correct way to catch criminals.[25]

Nevertheless, policing has, as in any profession, racist and abusive individuals who may be characterized as "rotten apples."[26] The remedy for the misconduct of abusive police officers is to remove them from office. In practice, the removal of abusive officers by police chiefs and local elected

[23] As Dunn (n.d.) notes, most rolling checks on drivers were anonymous because no traffic stop occurred. Thus, the hunted drivers were unaware that their vehicles were under suspicion or the police had used their social security numbers arbitrarily.

[24] Dunn, "Racial Profiling: A Persistent," 33-4.

[25] Harris, *Profiles in Injustice*, 15, 126.

[26] White, *Current Issues and Controversies*, 242-3.

officials is difficult due to the combination of civil service and collective employment services (unionization) of police departments. Police unions are powerful at the local level, given that 73 % of municipal departments are unionized.[27] Unlike many professional career services in government, public-employee unions have retained the civil service (merit) system's hiring through open and competitive examinations.[28] From labor's perspective, the expedited civil service hiring process to recruit college graduates into professional career services not only narrows the applicant pool but also potentially creates unfair, arbitrary, and inequitable treatment of employees.[29] Thus, the existing hiring provisions of the civil service system make it hard for police departments to avoid hiring potentially abusive officers. According to the Bureau of Labor Statistics (BLS), the work of police to serve and protect the public is physically demanding, stressful, and dangerous.[30] Although most civil service entrance examinations for police officers focus on the physical abilities, physiological characteristics, and psychological suitability of applicants, they fail to test for subtle prejudices, such as racism, or the proclivity for violence.[31] As White reports, few recruits are deemed psychologically unfit for police work.

[27] Ibid., 136.

[28] Ibid., 138.

[29] Carolyn Ban, "Hiring in the Federal Government: Balancing Technical, Managerial, and Political Imperatives," in *Public Personnel Management: Current Concerns, Future Challenges*, ed. Norma M. Riccucci, 5th ed. (NY, Longman: New York, 2012), 140.

[30] Bureau of Labor Statistics (BLS), "Police and Detectives. Occupational Outlook Handbook, 2014–2105," US Department of Labor, last modified January 8, 2014, accessed March 2, 2015, http://www.bls.gov/ooh/protective-service/police-and-detectives.htm.

[31] White, *Current Issues and Controversies*, 20.

In the case of *Ricci v. DeStefano* (557 U.S. 557) (2009), the Supreme Court ruled that the city of New Haven could not ignore the test results of a civil service examination for firefighters even though the examination had a disproportionate effect on minorities. In this case, the city denied promotions to management positions to seventeen white firefighters and one Hispanic firefighter because no black firefighter scored high enough and was eligible for a promotion. The eighteen firefighters sued New Haven under Title VII of the Civil Rights Act of 1964. By ignoring the results of the civil service examination, the Court held that the city violated Title VII. Given that the plaintiffs won their lawsuit under statutory law, the Court did not consider the firefighters' claim that the city violated their constitutional right to equal protection (Richey, 2009). Overall, the Court said that the city could not invalidate a legally sound, competitive civil service examination. Thus, the persons who scored the highest and met other eligibility criteria on a legal and competitive examination could not be denied a job or promotion because of race (Denniston, 2009). In other words, employers could not ignore legally valid examinations because they believed that the results were skewed against minorities or to avoid reverse discrimination lawsuits.

In addition, unionization makes it difficult for police departments to remove from their civil service systems those permanent police officers who engage in misconduct. As the advocates for police officers, police unions provide legal counsel to their members, including those who are accused of abusive conduct such as racial profiling. Local elected officials and police chiefs who try to remove abusive police officers find that the arbitration process thwarts them. As a part of collective bargaining, punished or terminated police officers are allowed to have their suspensions or dismissals heard and decided by impartial arbitrators. When cities, such as Philadelphia, Miami, Pittsburgh, and Cleveland, among others, have their arbitration cases heard by judges, the judges have ruled in favor of the arbitrators and unions.[32] Frequently, the arbitration process reinstates the suspended or fired police officers even though their supervisors have evidence of their misconduct on the job. Thus, labor rights take precedence over public safety and civil rights.

Furthermore, the unionization of police workforces has exacerbated the insular nature of police bureaus. According to Samuel Walker, police unions have aggressively fought to withhold information about the disciplinary records of police officers.[33] In fact, some union contracts may forbid the public release of police disciplinary records, hindering the openness and accountability of police administration.[34] By contrast, as Walker notes, the disciplinary records of lawyers and medical practitioners

[32] Conor Friedersdorf, "How Police Unions and Arbitrators Keep Abusive Cops on the Street," *The Atlantic*, December 2, 2014, accessed March 2, 2015, http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/.

Plain Dealer Staff, "Cleveland Mayor Frank Jackson Says Arbitration Process Keeps Bad Cops on the Police Force," *The Plain Dealer* (Cleveland, OH), February 27, 2015, accessed March 2, 2015, http://www.cleveland.com/metro/index.ssf/2015/02/cleveland_mayor_frank_jackson_22.html#incart_m-rpt-1).

[33] Samuel Walker, "The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing," *Police Practice and Research: An International Journal* 9, no. 2 (2008): 108.

[34] Stuart Gilman and Howard Whitton (2013) argue that transparency and openness are not the same thing. While transparency is a mechanism to achieve scrutiny of meaningful information, it does not always yield greater responsiveness and more accountability to the community. Based on their experiences in the field, Gilman and Whitton find that transparency in political settings may lead to complacency by practitioners, perverse incentives to game the system, greater organizational costs, and less public confidence in the integrity of government. In contrast, openness through the greater involvement or virtual presence of citizens is more consistent with democracy and, in turn, yields greater accountability than transparency mechanisms.

are a matter of public record and misconduct is reported in the local media. The consequence of shrouding police disciplinary records in secrecy is that it is difficult for police administrators and elected officials to know what is the "actual going rate" of the excessive use of force within one police department and how to compare this rate with other police departments.[35]

Another institutionally based explanation for racial profiling is that the contending obligations of police bureaucracies weaken the rule of law in police work. Similar to most bureaucratic agencies, police departments have multiple functions assigned to them by the local elected officials who sit on their governing bodies. These functions are law enforcement; order maintenance (i.e., preserving the peace); crime prevention; the protection of constitutional rights; and service-related tasks, including helping injured persons, controlling animals, and maintaining community relations.[36] Police departments using racial profiling emphasize crime fighting as their primary law enforcement function, and their officers see the perpetrators of crime, rather than the citizenry as a whole, as their primary clientele.[37] In this bureaucratic environment, police officers consider themselves more as "craftsmen" than legal actors[38]; police supervisors expect subordinate police officers to use their discretion to produce results and clear cases by being efficient crime fighters rather than by acting legally.[39]

Furthermore, associated with the bureaucratic production demands of police supervisors is the use of "the numbers game" to measure the performance of patrol officers. Within the closed environment of police departments, racial profiling has evolved into a scripted practice in which police officers in the search for contraband dehumanize detained citizens by processing them as numbers.[40] Moreover, local elected officials use the results of this number game to evaluate the effectiveness of police departments

[35] Samuel Walker, *The Discipline Matrix: An Effective Tool in Police Accountability* (Omaha, NE: University of Nebraska at Omaha, 2003), 8, accessed June 14, 2015, http://www.texascivilrightsproject.org/docs/sapd/Walker_2003_Discipline_Matrix_Report.pdf.

[36] White, *Current Issues and Controversies*, 138-9.

[37] Skolnick and Fyfe, *Above the Law: Police*, 243.

[38] White, *Current Issues and Controversies*, 35.

The craft of police work involves the following four features: on-the-job learning, a generalist work ethic, a lack of deference to authority, and the reliance on oral traditions.

[39] Jerome H. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society* (New York, NY: Wiley & Sons, 1966), 231.

[40] Epp, Maynard-Moody, and Haider-Markel, *Pulled Over: Racial Profiling*, 6.

by determining whether crime incidents have increased or decreased in their jurisdictions; police administrators measure the efficiency of patrol officers in terms of how many arrests or how many tickets they have produced. As White notes, good police work may not involve an arrest or result in a ticket in many cases.[41] Nonetheless, local elected officials recognize police departments for apprehending criminals rather than for complying with or expanding the due process of law.[42] A secondary consequence of the numbers game is that elected officials from many cash-strapped municipalities use it to help close revenue gaps.[43]

However, empirical studies refute the effectiveness and efficiency of racial profiling. Most traffic stops associated with racial profiling yield no drugs or small amounts for personal use rather than large seizures. According to David Harris, "*The hit rate for drugs and weapons in police searches of African-Americans is the same as or lower than the rate for whites.* … Police catch criminals among Latinos *at far lower rates* than among whites" (emphasis in the original).[44] Likewise, the racial profiling searches conducted in the Kansas City metropolitan area yielded little or no contraband.[45] Given that racial profiling yields mostly "dry holes" or tiny amounts of contraband, Harris concludes there is no real payoff for the police to use it as a rational law enforcement approach.[46]

Civil Service Reform and the Institutional Pathologies of Police Professionalization

To understand the institutional roots of racial profiling, it is also useful to look briefly at the history of civil service reforms in and the professionalization of police departments. In the 1920s, Progressive reformers sought

[41] White, *Current Issues and Controversies*, 206.

[42] Skolnick and Fyfe, *Above the Law: Police*.

[43] US Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department*, by US Department of Justice Civil Rights Division (n.p.: U S Department of Justice, 2015), accessed April 2, 2015, http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[44] Harris, *Profiles in Injustice*, 13.

[45] Epp, Maynard-Moody, and Haider-Markel, *Pulled Over: Racial Profiling*.

Skolnick and Fyfe, *Above the Law: Police*, 206.

Similarly, empirical studies find that the aggressiveness of police officers has had little effect on homicide rates.

[46] Harris, *Profiles in Injustice*, 14.

to untangle police departments from the corrupt urban machines that controlled police forces. Unreformed police departments were run as patronage operations. The only qualification for a job was a political connection, although police officers were required to live in the wards they patrolled. Consequently, police forces were democratic institutions because the ethnicity of a ward's police force matched the majority of the ward's population.[47] Under this democratic style of policing, police departments were service bureaus more than they were law enforcement agencies. As Radley Balko reports, in some wards, police officers ran soup kitchens and homeless shelters. In these ways, police officers were accessible to the community as they patrolled the streets to prevent crime and were approachable as they engaged in social service delivery. However, as Balko argues, this democratic style of policing was a double-edged sword.[48] One side gave police officers the discretion to enforce laws that reflected the priorities of their communities; for example, alcohol laws were enforced in one ward but not another. The other side involved patronage politics. Accordingly, ward leaders pressured local police commanders to assign their officers to duties that helped machine politicians win office or reelection.

Most of all, the Progressive reformers sought to limit political influence and instill professionalism in police departments in two ways. First, they advocated the use of the civil service system for police positions and the establishment of independent civil service commissions. These commissions were charged with the twin objectives of administering civil service (merit) rules and serving as a watchdog against possible transgressions against the merit system. These civil service commissions associated public personnel administration with morality, and they separated public personnel administration from the administrative leaders responsible for program implementation.[49] Second, the Progressives advocated a paternalistic role for police departments in an effort to enforce good habits and morals among the urban poor, especially new immigrants.[50] The Progressives helped secure the passage of the Eighteenth Amendment (Prohibition) in 1920. However, their social service morality and public ideology were short-lived because the Twenty-First Amendment repealed Prohibition in 1933.

[47] Radley Balko, *Rise of the Warrior Cop* (New York, NY: Public Affairs (Perseus) Books, 2013).
[48] Ibid., 30.
[49] Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (New York, NY: Oxford University Press, 1982), 73.
[50] Balko, *Rise of the Warrior*, 31.

Today, every police department runs under a civil service system and has a civil service commission appointed by the political leadership of cities.[51] For example, in the case of *Elrod v. Burns*,[52] the Supreme Court held that police departments may not condition employment on political affiliation. While the *Elrod* Court makes the civil service system in police departments somewhat of a constitutional requirement, its decision has had a limited effect.[53] Second, the civil service commissions have usurped the control of police chiefs over the hiring, firing, and promoting of police personnel.[54] Consequently, police chiefs cannot make changes in civil service personnel rules or promotional standards, nor can they refuse to hire or fire commissioned-certified police officers when they have evidence of the latter's misconduct.

By contrast, the professionalization of policing advocated by a small group of reform-minded police chiefs in the 1920s had enormous impact on the day-to-day operations of police departments. The police chiefs eliminated the paternalistic, social service-oriented tasks from policing. Instead, the police chiefs concentrated on professionalizing crime fighting by operationalizing the politics-administration dichotomy (see Chap. 9). In their view, police departments required college-educated police officers who were of high moral character and properly trained as neutral crime-fighting experts. In addition, the reform-minded chiefs centralized the command and control structure of police departments so that police administrators could deploy their personnel efficiently to achieve crime-fighting objectives. At the top of these command structures were qualified police chiefs whose appointments were based on professional criteria rather than political connections.[55] However, by insulating police work from democratic politics, the police chiefs' reforms to instill professionalism in police administration contributed to the unrepresentativeness of police workforces. The apolitical reforms converted the generalist occupation of policing into a specialized profession that is now dominated by white males.[56]

[51] White, *Current Issues and Controversies*, 135.

[52] *Elrod v. Burns*. 427 U.S. 347 (1976).

[53] Pamela Rogers, "*Elrod v. Burns*: Chipping Away at the Iceberg of Political Patronage," *Washington and Lee Law Review* 34, no. 1 (1977).

[54] White, *Current Issues and Controversies*, 135.

[55] Balko, *Rise of the Warrior*, 74.

[56] White, *Current Issues and Controversies*, 10.

According to the Bureau of Labor Statistics (BLS, 2015), the percentages of women and minority police and sheriff patrol officers in 2014 were as follows: 12.4 %—women; 15.6 %—black or African Americans; 1.8 %—Asians; and 13.2 %—Hispanic or Latino.

A consequence of the professionalization of policing is that it isolates police officers from the communities they patrol. The professional model deploys police officers to patrol their communities in cruisers from which they respond to calls to fight crime or provide service. Working alone and unsupervised, patrol officers in the field operate under conditions that have low visibility; consequently, their discretion allows them to choose the citizens to detain as well as the time and location of the encounter. Given that most citizen-police encounters occur in isolation, police officers can reduce the likelihood that these encounters will be witnessed by others.[57]

Therefore, the independence of patrol officers increases the opportunities for them to act inconsistently with the rule of law, especially if they encounter citizens who challenge their authority verbally or physically by fleeing (as in the case of King, who had a parole violation). Drivers who do not respect the authority of patrol officers may be treated as untrustworthy clients and recast as dangerous suspects.[58] As dangerous suspects, disrespectful drivers are likely to receive harsher scrutiny for criminality, and police officers may use force as retaliatory or punitive measures in situations that do not pose a threat to them.[59] These authoritarian police-citizen encounters not only heighten the tensions between the police and the communities they patrol but also alienate the general public.[60]

Finally, the combination of bureaucracy and professionalism breeds a police subculture of administrative arrogance and intense animosity toward citizens.[61] This institutional combination stresses the efficient production of crime fighting in the hierarchical police bureaus, while the apolitical (professional) style of policing separates police officers from lay citizens. Moreover, police bureaus socialize their officers into believing that policing is not an ordinary job but a calling and a way of life. This calling translates into an informal bureaucratic mission that the police provide a "thin blue line" to protect society from "an unruly and dangerous underclass."[62] Given this mission, police see themselves as the last line

[57] White, *Current Issues and Controversies*, 244.

[58] Steven Maynard-Moody and Michael C. Musheno, *Cops, Teachers, Counselors: Stories from the Front Lines of Public Service* (Ann Arbor, MI: University of Michigan Press, 2003). Skolnick and Fyfe, *Above the Law: Police*.

[59] US Department of Justice Civil Rights Division, *Investigation of the Ferguson*, 33.

[60] Skolnick, *Justice without Trial: Law Enforcement*, 231.

[61] Skolnick and Fyfe, *Above the Law: Police*, 146.

[62] Ibid., 96-7.

of defense between order and anarchy in American society and have come to view ordinary citizens as "the enemy."[63]

Based on this subculture, police officers develop "a perceptual shorthand" or a mental list of characteristics associated with dangerous suspects—a symbolic assailant—in order to fight crime efficiently.[64] Racial profiling is an example of this perceptual shorthand. As police officers are socialized into accepting an antagonistic mentality regarding the citizenry, they resist regulatory efforts that infringe on their bureaucratic authority and professional autonomy.[65] A substantial body of empirical research shows no significant differences in the field behaviors of white, black, Hispanic, and female police officers, although the female officers were less involved in cases of serious misconduct, repeated misconduct, and cited in fewer citizen complaints.[66] In effect, the combination of the vision of real police work as crime fighting and the police subculture of the thin blue line is toxic. This poisonous mix not only normalizes the cynicism and authoritarianism of police officers in the field but also reinforces their reliance on group solidarity as well as violent means to fight crime efficiently.[67]

In the view of Jerome Skolnick and James Fyfe (1993), police solidarity approaches family incest because there is little turnover between the entry and exit of police officers in the civil service system. Given that most police officers spend 20 to 30 years in the same hierarchical and rule-bound police departments, "everyone has something on everyone else."[68] Thus, at the end of their shifts in the field, patrol officers return to their acquired "blue family" from whom they need support and to whom they give their unwavering loyalty beyond the rule of law.[69] One would expect departments employing many second- and third-generation police officers to have very deep ties to protect their "blue families," while their ties to protect the citizenry as a whole have become shallower. As discussed

[63] Balko, *Rise of the Warrior*, 35.
[64] Skolnick, *Justice without Trial: Law Enforcement.*
[65] White, *Current Issues and Controversies*, 78.
[66] Walker, "The Neglect of Police," 104.
[67] Skolnick and Fyfe, *Above the Law: Police.*
White, *Current Issues and Controversies*, 246.
[68] Skolnick and Fyfe, *Above the Law: Police*, 264.
[69] This insight is drawn from remarks of William M. Denihan, former police chief and public safety director of the Cleveland Police Department, made on August 22, 2014, at a research conference sponsored by Cleveland State University's Levin College of Urban Affairs.

in Chap. 3, the unrestrained and thick morality of family loyalty gives precedence to the self-protection and the survival needs of police officers over the thin morality of serving democracy by protecting the citizenry as a whole.

This perversion of family loyalty is manifested in the "Blue Code of Silence," an unwritten rule that "police officers never rat out or testify against other police officers" even if they have personally witnessed misconduct.[70] This Blue Code of Silence designed to protect blue family members is reinforced by powerful police unions. Police unions foster a sense of group solidarity by securing tangible benefits for their members.[71] However, interfering with the liberty and equality of unarmed citizens against their will to protect themselves or their "blue family" is an inadequate justification for tyrannical police practices.[72]

Additionally, this toxic group subculture is intensified by a siege mentality associated with the quasi-military style of policing. This siege mentality rests on the notion that the police are domestic soldiers whose crime-fighting activities include homeland security.[73] As Skolnick and Fyfe argue, the quasi-military style of policing is inappropriate for local law enforcement because police officers are not warriors fighting a foreign enemy when constitutional rights may be suspended temporarily. "When any soldiers go to war, they must have common enemies. When cops go to war against crime, their enemies are found in inner cities and among our minority populations."[74] If reported crimes and violence against police officers increases, then police officials claim that the militarization and marginal accountability of police departments are necessary for them to do their crime-fighting jobs.[75] Furthermore, in response to criticism from local elected officials, media investigators, or citizen activists about abusive practices toward African-Americans, the leaders of police unions contend

[70] Balko, *Rise of the Warrior*, 329.

[71] Walker, "The Neglect of Police," 102.

[72] John Stuart Mill, "On Liberty."

[73] White, *Current Issues and Controversies*, 132.

Radley Balko, "Surprise! The Controversial Patriot Act Power Now Overwhelming Used in Drug Investigations," *Washington Post*, October 29, 2014, accessed March 8, 2015, http://www.washingtonpost.com/news/the-watch/wp/2014/10/29/surprise-controversial-patriot-act-power-now-overwhelmingly-used-in-drug-investigations/.

[74] Skolnick and Fyfe, *Above the Law: Police*, 116.

[75] Radley Balko, "The Increasing Isolation of America's Police," *Washington Post*, May 11, 2015, accessed May 13, 2015, http://www.washingtonpost.com/news/the-watch/wp/2015/05/11/the-increasing-isolation-of-americas-police/.

that police officers are hesitating to shoot to defend themselves, thereby making frontline police officers easy targets of increased violence. However, Balko cites FBI statistics that show felonious crime and violence against police officers were lower in 2014 than in 1959. In other words, police work is safer now than in the past. Nevertheless, law enforcement as a profession has grown extremely isolated. Balko concludes, "It is hard to think of a profession more sensitive, psychologically isolated, and protective of its own than law enforcement."[76]

This toxic mix has become explosive because the police do not operate in a political vacuum; police officers are commissioned to enforce the laws and mandates made by elected officials.[77] In fact, the quasi-military style of policing was stimulated by President Richard Nixon's war on drugs. Thus, police departments demanded more sophisticated weapons technology to enable frontline police officers to protect themselves better as the war on drugs made their jobs more dangerous.[78] By the mid-1990s, 90 % of US police departments had paramilitary units that relied on sophisticated technology to carry out their crime-fighting production demands in drug-related cases.[79] Subsequently, in the wake of September 11, police militarization was expanded under President Bush's War on Terrorism and the enactment of the PATRIOT Act of 2001.[80] The PATRIOT Act enabled federal law enforcement to gather domestic intelligence that invaded the privacy rights of citizens to protect the American homeland from future terrorist attacks. Under the PATRIOT Act, the Congress expanded the "sneak and peek" power of federal law enforcement to conduct searches of targeted citizens without informing them that they were under investigation.[81] According to Balko (2014), this "sneak and peek" power has become ubiquitous in the criminal investigations of local law enforcement. Moreover, the federal government made high-powered surplus military weaponry available to local police departments when the Obama administration withdrew American combat troops from Iraq in 2011.

[76] Ibid.

[77] William Burger, "The Challenge to Civil Rights and Liberty in Post 9/11 America," in *Public Policing in the 21st Century: Issues and Dilemmas in the U.S. and Canada*, ed. James F. Hodgson and Catherine Orban (Monsey, NY: Criminal Justice Press, 2005), 49.

[78] Balko, *Rise of the Warrior*.

[79] White, *Current Issues and Controversies*, 155.

[80] Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001. 115 Stat. 272 (2001).

[81] Balko, "Surprise! The Controversial Patriot."

Consequently, military weapons, such as assault rifles and enhanced combat readiness lasers given to local police departments have made warrior cops on patrol more efficient in engaging in violence and more competent at violating the rule of law in the field.[82] On bringing out their "big guns," police officers escalate an ordinary field encounter with citizens into an extraordinary emergency, increasing the potential for a violent confrontation.[83] Therefore, police militarization and its potential for violent confrontations raise concerns not only about the civil rights violations of detained motorists but also for the safety of all citizens (and the patrol officers) in traffic stops that go awry. As police officers deviate from widely accepted moral practices, they intensify public mistrust, and insular police departments come under intense public scrutiny.

Balko (2015) sees the problem of police militarization as the result of the immunity of many police from political criticism. First, local elected officials defer to police officials, especially when statistics in their communities show an increase in crime from one year to another. Most local elected officials are reluctant to appear "soft on crime"; similarly, mayoral and city council candidates who take a law and order stance in their electoral campaigns gain the political endorsements and financial support of resource-rich police unions.[84] Second, given the deference of local elected officials to powerful police interests, police departments are entrusted to investigate their own problematic situations and can therefore thwart efforts to release knowledge of police misconduct to the public. Third, crime is a salient issue for local electorates when the voters fear crime in their communities. When crime is up, then elected officials gain the voters' support for Draconian law and order measures; they respond by authorizing policies that erode the accountability and openness of their police departments. If statistics show that crime is down, then the voters turn to other social and political issues, but local elected officials do not rescind their Draconian law-and-order policies. According to Balko (2015), this political cycle creates a "ratchet effect" because local elected officials have no political incentive to abandon their deference to powerful police interests—until there is a constitutional crisis eliciting a civil rights lawsuit and an investigation by the US Department of Justice.

[82] Ibid., 244.
[83] White, *Current Issues and Controversies*, 79.
[84] Walker, "The Neglect of Police," 106-7.

Strengthening the Constitutional Rule of Law in Police Departments

Strengthening the rule of law is necessary in police departments because, as Skolnick and Fyfe (1993) argue, the police are primarily legal actors. They derive their bureaucratic authority from their oath to support and defend the Constitution as the supreme law of the land. Accordingly, "they are obliged to acknowledge the law's moral force and to be constrained by it"; therefore, "[a]ny reflective police officer will understand that when a cop reaches above the law to use more force or coercion than is necessary to subdue a suspect, he or she undermines the very source of police authority."[85] Consequently, police officers must develop a professional orientation that supports their role as "*legal actors*," based on an internalized respect for the rule of law (emphasis in the original).[86] Thus, Skolnick recommends recasting the distorted view of police professionalism to emphasize the legal-bureaucratic aspects of policing because police work involves citizens who have civil and political rights. However, emphasizing the legal-bureaucratic aspects of the police profession raises the dilemma that efficient criminal justice administration is hampered by the adoption of field practices designed to protect the civil liberties of citizens. In other words, "the basic purpose of the law is, in fact, to make their task [that of police officers] more difficult."[87]

To instill respect for the rule of law, patrol officers must learn how to uphold the rule of law instead of viewing it as an intrusion into their professional autonomy. Thus, the socialization of police officers in their formal education, training academies, and on-the-job experiences need to reinforce the view that the infringement of the rule of law is a serious breach of duty. At a minimum, police instructors should review with their trainees what every public servant ought to know about the Constitution, as presented by David Rosenbloom and Joshua Chanin.[88] If the professional socialization of police officers does not foster respect for the rule of law, then police officers are unlikely to abandon their view that their real

[85] Skolnick and Fyfe, *Above the Law: Police*, xvi.

[86] Skolnick, *Justice without Trial: Law Enforcement*, 254.

[87] Ibid., 239.

[88] David H. Rosenbloom and Joshua Chanin, "What Every Public Personnel Manager Should Know about the Constitution," in *Public Personnel Management*, ed. Richard C. Kearney and Jerrell Coggburn, 6th ed. (Los Angeles, CA: Sage/CQ Press, 2016).

work involves the quasi-military model of efficient crime fighting that may include racial stereotypes and unlawful means.

Relatedly, job descriptions should include provisions to hold police officers administratively accountable and criminally liable for violations of the constitutional rights of citizens. Through the performance appraisal process, police supervisors can hold their subordinates accountable and require actions that limit police deviance in the field. Police supervisors can also engage in management by walking around so that patrol officers know that somebody in authority is watching them in the field. By watching what goes on in the field, police supervisors are positioned not only to punish abusive officers they observe but also to recognize, nurture, and bestow honor upon those officers whose practices strengthen the rule of law.[89] In these ways, respect for the rule of law may be institutionalized into the professional development and personnel systems of police departments.

Over the past 25 years, many police departments have established community partnerships with their residents to encourage citizens to take on a greater role in the co-production of public safety. Citizen police academies, block watches, parapolicing initiatives, and other community-based strategies vary from department to department in terms of how extensively they frame citizen participation. As Skolnick and Fyfe point out, the policeman's lot is severely undervalued by the general public.[90] By educating the public about the demands and challenges of police work, these community partnerships create the conditions to help build the citizenry's esteem for frontline police officers and to promote respect for the difficulties of policing. Given this awareness, citizens may appreciate that it is a mistake to burden the police with the entire responsibility of controlling crime and maintaining order in their communities.[91] At the same time, it may be harder for police officers to act above the law when citizens they know are up close and watching.

Strengthening the rule of law in police departments is not automatic and requires strong police administration. If police administrators are

[89] Skolnick and Fyfe, *Above the Law: Police*, 236.

[90] Ibid., 262.

According to Skolnick and Fyfe, policing is seen as "*uneducated people's work*" because civil service and union rules require only a high school education whereas elite law enforcement corps such as the FBI and the Secret Service actively recruit top college graduates (emphasis in the original).

[91] Gary Cordner, "Community Policing," in *The Oxford Handbook of Police and Policing*, ed. Michael Dean Reisig and Robert J. Kane (New York, NY: Oxford University Press, 2014), 157.

weak, then line officers are free agents who "develop their own *sub rosa* codes of behavior, their own loyalties, their own systems for defining and dealing with good police work, their own methods of telling headquarters what it wants to hear" (emphasis in the original).[92] Moreover, as Skolnick and Fyfe argue, it is harder for patrol officers to treat a black driver badly if they are sharing a squad car with an African-American peer. Ultimately, respect for the rule of law may serve as an anchor to which to tie internal police reforms, such as community-based policing and those recommended by the DOJ investigators.[93]

Police-Community Relationships and the Rule of Law

According to Skolnick, the ultimate responsibility for the quality of law and order reflects the disposition of the civic community. For Skolnick, the situation is bleak: "As an institution dependent on rewards from the civic community, the police can hardly be expected to be much better than the political community in which they operate."[94] If the civic community is corrupt, then the police will be corrupt.

> When prominent members of the community become more aroused over an apparent rise in criminality than over the fact that Negroes are frequently subjected to unwarranted police interrogation, detention, and invasions of privacy, the police will continue to engage in such practices. … Without widespread support for the rule of law, it is hardly to be expected that the courts will be able to continue advancing individual rights or that the police will themselves develop a professional orientation as *legal* actors, rather than as efficient administrators of criminal law (emphasis in the original).[95]

Skolnick concludes that the bleakness of the situation is because the dilemma's built-in dialectic means that it cannot be resolved.

Skolnick is correct to question the ability of lay citizens to hold powerful governmental authorities accountable. The ideology of citizen power and democratic accountability assumes that citizens are informed and know

[92] Skolnick and Fyfe, *Above the Law: Police*, 137.
[93] Ibid., 171.
US Department of Justice Civil Rights Division, *Investigation of the Ferguson*.
[94] Skolnick, *Justice without Trial: Law Enforcement*, 245.
[95] Ibid., 254.

what powerful authorities are doing.[96] However, this ideology may mask the contributions of ordinary citizens, thereby introducing irresponsibility in democratic governance.[97] On the one hand, citizen responsibility is ambiguous. Without clear, consistent, and stable preferences as well as training in constitutional processes and reliable information, citizens are unable to hold officeholders accountable. In practice, most citizens are informed through the mass and social media that may misinform or manipulate public opinion through incomplete, inaccurate, or biased reporting, thereby undermining collective intelligence.[98] As Weber has said, "public opinion is communal conduct born of irrational 'sentiments.' Normally, it is staged or directed by party leaders and the press."[99]

Therefore, what is at stake, according to Olsen, is whether citizens view their rights primarily as consumers of public goods and services or as a part of an internalized behavioral code similar to membership in a profession. On the one hand, most citizens do not have an internalized and professionalized behavioral code about their civic duties because, as discussed in Chap. **3**, they do not necessarily see their relationship to the larger democratic political community as a part of their primary moral identity. Accordingly, they are unlikely to feel professionally responsible for accounting to each other by participating actively in political and civic life, keeping each other informed, and accepting duties toward the welfare of other citizens, especially for the most vulnerable people who cannot protect themselves.[100] In practice, most active citizens may be more concerned with protecting and promoting their self-interests than in promoting the common good.

On the other hand, citizen responsibility is open-ended in pluralist American society. Although citizens can raise any issue in public and seek support for their views, their political mobilization is temporary and changeable. Often, the political mobilization of citizens is improvised,

[96] Hugh T. Miller, "Everyday Politics in Public Administration," *American Review of Public Administration* 23, no. 2 (June 1993).

[97] James G. March and Johan P. Olsen, *Democratic Governance* (New York, NY: Free Press, 1995).

[98] Johan P. Olsen, "The Institutional Basis of Democratic Accountability," *West European Politics* 36, no. 3 (2013).

[99] Max Weber, "Bureaucracy," in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills, trans. H. H. Gerth and C. Wright Mills (New York, NY: Oxford University Press, 1958), 221.

[100] Olsen, "The Institutional Basis of Democratic," 473.

based on their cursory understanding of exceptional or unfortunate situations in response to sensational publicity, celebrity initiatives, scandals, accidents, and governmental performance crises.[101] Nonetheless, the self-interested or improvised political actions of citizens may catalyze spontaneous public protests as a result of intensive media attention. Consequently, accountability processes may become either overloaded or oversimplified.[102]

For example, civilian oversight boards are popular across the United States as an institutional mechanism to insure democratic accountability, with 80 % of large cities using them for lay citizens to investigate complaints of police misconduct.[103] Although no cookie-cutter approach exists in organizing civilian review boards, they, according to White, share four important characteristics.[104] First, they establish whether the police department or civilians are responsible for conducting the initial investigation and fact-finding of police misconduct. Second, they identify whether a hearing officer, the board, or a police official reviews the completed report. Third, the complainant is granted the right to appeal. Fourth, the board identifies who disciplines officers who have engaged in misconduct. Similarly, civil service commissions have not been effective in providing citizen oversight of police administration.

Empirical research on the effectiveness of civilian review boards is mixed. Skolnick and Fyfe find that most of the time these boards have exonerated accused police officers because most citizen complaints lodged against them are unsustainable.[105] Furthermore, the actions and attitudes of the mayor as well as the opposition of powerful police unions to civilian oversight of police administration have influenced the decision outcomes of civilian review boards.[106] Thus, civilian review boards are not always focused on the competency of police administration, and police officials

[101] Ibid.

[102] Ibid.

[103] White, *Current Issues and Controversies*, 314.
Balko, *Rise of the Warrior*, 74.

[104] White, *Current Issues and Controversies*, 314.

[105] Skolnick and Fyfe, *Above the Law: Police*, 229.

[106] Eileen Luna and Samuel Walker, "Institutional Structure v. Political Will: Albuquerque as a Case Study in the Effectiveness of Citizen Oversight of Police," in *Civilian Oversight of Policing: Governance, Democracy, and Human Rights*, ed. Andrew Goldsmith and Colleen Lewis (Portland, OR: Hart Publishing, 2000).
Walker, "The Neglect of Police."

do not trust lay citizens to decide cases on the basis of merit.[107] Nevertheless, some cities, such as Minneapolis, Portland, and San Jose, have produced success stories. White draws two lessons from the success of civilian review boards in these cities.[108] The first lesson is that improvements in the civilian review board process are possible when police departments and their communities together develop an organizational plan with a scope that meets both sets of needs. The second lesson is that combating police misconduct is more likely when police departments and their communities include civilian review boards as part of a comprehensive package of institutional reforms and accountability measures, as will be discussed in the next chapter.

Implications for Career Public Servants in Police Departments

This chapter has analyzed racial profiling as an example of the institutional pathologies that breed abusive administrative behaviors when lay citizens interact with government authorities in routine but involuntary encounters. It has drawn attention to the institutional roots of racial profiling—the bureaucratization, professionalization, and unionization of civil service systems in police departments—that foster toxic subcultures and operating practices disconnected from the rule of law. Besides threatening lay citizens, these toxic subcultures and unlawful practices not only undermine the liberty and equality of citizens, especially minorities, but also result in harming them.

As discussed in Chap. 9, these institutional pathologies stem, in part, from the clashes of governance perspectives inherent in the structure of democratic public service. As evidenced in the analysis of racial profiling in

[107] Skolnick and Fyfe, *Above the Law: Police*, 220.

Civilian review boards are grounded in the theory of representative bureaucracy, and local elected officials appoint their members to represent different racial, ethnic, and gender groups (Skolnick & Fyfe, 1993, 224). However, police officials are suspicious of civilian review boards because these boards often include non-professionals without the competency to judge police work fairly (Skolnick & Fyfe, 1993, 225). Consequently, the police view civilian review boards as "kangaroo courts," filled with ethnic biases and hidden agendas of lay citizens, who have a predisposition to place blame and find against accused officers (Skolnick & Fyfe, 1993, 226). Skolnick & Fyfe (1993, 228, 229) argue that police officials tend to accept the findings of civilian review boards if the investigations of the boards are not conducted by "representative persons" but involve "hardnosed, experienced investigators and fair and qualified hearing officers."

[108] White, *Current Issues and Controversies*, 318.

this chapter, these clashes may not only separate career public servants from their political superiors but also weaken their accountability to elected officials and the citizenry as a whole. In this section, I discuss five implications derived from the analysis of racial profiling that are germane to public servants interested in strengthening the rule of law within their sphere of operation.

The first implication strengthening the rule of law from the political heads of the executive branches of the American government. The analysis of racial profiling revealed that this abusive practice flourished because of lack of a political will among local elected officials, who deferred to their police departments to handle problematic situations internally. However, for those reform-minded political executives interested in making substantial changes in entrenched and insular police departments, they cannot do it alone.

For example, the US Department of Justice's Civil Rights Division launched an investigation into the Cleveland Division of Police (CDP) after 104 officers in 62 cruisers chased and fatally shot two unarmed black residents.[109] Cleveland Mayor Frank Jackson, US Representative Marcia Fudge of Ohio's Eleventh Congressional District and Chair of the Congressional Black Caucus, as well as community leaders drawn from faith-based institutions and from civil rights and civil liberties organizations requested the DOJ to investigate this tragedy.[110] The DOJ investigators

[109] US Department of Justice Civil Rights Division and United States Attorney's Office, Northern District of Ohio, *Investigation of the Cleveland Division of Police*, by US Department of Justice Civil Rights Division (n.p.: US Department of Justice, 2015), accessed June 11, 2015, https://www.documentcloud.org/documents/1375050-doc.html.

[110] James F. McCarty, "Justice Department Wants Sweeping Changes in Cleveland Police Department; Report Finds 'Systemic Deficiencies'," *The Plain Dealer* (Cleveland, OH), December 5, 2014, accessed July 5, 2015, http://www.cleveland.com/court-justice/index.ssf/2014/12/justice_department_recommends.html.

The case focused on a routine traffic stop for a turn-signal violation and suspected illicit drug activity in downtown Cleveland. The situation escalated into a massive police hunt after this suspicious vehicle occupied by an unarmed couple sped away from the initial undercover officer who was patrolling a known drug area of downtown Cleveland. Violating departmental policy and procedures, sixty-two (62) cruisers and one hundred four (104) police officers engaged in a 23-minute pursuit of this vehicle at high speeds through residential areas. While chasing the fleeing vehicle, many officers perceived the sounds of the speeding car's backfires as gunshots, and they received erroneous radio transmissions about injured police officers. A major shootout occurred at the end of the pursuit although the suspects informed one officer that they were unarmed (DeWine, 2013). However, in the chaos and confusion of the massive chase, thirteen (13) officers felt they were in imminent danger and fired one hundred thirty-seven (137) rounds: the passenger was shot twenty-four (24) times, the driver twenty-three

found "systemic deficiencies" in the CDP and recommended improvements in the training, operations, equipment upgrades, and community engagement of the Cleveland Police Department.[111] The recommendations of the federal investigators were incorporated into a federal consent decree that Cleveland officials negotiated with the DOJ.[112] According to Walker, consent decrees (also known as negotiated settlement agreements)

(23) times (DeWine, 2013; Blackwell, 2012). After a 9-month internal investigation, the police chief disciplined sixty-four officers and twelve supervisors; of these twelve supervisors, one was fired and two were demoted (*The Guardian*, 2014).

At the urging of religious, civil rights, and community groups, the mayor turned over the investigation of the officers involved in the shootout to the county prosecutor. The officer who was responsible for 49 out of the 137 shots (including fifteen after the car chase ended) was charged and ultimately acquitted of felony voluntary manslaughter; five supervisors were charged with dereliction of duty and the failure to control the chase (Kelly & Lowery, 2015). Moreover, state-level investigators found a systemic failure in the Cleveland Police Department, and the Ohio Attorney General recommended significant changes in police policy, training, communication, and leadership (DeWine, 2013). Subsequently, the DOJ (2015b) investigation found that the Cleveland Division of Police used excessive use of force stemming from systemic deficiencies. Besides raising concerns over Fourth Amendment violations, this systemic pattern posed an ongoing risk to citizens and police officers (*United States v. City of Cleveland*, 2015).

[111] US Department of Justice Office of Public Affairs, "Justice Department Reaches Agreement with the City of Cleveland to Reform Cleveland Division of Police Following the Finding of a Pattern or Practice of Excessive Force," US Department of Justice (DOJ), last modified May 26, 2015, accessed July 6, 2015, http://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-cleveland-reform-cleveland-division-police.

[112] *United States v. City of Cleveland*. 2015. "Settlement Agreement." Northern District of Ohio, Eastern Division. Retrieved 07/06/2015 from http://www.justice.gov/file/441426/download.

Specifically, the Cleveland consent decree requires the city to appoint an independent monitor acceptable to both parties for a term of 5 years (Cooley 2015). The mission of the independent monitor is to assist the US District Court of Northern Ohio, city officials, and the community in restoring public trust in the Cleveland Division of Police. Whereas the independent monitor is empowered to provide technical assistance and recommendations to help the city comply with the consent decree, the Cleveland Police Chief remains in charge of his division (Atassi 2015a; Cleveland RFI 2015). In addition, the consent decree establishes the office of Police Inspector General and a Mental Health Response Advisory Committee, both of which report to the Cleveland Police Chief (*United States v. City of Cleveland*, 2015). Furthermore, the consent decree also establishes a thirteen-member Community Police Commission to represent the city's diverse communities and police unions, and its task is to make recommendations and issue annual reports related to "community-oriented, bias-free, and transparent policing" in Cleveland (DOJ, 2015b; Cooley, 2015). The consent decree also requires the mayor and the city council to put a charter amendment on the ballot to gain the electorate's approval in insuring that the commission's members are appointed openly (DOJ 2015b). Relatedly, the Cleveland City Council has introduced legislation to ban racial profiling of citizens and require police officers to collect demographic data on the citizens they detain or arrest (Atassi 2015b).

have been used widely in police departments to achieve constitutional policing through the equal treatment of all citizens, the elimination of the use of excessive force, and the achievement of greater accountability in the conduct of individual officers.[113] The federal judge who approved the Cleveland consent decree called it a "good, sound agreement," and Representative Marcia Fudge said it was "a turning point for the city of Cleveland, its police department, and its citizens."[114]

The second implication involves strengthening the rule of law by the top administrative leadership of executive-branch agencies. The analysis of racial profiling revealed how the professionalization of the civil service system in police departments has fostered the quasi-military style of policing. Given this militarization, police supervisors not only tolerated but also encouraged widespread practices involving the excessive use of force against undefended citizens, violating their constitutional rights.[115] Thus, strengthening the rule of law in militarized police departments requires police chiefs to change the toxic subculture in which the police inappropriately view themselves as domestic warriors and the general public as the enemy.[116] For instance, Cleveland Police Chief Calvin Williams exhorted his police officers to abandon the warrior mentality by viewing themselves

[113] Samuel Walker, "The Consent Decree Does Not Hamper Crime Fighting," *East Bay Express* (Oakland, CA), September 26, 2012, accessed June 14, 2015, http://www.eastbayexpress.com/oakland/the-consent-decree-does-not-hamper-crime-fighting/Content?oid=3346845.

[114] Heisig, Eric, "Federal Judge Approves Cleveland Consent Decree, Calls It a 'Good, Sound Agreement,'" *The Plain Dealer* (Cleveland, OH), June 13, 2015, accessed June 15, 2015, http://www.cleveland.com/court-justice/index.ssf/2015/06/federal_judge_overseeing_cleve.html.

Sabrina Eaton, "Rep. Marcia Fudge Calls Cleveland Consent Decree a 'Turning Point,'" *The Plain Dealer* (Cleveland, OH), May 26, 2015, accessed July 5, 2015, http://www.cleveland.com/metro/index.ssf/2015/05/rep_marcia_fudge_calls_clevela.html.

In contrast, the Cleveland chapter of the NAACP, the Ohio chapter of the National Lawyers Guild, and a group of community activists filed a "friend of the court" brief in which they raised concerns about the representativeness of the Community Police Commission and the lack of independence of the newly created office of Police Inspector General.

Eric Heisig, "Cleveland's Consent Decree Has Deficiencies That Will Hinder Reform, Court Filing Says," *The Plain Dealer* (Cleveland, OH), June 29, 2015, accessed July 6, 2015, http://www.cleveland.com/court-justice/index.ssf/2015/06/clevelands_consent_decree_has.html#incart_story_package.

[115] US Department of Justice Civil Rights Division and United States Attorney's Office, Northern District of Ohio, *Investigation of the Cleveland*, 4.

[116] Eric, Heisig, "Federal Judge Approves."

as champions of the people and the guardians of the community.[117] The chief's exhortations are reinforced by the requirement of the Cleveland consent decree for all city police officers to participate in training on cultural sensitivity, crisis intervention, and interacting with youth in addition to implementing community policing initiatives to facilitate engagement with citizens respectfully.[118] Exhortations referencing the highest ideals of democratic public service provide important signals from the top of police bureaucracies, though necessary, are insufficient to change the toxic police subculture to instill a respect for the rule of law. The reason is that changing the culture of any organization is the most difficult task of leadership. According to Edgar Schein, the difficulty stems from the fact that an organizational culture not only surrounds employees but also is internalized within them.[119] Therefore, police chiefs cannot detoxify police subcultures alone; they need internal help.

One way to help police chiefs detoxify bureaucratic subcultures in their departments is by modifying the numbers game used as the primary measurement of officer productivity. According to Walker, efficient crime fighting is not hampered by constitutional policing but is helped when police officers have earned the trust of the people they serve.[120] Consequently, Walker advises police managers to encourage their officers to concentrate their attention on the people they know are criminals and by intervening only when patrol officers have probable cause. In other words, police officers who detain citizens without probable cause, stop drivers on account of their race, or engage in anonymous rolling checks to hunt for black drivers with non-observable violations are wasting valuable police time. As Walker notes, police officers will be more efficient and productive by spending their time by talking with neighborhood residents to gain insights about problems in their areas and developing productive relationships with community members. In these ways, patrol officers

[117] Leila Atassi, "Cleveland Police Chief: Officers Should See Themselves as 'Guardians,' Not 'Warriors'," *The Plain Dealer* (Cleveland, OH), June 11, 2015, accessed June 11, 2015, http://www.cleveland.com/cityhall/index.ssf/2015/06/cleveland_police_chief_officer_1.html.

[118] Patrick Cooley, "DOJ Consent Decree: How Long Does the Cleveland Police Department Have to Implement Changes?," *The Plain Dealer* (Cleveland, OH), May 26, 2015, accessed July 5, 2015, http://www.cleveland.com/metro/index.ssf/2015/05/doj_consent_decree_a_timeline.html.

[119] Edgar H. Schein, *Organizational Culture and Leadership*, 4th ed. (San Francisco, CA: John Wiley & Sons, 2010), 9.

[120] Ibid.

are likely to elicit useful crime-fighting knowledge as they gain the trust of neighborhood residents to provide them with information as witnesses or victims of crime.[121]

Another source of help for police chiefs in detoxifying police subcultures comes from the supervisory ranks of their departments. As Walker points out, no police department—or any public bureaucracy—can function effectively if supervisors fail to correct inappropriate behaviors.[122] As discussed earlier, police departments in which racial profiling prevailed had supervisors who tolerated and encouraged abusive practices toward undefended citizens. Thus, Walker offers a discipline matrix as a tool for enhancing and measuring accountability within law enforcement agencies.[123] Developed in consultation with the Phoenix Police Department and the Los Angeles County Sheriff's Department, Walker's discipline matrix is similar to sentencing guidelines used in the federal court system and in more than twenty state courts. It is important to note that Walker conceives of a discipline matrix as a part of the progressive discipline process built into civil service systems and collective bargaining, and it concentrates attention on the types of misconduct that do not rise to the level of formal charges or criminal investigations.

Walker's discipline matrix focuses on the actions that are appropriate punishments for supervisors to use when they appraise the performance of subordinate officers as less than satisfactory.[124] This matrix identifies the presumptive disciplinary action for a specific type of police misconduct and specifies any adjustments that are necessary in light of an officer's previous record of discipline.[125] Moreover, a discipline matrix includes corrective action, such as coaching, advising, and instructing. According to Walker, a discipline matrix is in the interest of both the department and employees because its purpose is to eliminate disparities so that officers who committed similar forms of misconduct will receive similar discipline. The implementation of a discipline matrix by police supervisors can deter future misconduct by both the individual in question (specific deterrence) and other officers (general deterrence).[126] Nonetheless, the successful implementation of a discipline matrix requires careful planning and

[121] Walker, "The Consent Decree Does."
[122] Ibid.
[123] Walker, *The Discipline Matrix: An Effective*, 14.
[124] Ibid.
[125] Ibid., 2.
[126] Ibid., 3.

codification into the operations manuals of police departments, which leads to the next implication.

The third implication strengthens the rule of law from the frontlines of executive-branch bureaus. The codification and implementation of a discipline matrix can be collaboratively designed by management in a partnership with line employees. Collaborative design, says Svara, not only trains police officers but also facilitates their ownership of the constitutional obligations and accountability measures that govern them. Direct supervisors signify the importance of these obligations and accountability mechanisms when they follow up with observations of patrol officers in the field. For Svara, the process of collaborative design in establishing and monitoring constitutional norms and accountability measures is as important as specifying the expected ethical outcomes.[127] Furthermore, the process of collaboratively designing a discipline matrix may include input from labor representatives, who, according to Walker, are neglected in police administration.[128] By including the contributions of labor representatives in building a discipline matrix, the collaborative design process promotes cooperative rather than adversarial labor-management relationships.

Relatedly, the fourth implication addresses the combination of civil service and union rules that has allowed labor rights to trump the civil rights of citizens in policing. The analysis of racial profiling revealed the power of civil service commissions and the arbitration process to thwart the efforts of police chiefs in removing police miscreants from their departments. It also showed how police unions solidify the allegiance of police officers to their "blue family" and the Blue Code of Silence. These features of the police's way of life were reinforced in bargaining contracts that prohibited the public release of knowledge of police misconduct. As noted earlier, these prohibitions were contrary to the practice of the medical and legal professions. Therefore, police labor negotiators should try to broker rescissions in their employee contracts that obstruct the openness of police departments and the accountability of police officers. By conforming to accountability practices used in the highly respected professions of law and medicine, policing can become a less isolated profession. In breaking down the barriers separating police officers from other citizens, the police profession moves closer in the direction of constitutional policing.

[127] James H. Svara, *The Ethics Primer for Public Administrators in Public and Nonprofit Organizations*, 2nd ed. (Sudbury, MA: Jones and Bartlett Publishers, 2007), 134.

[128] Walker, "The Neglect of Police."

The last implication relates to strengthening public trust through meaningful citizen participation. This implication addresses Skolnick's bleak picture of police-community relationships and the limited success of civilian review boards in insuring police accountability. Olsen finds that "the citizens need help."[129] Citizens receive the help they need from constitutionally minded career public servants in the executive branches of government who adopt a comprehensive approach to prevent the breeding of abusive administrative practices from threatening the liberty, equality, and safety of citizens. As discussed in the next chapter, this comprehensive approach combines constitutionally centered external controls over administrative authorities and the norms of democratic public service to safeguard the constitutional freedoms of citizens in bureaucratic governance.

[129] Johan P. Olsen, "Citizens, Public Administration, and the Search for Theoretical Foundations," *PSOnline*, last modified 2004, accessed February 23, 2014, http://aspanet.org.

CHAPTER 11

The Political Ethics of Constitutional Professionalism

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In ...[running] a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Publius (James Madison), Federalist Paper #51

This is the third chapter in Part IV of this book focusing on the political ethics of the public service in bureaucratic governance. In the last chapter, I discussed the constitutional crisis in bureaucratic governance that emerged from the institutional pathologies that breed abusive administrative practices, such as racial profiling. Given that abusive administrative practices are rooted in the institutional pathologies of the bureaucratization, professionalization, and unionization of the civil service system, eliminating them will not result from the ethics moments and conspicuous ethics consumption associated with the American way of ethics discussed in the Introduction. Instead, the elimination of abusive administrative practices in bureaucratic governance requires a comprehensive institutional approach to restore the constitutional balance between bureaucratic authority on the

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V. Vogelsang-Coombs, *The Political Ethics of Public Service*,
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one hand and the liberty of citizens on the other hand. As suggested by Madison in the chapter's epigraph, this comprehensive approach depends not only on the American people through their representative political institutions but also on a combination of internal and external institutional controls over bureaucratic authorities.[1] The argument presented in this chapter is that career public servants may restore the legitimacy of administrative authorities in bureaucratic governance by assuming the political-ethical leadership role of a constitutional professional.

The plan of this chapter is as follows. After discussing the elements of constitutional professionalism, I analyze how career public servants acting as constitutional professionals can reverse the degradation of constitutional processes and the ethical decline of political institutions in democratic public service that tolerate abusive authoritarian practices. I conclude this chapter with guidelines for career public servants to serve as the people's champions by leading as constitutional professionals dedicated to protecting the liberty of all Americans from abusive administrative authorities.

The Political Ethics of Constitutional Professionalism

According to Green and associates, professionalism in democratic public service draws from the American constitutional heritage rather than the sociology of occupations.[2] They argue that the hallmark of professionalism in public service is in that its institutional feature strengthens constitutional processes, public administrative norms, and democratic accountability relationships in bureaucratic governance. To illustrate this argument, I depict constitutional professionalism as three concentric circles (see Fig. 11.1). The first concentric circle connotes that the use of administrative authority and professional hegemony of career public servants in bureaucratic governance is wrapped around constitutional processes, such as the rule of law and checks and balances, to protect the political liberty of the American citizens. As discussed in the

[1] James Madison, *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, NY: Mentor, 1961), 322.

[2] Richard T. Green, Lawrence F. Keller, and Gary L. Wamsley, "Reconstituting a Profession for American Public Administration," *Public Administration Review* 53, no. 6 (November/December 1993): 518.

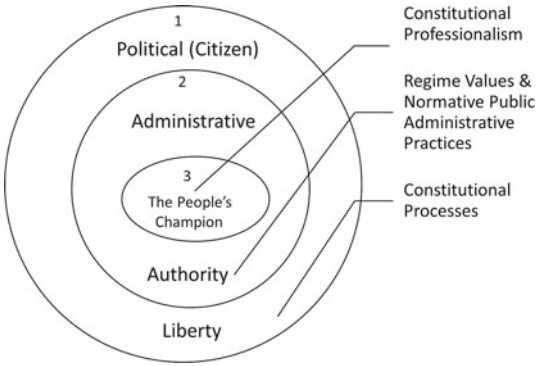

Fig. 11.1 The political-ethical leadership role of constitutional professionalism

last chapter, administrative authorities that tolerate abusive practices such as racial profiling in policing have eroded constitutional processes in bureaucratic governance.

Although acting according to constitutional processes is necessary for career public servants, it is insufficient for them to fulfill the role of constitutional professionals. Thus, the second concentric circle of Fig. 11.1 connotes that the bureaucratic governance behaviors of career public servants must be consistent with the regime values of American constitutionalism and normative public administrative practices as discussed in Chap. 9. If career public servants neglect regime values and normative public administrative practices, then they may adopt management fads and technology innovations for more efficient and cost-effective bureaucratic governance, but they do so by sacrificing the liberty of Americans and ultimately causing harm to citizens.[3] An example is the adoption of the quasi-military style of policing and the reliance on military-grade weapons by police departments to fight crime efficiently but inappropriately as domestic warriors (see Chap. 10). The third concentric circle of Fig. 11.1 representing constitutional professionalism is embedded in the other two concentric circles. As constitutional professionals, career public servants serve as the people's champion rather than an absolute tyrant as long as their bureaucratic governance behavior

[3] Michael W. Spicer, "Public Administration, the History of Ideas, and the Reinventing Government Movement," *Public Administration Review* 64, no. 3 (May/June 2004).

is encircled (and constrained) by constitutional processes, regime values, and normative public administrative practices.

Reversing the Degradation of Constitutional Processes in Bureaucratic Governance

As depicted in Fig. 11.1, the first step for career public servants to secure the liberty of American citizens in bureaucratic governance is to prevent or halt the degradation of constitutional processes in executive branch agencies. A combination of internal and external constitutional controls are necessary. Chapter 10 offered suggestions on how career public servants in police departments can strengthen the constitutional rule of law in their sphere of operations. These suggestions are germane to reversing the degradation of constitutional process through the implementation of internal controls. In this section, I focus on reversing the degradation of constitutional processes in any bureaucratic agency through the use of external controls provided by representative political institutions and the constitutional system of checks and balances.

Strengthening Representative Political Institutions

One external control to reverse the degradation of constitutional processes in bureaucratic governance is through legal bodies, such as grand juries, constituted to represent the public interest. Grand juries, which are under the supervision of judicial officials, provide an entry level for the supervised participation of lay citizens in bureaucratic governance. Known as "the watchdog" of government, grand juries are independent citizen panels ranging from six to twenty-three members that provide civilian control over bureaucratic governance. Their purpose is to protect innocent citizens from unfounded charges and politically driven prosecutions. Two types of grand juries—the criminal grand jury and the civil grand jury—are discussed in turn.

Criminal Grand Juries The purpose of criminal grand juries is to require prosecuting officials to prove to a panel of lay citizens a case of criminal violations exists against an accused person; this provision avoids having the general public bear the costly expense of a criminal

(Continued)

(Continued)
trial without a reasonable cause.[4] In practice, grand juries have broad investigative powers into the criminal investigations of government. Unlike trial (petit) juries, grand juries in criminal investigations do not determine guilt but establish whether there is evidence to warrant a criminal prosecution of the accused person. Also, unlike trial juries, grand juries work in secret, and their proceedings, testimony, and transcripts are rarely released to the public if there is no indictment. This secrecy facilitates candid group deliberations among grand jurors so that they are free from outside intimidation; it also avoids having their discussions catalyze a divisive community controversy.[5] Furthermore, the secrecy of grand juries protects accused persons if the complaints made against them are unfounded.

Moreover, grand juries have the power to compel witnesses to testify, including the president of the USA. For example, President Nixon, who was not impeached, could not evade a subpoena from the second Watergate grand jury. In *United States. v. Nixon*,[6] the Supreme Court unanimously ruled that the executive privilege of the president, though constitutionally protected, applied only to the co-equal branches of government and was not absolute. Thus, the Court decided that a fair trial by jury with full disclosure outweighed the president's need to keep his private communications secret. Consequently, President Nixon was forced to testify about his use of executive privilege to cover up crimes committed by his reelection committee. Subsequently, the Watergate grand jury not only indicted seven lawyers but also named President Nixon an unindicted co-conspirator.

As another example, on finding tyrannical administrative behaviors that may be above the law, police chiefs through their mayors or other elected officials can refer allegedly abusive police officers to a grand jury.[7] The use

[4] Herman C. Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs, NJ: Prentice-Hall, 1984), 217.

[5] Ibid., 224.

[6] *United States. v. Nixon*. 418 U.S. 683 (1974).

[7] Title 18 of the US Penal Code (18 USC, section 3331a) requires every federal judicial district to impanel a grand jury if requested by an elected official or the Department of Justice.

of grand juries in federal criminal investigations derives from the Fifth and Seventh Amendments to the Constitution, and similar to trial juries, the selection of grand jurors must be "impartial."[8] In fact, grand juries operate on the basis of the cross-section principle. This principle forbids the systematic exclusion of identifiable segments of the community from jury panels or from the juries ultimately drawn from these panels.[9] In the Federal Jury Selection and Service Act of 1968,[10] the Congress required a trial by jury based on a random selection from a "fair cross-section of the community in the district or division wherein the Court convenes." However, this cross-section principle in jury selection may be altered to prevent racial or ethnic bias.[11] Moreover, the Supreme Court, under the auspices of the Fourteenth Amendment's due process and equal protection clauses, monitors jury selection to eliminate possible discrimination.[12] In these ways, the composition of grand juries, for example, offsets the unrepresentativeness of police departments (see Chap. 10).

Although grand juries are not constitutionally guaranteed, all fifty American states have provisions for grand juries, but only half use them.[13] In most states, grand juries operate at the discretion of public prosecutors (who are often elected officials). While most prosecutors use their discretion appropriately, their professional autonomy is summed up in New York State Judge Sol Wachtler's opinion that a good prosecutor can persuade a grand jury to indict a ham sandwich.[14] In practice, prosecutors have the power to decide whether or not to bring criminal charges without impaneling a grand jury. Thus, grand juries can become politicized in the hands of zealous prosecutors or by prosecutors who choose not to refer a case on an important public problem, such as the excessive use of force by the police. Alternatively, the most dangerous prosecutors are those who

[8] Pritchett, *Constitutional Civil Liberties*, 219.

[9] Ibid., 200.

[10] Federal Jury Selection and Service Act of 1968. 28 U.S.C. §1861 (1968).

[11] Ibid., 222.

[12] Herman C. Pritchett, *The American Constitution* (New York, NY: McGraw-Hill, 1959), 544.

[13] American Bar Association (ABA), "In the Aftermath of Ferguson: Teaching about Grand Juries," American Bar Association, accessed March 18, 2015, http://www.americanbar.org/groups/public_education/GrandJury.html.

[14] Josh Levin, "The Judge Who Coined 'Indict a Ham Sandwich' Was Himself Indicted," *Slate*, last modified November 25, 2014, accessed May 29, 2015, http://www.slate.com/blogs/lexicon_valley/2014/11/25/sol_wachtler_the_judge_who_coined_indict_a_ham_sandwich_was_himself_indicted.html.

pick the people they "should get" and then search criminal statutes to pin offenses on them instead of selecting the cases that are in need of prosecution.[15] Furthermore, the cross-section principle at the state level has resulted in discrimination toward black citizens as grand jurors, distorting the integrity of the grand jury as a representative political institution, as happened in Ferguson, Missouri.[16] The Ferguson grand jury decided not to indict Darren Wilson, a white police officer, for fatally shooting Michael Brown, an unarmed black teenager, on August 9, 2014.

Unfortunately, the Ferguson grand jury went wrong not only because of the procedural shortcomings implemented by the prosecutor who ran it but also due to its apparent unrepresentativeness.[17] This grand jury was 75 % white and representative of St. Louis County but unrepresentative of the city of Ferguson, which was 66 % black.[18] The grand jury's decision not to indict Officer Wilson heightened the widespread resentment and mistrust extant between the police and the black community, the majority of Ferguson's population. Despite clearing Wilson of civil rights violations, DOJ investigators found a pattern of unlawful conduct in the Ferguson Police Department.[19] This pattern stemmed from the routine use of racial stereotypes by Ferguson police officers that resulted in discrimination against black citizens and the violation of their civil rights.

According to Peter W. Sperlich, a noted jury expert, the problem of the cross-section principle resulting in discrimination occurs under special

[15] Glenn Harlan Reynolds, "Ham Sandwich Nation: Due Process When Everything Is a Crime," *Columbia Law Review Sidebar* 113 (July 2013): 103.

[16] US Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department*, by US Department of Justice Civil Rights Division (n.p.: U S Department of Justice, 2015), accessed April 2, 2015, http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[17] The prosecutor was criticized for not sequestering the Ferguson grand jury and for making its work public even though there was no indictment. Also, grand jury testimony favoring the police officer was leaked to *The St Louis Post Dispatch, The New York Times,* and *The Washington Post* to influence public opinion. However, the prosecutor decided not to investigate the leaks, although DOJ investigators found the leaks "irresponsible and highly troubling" (Samuels & Horowitz, 2014). Another criticism was whether the prosecutor who controlled the grand jury process should have recused himself because his father, a St. Louis police officer, was killed by a black suspect (Kindy, 2014).

[18] Mark Trumbell, "Ferguson Grand Jury: What Do We Know about Michael Brown Deliberations?," *Christian Science Monitor*, November 14, 2014, accessed April 5, 2015, http://www.csmonitor.com/USA/Justice/2014/1119/Ferguson-grand-jury-What-do-we-know-about-Michael-Brown-deliberations-video.

[19] US Department of Justice Civil Rights Division, *Investigation of the Ferguson*, 1.

circumstances: when a county majority is white and a community within the county has a black majority, as in Ferguson.[20] What is at stake is the geographical basis of a grand jury. Unless a grand jury is established for each community, the county cross-section principle remains the most reasonable way to select jurors. Moreover, grand juries selected on the basis of special representation might not pass the constitutional test of equal protection.

While no guarantee existed that the inclusion of more jurors from Ferguson would have produced a different outcome, the Ferguson jury selection process gave the appearance of an impropriety—the violation of the impartiality principle. According to Carol Lewis and Gilman, the appearance standard is especially meaningful in public service because it links the political and ethical obligations of career public servants to reinforcing public trust in government. As Lewis and Gilman assert, "It is not enough for ...[public servants] *just* to uphold the law and be ethical. Public service must look right, smell right, feel right; in short, it must avoid the appearance of an impropriety" [emphasis in the original].[21] Thus, public servants, including public prosecutors, are expected to uphold "process accountability."

According to Kettl, process accountability concentrates attention on public perceptions and citizen responses to how government performs its tasks.[22] If public servants do not pay attention to the perception of procedural fairness associated with their administrative and enforcement processes, then they may find themselves charged with unfair treatment in the court of public opinion. In fact, the lack of public trust in the Ferguson grand jury triggered a riot in Ferguson and peaceful protests in seventy cities across the nation.[23] Also, following the Ferguson grand jury's decision, a gunman, avenging the killing of unarmed black men by the

[20] Peter W. Sperlich, "Comments on Your Draft Regarding Grand Juries," e-mail message to author, April 8, 2015.

[21] Carol W. Lewis and Stuart C. Gilman, *The Ethics Challenge in Public Service: A Problem-Solving Guide*, 2nd ed. (San Francisco, CA: Jossey-Bass, 2005), 84.

[22] Donald F. Kettl, *The Politics of the Administrative Process*, 6th ed. (Thousand Oaks, CA: Sage-CQ Press, 2015), 14.

[23] *The Economist*, "We Don't Belong Here: Rioting in One Run-down Suburb of St. Louis Shows the Enduring Rifts between Blacks and the Police," *The Economist*, November 29, 2014, accessed April 5, 2015, http://www.economist.com/news/united-states/21635007-rioting-one-run-down-suburb-st-louis-shows-enduring-rift-between-blacks-and.

police, murdered two New York City police officers as they sat in their patrol car in the East Flatbush neighborhood of Brooklyn.[24]

The attacks on the grand jury system are many and unrelenting. On the one hand, grand juries are criticized for a lack of capacity to deal with complex evidence. Sperlich (1982) refutes this allegation on four grounds.[25] In Sperlich's view, the solution to problematic verdicts may require the redrafting of laws instead of eroding the institution of grand juries. For this reason, he argues that it is unwise to negate the application of the Seventh Amendment's guarantee to a trial by jury with the Fifth Amendment's due process protection in complex litigation. Sperlich concludes that better judicial management is the best remedy for complex cases rather than a curtailment of the constitutional principles governing juries. On the other hand, the credibility of grand juries is attacked in situations involving a small, coherent minority within a larger geographical unit (a county), as in the Ferguson case. This question remains unresolved because, according to Sperlich, no solution exists that would not violate the constitutional principle of equal protection.[26] Although the cross-section requirement governing grand jury selection is imperfect, it vastly improves the previous practice wherein judges appointed their friends to serve as grand jurors.

Similarly, Stanford Law Professor Robert Weisberg argues that grand juries are valuable for the criminal investigations of government.[27] As

[24] Peter Holley, "Two New York City Police Officers Are Shot and Killed in a Brazen Ambush in Brooklyn," *Washington Post*, December 20, 2014, accessed April 5, 2015, http://www.washingtonpost.com/national/two-new-york-city-police-officers-are-shot-and-killed-in-a-brazen-ambush-in-brooklyn/2014/12/20/2a73f7ae-8898-11e4-9534-f79a23c40e6c_story.html.

[25] Peter W. Sperlich, "The Case for Preserving the Right of Trial by Jury," *Judicature* 65, nos. 8–9 (1982).

Sperlich's (1982) four-prong defense of grand juries is as follows. First, a bench trial is not necessarily better than a jury trial because a single judge as a decision-maker is not necessarily superior to the fact-finding process conducted by a grand jury. Second, a grand jury has certain advantages in complex litigation in that its verdict individualizes law in cases without setting a precedent. Third, besides fact-finding, a grand jury may discipline counsels and can provide checks on judicial power. Relatedly, a jury verdict is an expression of community values that bear on important public issues. Fourth, the problems with a jury verdict are often rooted in the laws that jurors are asked to enforce rather than deficiencies inherent in the institution of trial by jury.

[26] Peter W. Sperlich, "Comments on Your Draft," e-mail message to author.

[27] Clifton Parker, "Grand Jury Flawed in Ferguson Case but Still Valuable for Investigations, Stanford Law Professor Says," *Stanford Report*, December 9, 2014, accessed March 18,

Bailey (1964) notes, every procedure has paradoxes and weaknesses.[28] Therefore, correcting the structural shortcomings of grand juries rather than diminishing or abolishing them can restore their institutional integrity as effective representative political institutions watching over bureaucratic officials. Consequently, curtailing the opportunities for prosecutorial abuses is essential. Unlike public defenders, public prosecutors have broad discretionary power and access to many resources in conducting criminal grand jury proceedings. In practice, prosecutors may often dominate the grand jury process, and grand jurors often follow their lead.[29] On the one hand, prosecutors, with a few exceptions, avoid indicting accused police officers, in light of the Supreme Court's *Terry* and *Whren* decisions discussed in Chap. 10.[30] On the other hand, prosecutors who are elected officials may channel an aggressive "win-at-all costs" attitude toward accused abusive police officers (and corrupt public officials) in high-profile cases to satisfy community activists and to obtain political capital for their reelection prospects. Thus, prosecutors may overcharge accused police officers (and public officials) to obtain plea agreements and win convictions, thereby avoiding costly trials. Given the power of incumbency and "the ratchet effect" identified by Balko (2015), few elected prosecutors fail their reelection bids (see Chap. 10). Communities in which powerful prosecutors are motivated by politics, prejudice, ambition, or revenge run the risk of exposing all citizens to improper and unconstitutional prosecutions.[31]

Five remedies are possible to check the unlimited power of prosecutors. One remedy is to provide a buffer between public prosecutors and their grand juries. For example, Roger Roots (1999–2000) supports federal rules to limit the discretion of prosecutors by having them testify at grand jury investigations only if grand jurors specifically invite them to testify. This remedy, however, may be difficult to implement because grand jurors may not know when a prosecutor's testimony is relevant. Another remedy

2015, http://news.stanford.edu/news/2014/december/grand-jury-qanda-120914.html.

[28] Stephen K. Bailey, "Ethics and the Public Service," *Public Administration Review* 24, no. 4 (1964).

[29] Pritchett, *Constitutional Civil Liberties*, 217.

[30] James C. McKinley and Al Baker, "Grand Jury System, with Exceptions, Favors the Police in Fatalities," *The New York Times*, December 7, 2014, accessed June 19, 2015, http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html?_r=0.

[31] Reynolds, "Ham Sandwich Nation: Due Process."

to restore public trust, drawn from Weisberg, is to appoint special prosecutors and impanel grand juries specifically to hear cases about civilian deaths due to police brutality.[32]

A third remedy to rein in prosecutors is to increase their potential liability in federal constitutional tort suits. Unlike other public employees, prosecutors at all levels have absolute immunity for money damages in federal constitutional tort suits involving the scope of their prosecutorial duties.[33] The Supreme Court granted absolute immunity to judicial officials engaged in adjudicatory functions (and legislators engaged in legislative functions) so that the threat of a lawsuit and the potential for severe penalties could not impede them from conducting public business effectively. In 1971, the Supreme Court reinterpreted Section 1981 of the Civil Rights Act of 1871 that was originally designed to protect the former slaves (see Chap. 8). The Court's reinterpretation weakened the immunity standard by shifting the liability of most public employees, including police officers, from absolute to qualified immunity; this shift was to serve as a deterrent to overly zealous unconstitutional law enforcement actions. Under the weaker immunity standard, career public servants can be held liable for breaches of Fourth Amendment rights, such as conducting a search without a warrant. By shifting from their absolute to similarly qualified immunity, prosecutors could be held potentially liable for violating clearly established constitutional rights of which a reasonable person (in their official position) would have known.

The fourth remedy addresses the interplay of plea bargaining and prosecutorial overreaching. As practiced, American criminal justice is essentially a plea-bargaining system to avoid costly trials. Glenn Reynolds suggests establishing a requirement to inform juries and judges about the plea bargains made by prosecutors after the conviction but before the sentencing phase of trials. As Reynolds states, "Judges and juries might then wonder why they are being asked to impose a sentence of 20 years without parole on a defendant when the prosecutor was willing to settle for five."[34] This disclosure in open court might deter prosecutors from the practice of overcharging accused persons in order to win their cases.

[32] Parker, "Grand Jury Flawed in Ferguson."

[33] David H. Rosenbloom, "Public Employees' Liability for 'Constitutional Torts'," in *Public Personnel Management: Current Concerns, Future Challenges*, ed. Norma M. Riccucci, 5th ed. (Glenview, IL: Longman, 2012).

[34] Reynolds, "Ham Sandwich Nation: Due Process," 107.

The fifth remedy rests with the ethics officers of the DOJ and state supreme courts. Title 9 of the United States Attorneys' Manual specifies the professional responsibilities of federal prosecutors in conducting criminal grand jury investigations.[35] As stated in Title 9-11-233 of the U.S. Attorney's Manual, "It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such [exculpatory] evidence to the grand jury before seeking an indictment against such a person."[36] In practice, the DOJ prosecutorial ethics rules about the presentation of exculpatory evidence to federal grand juries may be unclear, and judges may be reluctant to enforce them.[37] While a failure to follow the DOJ's policy to present extreme exculpatory evidence to grand juries may not result in dismissal of an indictment, appellate courts may refer those prosecutors who violate this DOJ policy to its Office of Professional Responsibility for a review.

In effect, the fifth remedy calls for the DOJ to strengthen the potential for the suspension and disbarment of prosecutors accused of violating and found to have violated ethics rules, after due process proceedings.[38] However, Nicole Perlroth (2015) reports that the enforcement of ethics rules was not a priority of the DOJ under Attorney General Eric Holder. In 2015, President Obama appointed Loretta Lynch as Attorney General. Therefore, General Lynch and her successors have an opportunity to pay

[35] U.S. Attorneys Offices, "Title 9-11-000, Grand Jury," in *U.S. Attorneys' Manual (USAM, 2015)* (US Department of Justice, 2015), accessed May 29, 2015, http://www.justice.gov/usam/usam-9-11000-grand-jury#9-11.233.

[36] No constitutional requirement exists for federal prosecutors to present grand juries with exculpatory evidence that might clear a defendant of guilt or blame for a crime. At the state and local levels, it is not customary for prosecutors to provide exculpatory evidence. While the one-sided presentation to grand juries might appear strange or unfair to lay persons, this practice, according to Sperlich (2015) is appropriate; otherwise, the grand jury process would become the equivalent of a trial to determine guilt or innocence of the accused. As mentioned earlier, the function of the grand jury is not to acquit or convict but to determine if enough incriminating evidence exists to have a trial at all. In this way, the accused person is spared an unjustified trial that can be damaging and costly, even if the defendant is ultimately acquitted. Nevertheless, the DOJ imposes a professional obligation on federal prosecutors to expose the most extreme type of exculpatory evidence (USAM, 2015).

[37] *In re Kline*, No. 13-BG-851 (Apr. 9, 2015), *Justia US Law*, accessed May 29, 2015. http://law.justia.com/cases/district-of-columbia/court-of-appeals/2015/13-bg-851.html

[38] David J. Rosenbloom, "Prosecutorial Misconduct and Remedies," e-mail message to author, May 27, 2015.

more attention to the unlimited power of US prosecuting attorneys by making the enforcement of the DOJ's ethics rules a priority of their administrations. By doing so, they may serve as models for their state and local counterparts.

Civil Grand Juries A variant of the criminal grand jury is the civil grand jury, which can be an important institution curtailing the oppressive tendencies of administrative and judicial officials. Some states and counties have established civil grand juries to investigate the conduct of government institutions, including their fiscal activities. While civil grand juries exist in thirty states, only California has made extensive use of this citizen-based legal body.

Each of California's fifty-eight counties is required under the state constitution to impanel a civil grand jury every year. Grand jurors are civic-minded citizens who volunteer to give back to their communities and are willing to serve for 1 year. The selection of civil grand jurors in California is inclusive, and this inclusiveness is based in statutes.[39] The inclusiveness of California civil grand juries is to encourage a multiplicity of perspectives that balance competing values—moral, political, and legal—in the cases they investigate.[40] The deliberations of the civil grand juries allow each individual juror and the jury collectively to determine their own public identity and that of the community.[41] Akhil Amar (2014) draws the analogy between the civil grand jury as a representative political institution and the US House of Representatives.

[39] California Courts, "Civil Grand Jury," California Courts: The Judicial Branch of California, accessed March 21, 2015, http://www.courts.ca.gov/civilgrandjury.htm.

On the one hand, the California penal code sets the following "inclusive" requirements for the selection of civil grand jurors: jurors must be 18 years of age, live in the county 1 year before selection, have sound judgment and good character, and possess a sufficient knowledge of English to communicate in written and oral forms. On the other hand, the California penal code sets that ineligible persons are those who are serving on trial juries or who have served on a trial jury in the year preceding selection, as well as incumbent elected officials or persons convicted of malfeasance in office or a felony or other high crime (California Courts, 2015).

[40] Akhil Reed Amar, "William & Mary Law Review 2013 Symposium: 'The Civil Jury as a Political Institution': Opening Remarks," *William & Mary Law Review* 55, no. 3 (2014).

[41] Robert P. Burns, "The Jury as a Political Institution: An Internal Perspective," *William & Mary Law Review* 55, no. 3 (2014).

Although California civil grand juries are independent legal bodies, they conduct their investigations under the auspices of the state's Superior Court. The civil grand juries of California are empowered to investigate and report on the operations of various officers, departments, and agencies of local governments. Besides this watchdog function, civil grand juries may issue criminal indictments requiring persons accused of crimes to go to trial on felony charges. A third function of civil grand juries is to investigate allegations of the corruption or "willful misconduct in office" of public officials and, if warranted, to remove them from office.[42] The members of civil grand juries have wide discretion in deciding which officers, departments, and agencies they will investigate during their terms in office. The civil grand jury builds its own agenda from three sources: citizen complaints, the ideas of the jurors, and the referrals from the preceding civil grand jury. Like criminal grand juries, civil grand juries work in secret.

Moreover, California law establishes a developmental approach to citizen participation. Specifically, the statute requires civil grand jurors to receive training and instruction about the law from a Superior Court judge, the state's attorney general, the district attorney, and the county counsel. Jurors also receive practical advice on how to conduct fact-finding investigations and to write a grand jury report aimed at improving local government operations and promoting accountability. Ultimately, the civil grand jury submits its fact-finding report and its recommendations to the presiding judge of the California Superior Court. However, the latitude given to civil grand juries may tip the balance between authority and liberty toward community-based justice that conflicts with the constitutional rule of law. Therefore, the California Superior Court serves as a check on civil grand juries because the presiding judge can reject their unlawful recommendations (as well as poorly written or impractical ones). If approved by the presiding judge, the Superior Court sends the report of the civil grand jury to the local government under investigation, and local officials have 60 to 90 days to answer the findings and recommendations. It is through their public reports, along with the check and balance provided by the courts, that civil grand juries wield their power to balance government authority and the liberty of citizens.

However, the civil grand jury has two important deficits.[43] The first deficit is that its recommendations (regardless of how well founded and well writ-

[42] California Courts, "Civil Grand Jury," California Courts: The Judicial Branch of California.

[43] Peter W. Sperlich, "Comments on Your Draft," e-mail message to author.

ten) are typically ignored, even if a formal reply has to be made by the agency in question. After the civil grand jury submits its report, there is no "follow-up" instrument—which leads to the second deficit. The civil grand jury lacks an institutional memory. Each civil grand jury starts from scratch, and its membership is not staggered. Therefore, experienced grand jurors are not available to share their experience and to advise new members. Relatedly, no documentary files are kept to permit new jurors' informing themselves of what was done before and to leverage the civil grand jury's institutional memory. Nevertheless, both deficits of civil grand juries are correctable to make them viable representative political institutions and trained watchdogs to guard the constitutional rights of citizens in bureaucratic governance.

Strengthening the Constitutional Checks and Balances

The system of checks and balances is another external control to reverse the degradation of constitutional processes in bureaucratic governance. As discussed in Chap. 6, the constitutional system of checks and balances is an umbrella for many legislative powers that constrain the arbitrary use of administrative authority. These constraints include the legislative branch's investigative and oversight functions of the executive branch, as well as its power of the purse. The system of checks and balances also offsets the collapse of the separation of powers inside the executive branch bureaus (see Chap. 9).

Despite having vast investigative and oversight powers, most legislative bodies exercise only intermittent oversight of administrative agencies and rarely intervene to correct abuses or compel policy changes.[44] In practice, legislators give short shrift to their vast oversight and investigative functions, emphasizing, instead, their lawmaking and constituent service functions.[45] Typically, legislators respond to a community crisis by establishing an independent commission with the power to conduct investigations into such matters as the unlawful use of deadly force by police officers. Such oversight bodies are variants of the ombuds concept because they introduce a disinterested umpire to investigate abusive administrative practices.[46] In

[44] Herbert Kaufman, "Emerging Conflicts in the Doctrines of Public Administration," *American Political Science Review* 50, no. 4 (1956).

[45] Alan Rosenthal, *Heavy Lifting: The Job of the American Legislature* (Washington, DC: CQ Press, 2004).

[46] Jerome H. Skolnick and James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* (New York, NY: Free Press, 1993), 220.

this way, legislators satisfy upset constituents who may have greater confidence in the fairness of outside investigators than in the investigations led by elected officials who are partisan politicians or in the internal administrative investigations of citizen complaints. Frequently, legislators use the findings of these independent bodies to vest blame on executive branch administrators for undesirable outcomes. Once legislators assign blame to agency administrators, then those administrators "have to go."[47] Firing administrators, however, is a temporary and self-interested expedient that helps legislators ease a crisis in bureaucratic governance in addition to helping them earn political capital for reelection purposes. On easing the bureaucratic governance crisis, legislators tend to lose interest in their oversight function so that they can concentrate on lawmaking or serving their constituents.[48] Consequently, the traditional approach to legislative oversight neither reverses the degradation of constitutional processes in bureaucratic governance nor dismantles the toxic bureaucratic subcultures in which tyrannical administrative practices are anchored.

Dennis Thompson provides a constitutionally centered oversight approach that overcomes the oversight fatigue of legislators (and the shortcomings of civilian review boards discussed in Chap. 10). Thompson's oversight approach establishes a "design responsibility regime" that specifically addresses the "many hands" dilemma of government.[49] For Thompson, the many-hands dilemma produces governmental failures, such as racial profiling, because they stem from a panoply of decisions, some unintentional or minimal, as well as the non-decisions of many different people over a long time. Specifying the responsibility for monitoring structural reforms and organizational cultures (i.e., design responsibility) is as important in Thompson's oversight approach as assigning responsibility for administrative outcomes.

Therefore, Thompson separates the search for structural defects from the investigation into individual errors. Accordingly, he assigns oversight bodies two distinct functions: the first one is to expose administrative defects that obstruct individual responsibility, and the second one is to hold individuals responsible for oversight on a continuous basis. Thompson's first function involves interviewing those administrators who "knew about the defects

[47] Vera Vogelsang-Coombs, "The American Constitutional Legacy and the Deliberative Democracy Environment of New Public Governance," in *New Public Governance: A Regime-Centered Perspective*, ed. Douglas F. Morgan and Brian J. Cook (Armonk, NY: M.E. Sharpe, 2014), 90.

[48] Rosenthal, *Heavy Lifting: The Job of the American*.

[49] Dennis F. Thompson, "Responsibilities for Failure of Government: The Problem of Many Hands," *American Public Administration Review* 44, no. 3 (2014): 267.

but may not have had the power to fix them, and those who had the power but may not have known (though often they should have known)."[50] The purpose of this function is not to punish or discipline those individuals who knowingly and freely contributed to governmental failures such as racial profiling but to find out how to make changes in bureaucratic organizations to reduce the recurrence of problematic administrative practices. Using the knowledge gained about the responsibility for structural defects that contributed to past problematic outcomes, oversight bodies may then recommend administrative changes and assign individuals with responsibility for future outcomes.[51]

The second function of oversight bodies identified by Thompson requires the involvement of the legislature. To operationalize this function, the legislature must establish and fund oversight offices with a complement of expert staff and resources; these staff are then given the mission to oversee the implementation of administrative changes designed to correct the structural deficiencies uncovered in the first function. The irony, as Thompson notes, is that his design responsibility regime creates more hands, but, as he argues, these additional hands have precisely defined responsibilities.[52] In other words, Thompson holds the overseers accountable not only for monitoring the structure of executive branch bureaus but also for changing the organizational structure that breed toxic organizational cultures. If the overseers fail to fulfill that function, then the legislature (and the public) knows whom to blame fairly, even if the organizational failure is the result of the actions of many hands.[53]

Critics may dismiss Thompson's oversight approach because it adds to the myriad accountability agencies and ethics minders that characterize the American way of ethics. Olsen (2013) is correct when he argues that complaints of accountability overload are legitimate when more governmental resources are put into reporting administrative problems than in correcting them or into producing reports that are unread or underutilized.[54] However, unlike standard oversight approaches, Thompson's design responsibility regime goes well beyond symbolic politics and partisan political agendas in three ways. First, Thompson's oversight approach operates under the system of constitutional checks and

[50] Ibid., 261.
[51] Ibid., 267.
[52] Ibid., 261.
[53] Ibid., 261.
[54] Johan P. Olsen, "The Institutional Basis of Democratic Accountability," *West European Politics* 36, no. 3 (2013).

balances. Second, the oversight body is constituted to represent the public interest in bureaucratic governance on an ongoing basis. Last, the oversight body has the consent of the community (through the legislature) as a necessary precondition for funding and authorizing the overseers to enforce significant administrative changes for which they will be held accountable.

Reversing the Decline in Ethics and Accountability Processes in Bureaucratic Governance

Restoring the balance between liberty and authority in bureaucratic governance also requires reversing the decline of ethics and the accountability processes in executive branch agencies. For example, in police departments that allow racial profiling to prevail, the regime values and normative standards of democratic public service are neglected or contested.[55] Against the backdrop of Fig. 11.1, this neglect means that the behavior of bureaucratic authorities is not constrained by the second concentric circle, leaving the people collectively without an institutional champion to protect their interests. In contrast, career public servants who operate within the second concentric circle gain opportunities for exploring, explaining, justifying, and changing normative standards and accountability in bureaucratic governance.[56] In this section, I focus on how career public servants can reverse the decline of ethics and accountability processes in executive branch agencies by using the constitutional separation of powers to discern regime values and by institutionalizing representative bureaucratic norms.

Using the Separation of Powers to Discern Regime Values

Given that bureaucratic governance is inherently a political and a normative enterprise, it must reflect the regime values of American constitutionalism—liberty, freedom, the rule of law, individual rights, due process, and equal protection.[57] The regime values of American constitutionalism are also an expansive force because the executive branch agencies are rooted in pluralist American society. The American people, as the democratic

[55] Olsen, "The Institutional Basis of Democratic."

[56] James G. March and Johan P. Olsen, *Democratic Governance* (New York, NY: Free Press, 1995).

[57] Green, Keller, and Wamsley, "Reconstituting a Profession for American."

David H. Rosenbloom, "Reflections on Public Administration Theory and the Separation of Powers," *American Review of Public Administration* 43, no. 4 (May/June 2013).

sovereign, have over time integrated evolving social norms and changing civic preferences into their governing institutions.[58] Therefore, other governing values can join the prevailing set of regime values. For new values to join the set of prevailing regime (constitutional) values, they must, according to Rosenbloom (2013), achieve primacy in bureaucratic management, democratic politics, and public law, not just in administrative theory.[59] The three approaches of management, politics, and law associate with execution, legislation, and adjudication in governance, respectively, and the significance of these three approaches is that the constitutional separation of powers underlies them.

By using the constitutional separation of powers as a guide, career public servants can discern indispensable regime values from transient administrative reform values based on ideological fads, partisan purposes, or commonly accepted historical cycles.[60] A good example of a new regime value is representative bureaucracy. As a public administrative theory, representative bureaucracy is related to human rights, increased diversity, citizen-based accountability, and the legal-bureaucratic aspects of governing.[61] However, the norm of representative bureaucracy was once an anathema to the civil service system because it conflicted with the merit principle of neutral competence.[62] Through democratic politics, the Congress embedded the principle of representative bureaucracy into the CSRA (Section 310), and the Carter administration successfully institutionalized it into the bureaucratic management practices of the federal government. Researchers report that minorities and females have made significant advances in the federal civil service since the enactment of CSRA.[63]

As discussed in Chap. 9, the reinventing government movement and the "new public management" implemented by presidents were based on

[58] Brian J. Cook, "Regime Leadership and New Public Governance," in *New Public Governance: A Regime Perspective*, ed. Douglas F. Morgan and Brian J. Cook (Armonk, NY: M.E. Sharpe, 2014).

[59] Rosenbloom, "Reflections on Public Administration," 393.

[60] Ibid.

[61] Olsen, "The Institutional Basis of Democratic."

[62] Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (New York, NY: Oxford University Press, 1982).

[63] Katherine C. Naff, "Through the Glass Ceiling: Prospects for the Advancement of Women in the Federal Civil Service," *Public Administration Review* 54, no. 6 (November/December 1994).

Norma M. Riccucci, "Diversity and Cultural Competency," in *Public Personnel Management*, ed. Norma Riccucci, 5th ed. (New York, NY: Longman, 2012).

idealized notions of private sector management, and they do not cover regime values. These partisan political reforms covered short-term management values that emphasized customer service, entrepreneurship, market mechanisms, revenue generation, and cost-containment rather than citizens as the owners (or the sovereign) of government, the rule of law, and long-term public interests. Rosenbloom argues that these reform values are problematic because they often conflict with constitutional rights embedded in code and common law in addition to invoking extreme forms of utilitarianism.[64] As extreme forms of utilitarianism, these reform values promote the rational computational morality associated with the American way of ethics. As discussed in Part I of this book, rational computational morality produces mechanical political judgments and disastrous bureaucratic outcomes, ultimately causing harm to citizens.[65] The exposure of career public servants to this discussion about differentiating regime values from non-regime values is significant. It helps them consciously avoid adopting dangerous reform practices based on the flawed moral and political ideas of short-lived reform movements.[66] It also helps them avoid accepting unconstitutional ideas as the basis for bureaucratic governance practices that threaten and adversely affect citizens, especially minorities.

Institutionalizing Representative Bureaucracy

The new regime value of representative bureaucracy relates to the fundamental ideals of American constitutionalism. Samuel Krislov and Rosenbloom argue that the greatest threat to the liberty of citizens is not bureaucratic authority per se, but its unrepresentative power. If legislators and elected officials at the top of executive branches lack the political will to constrain administrative authorities, then executive branch bureaus may still operate democratically if their composition is representative of the American people collectively.[67] For Long, a representative bureaucracy constitutionalizes bureaucratic governance by its inclusion of the diverse races, nationalities, and religions that collectively make up

[64] Rosenbloom, "Reflections on Public Administration," 388.

[65] Stuart Hampshire, "Public and Private Morality," in *Public and Private Morality*, ed. Stuart Hampshire et al. (London, UK: Cambridge University Press, 1978).

[66] Michael W. Spicer, *In Defense of Politics in Public Administration: A Value Pluralist Perspective* (Tuscaloosa, AL: University of Alabama Press, 2010).

[67] Samuel Krislov and David H. Rosenbloom, *Representative Bureaucracy and the American Political System* (New York, NY: Praeger, 1981), 22.

pluralist American society.[68] Thus, executive branch bureaus are descriptively (or passively) representative when their workforces mirror the communities and the clienteles they serve.[69] According to Mosher, one may statistically measure representative bureaucracy "in terms of locality or origin, for example, and in its nature (rural, urban, suburban), previous occupation, ...[parents'] occupation, education, family income, family social class, sex, race, religion."[70]

Although passive representation does not guarantee democratic decision making in the executive branch, it is a symbolic political value necessary for governing pluralist American society. A broadly representative public service is "an *open service* to which most citizens have access whatever their station in life and in which there is *equality of opportunity*" (emphasis in the original).[71] Thus, the importance of representative bureaucracy is not just a lofty goal. Representative bureaucracy resides in the behavior and practices of career public servants, not just in the fact that diverse public servants hold positions in executive branch agencies. For Mosher, it is especially important for the public service's leadership personnel to be broadly representative of all categories of the population. If so, then public service, in part, satisfies Lincoln's Gettysburg prescription of "government by the people."[72]

However, public demands and expectations for descriptively representative executive-branch agencies threaten the foundational ideas of the civil service (merit) system, and the apolitical professional model of administrative governance. On the one hand, representative bureaucracy weakens the civil service system's emphasis on neutral competence in bureaucratic decision-making because diversity recruitment is hard to fit within the classification and examination systems of the merit system.[73] As Mosher notes, if individuals are chosen to represent certain community (political) interests, then a merit system is inadequate, given its requirement for mastery of knowledge and skills appropriate to specific jobs. On the other hand, the unionization of the civil service system has been a barrier

[68] Norton E. Long, "Bureaucracy and Constitutionalism," in *The Polity*, ed. Charles Press (Chicago, IL: Rand McNally, 1952).

[69] Hanna F. Pitkin, *The Concept of Representation* (Berkeley, CA: University of California Press, 1967).

[70] Mosher, *Democracy and the Public*, 15.

[71] Ibid., 17.

[72] Ibid., 15.

[73] Ibid., 220.

to the diversification of executive branch bureaus. Frequently, agency leaders lack the power to implement diversity initiatives without first getting the approval of their employee unions, and public employee unions have typically rejected challenges to the status quo.[74] For Mosher as well as Harvey White and Mitchell Rice, the severest threat to representative bureaucracy is the shortage of women and minorities in public service at all levels of government.[75]

A factor complicating the diversification of public service is the lack of mobility within public service. Given their tenured employment, career public servants remain in the same agencies for most of their careers (see Chap. 9). As career public servants become immersed and vested in the organizational cultures of professionalized career services, they are unlikely to remain actively representative and committed to outside community interests for the three decades they have positions in public service. For example, the police profession is unrepresentative, and the lack of diversity in police workforces has allowed abusive practices against citizens of color to cohere (see Chap. 10). Skolnick and Fyfe find that new police officers tend to clone themselves to their peers by embracing the prevailing toxic "blue family" subculture.[76] Thus, it is difficult to accommodate representative bureaucracy, given the cloning extant in the closed personnel systems of executive branch agencies.

Representative bureaucracy provides an organizational philosophy that not only overrides cloning but also opens up insular bureaucracies.[77] Mosher recommends agency leaders to inject a fresh flow of new community representatives continuously into their insular bureaus.[78] To infuse new blood into the life of their agencies, top leadership should adopt openness in management and practices.[79] By opening executive branch agencies to make them descriptively representative and more accountable to the communities they serve is another way to restore the balance between authority and liberty in bureaucratic governance. Open bureaucratic systems are

[74] Michael D. White, *Current Issues and Controversies in Policing* (Boston, MA: Prentice Hall, 2007), 138.

[75] Mosher, *Democracy and the Public*, 17.

Mitchell F. Rice and Harvey L. White, "Embracing Workforce Diversity in Public Organizations," in *Diversity and Public Administration: Theory, Issues, and Perspectives*, ed. Mitchell F. Rice, 2nd ed. (Armonk, NY: M.E. Sharpe, 2010), 6.

[76] Skolnick and Fyfe, *Above the Law: Police*, 138.

[77] Ibid., 266.

[78] Mosher, *Democracy and the Public*, 101.

[79] Skolnick and Fyfe, *Above the Law: Police*, 266.

responsive to external changes.[80] Open bureaucratic systems become actively representative of the American people when their internal operations distill the interests of the public. For Mosher, the philosophy of representative bureaucracy becomes a part of the working Constitution when administration is the milieu for decision-making that draws from the conflict and competition between and among the variety of interests and elements of pluralist American society.[81]

Representative bureaucracy provides an organizational philosophy that not only overrides cloning but also opens up insular bureaucracies. Hugh Miller defines discursive public administrative behaviors as insuring that the will of the people is served through an appreciation for a diversity of opinions.[82] Based on internal deliberation and discourse about public interests, discursive administrative behaviors help career public servants view contending arguments not as weaknesses but as playing their part in the constitutional conversation started by the founding generation.[83] Thus, the operationalization of representative bureaucracy provides an outside-in orientation to closed personnel systems and an antidote for oppressive practices in bureaucratic hierarchies.[84] Executive branch agencies infused with norms of representative bureaucracy and discursive public administrative practices shift from isolated monocultural (self-protective) bureaus toward community-oriented, multicultural agencies characteristic of twenty-first-century governance.[85]

Finally, institutionalizing the norm of representative bureaucracy and discursive public administrative behaviors in unrepresentative agencies requires strong leadership from the top. One cannot underestimate the importance of signals sent from the top of executive agencies to reinforce regime values and ethical norms. Therefore, Rice advises top-level administrators who seriously value the norm of representative bureaucracy

[80] Rosemary O'Leary, *The Ethics of Dissent: Managing Guerrilla Government* (Washington, DC: CQ Press., 2006), 98.

[81] Mosher, *Democracy and the Public*, 101.

[82] Hugh T. Miller, "Everyday Politics in Public Administration," *American Review of Public Administration* 23, no. 2 (June 1993): 109.

[83] Douglas F. Morgan et al., *Foundations of Public Service*, 2nd ed. (Armonk, NY: M.E. Sharpe, 2013).

[84] Stuart C. Gilman and Howard Whitton, "When Transparency Becomes the Enemy of Accountability: Reflections from the Field," *Public Administration Times* (Washington, DC), November 26, 2013, accessed November 27, 2013, http://patimes.org/transparency-enemy-accountability-reflections-field/.

Miller, "Everyday Politics in Public."

[85] Rice and White, "Embracing Workforce Diversity in Public," in *Diversity and Public Administration*, 298.

to insure that their leadership behavior is consistent with espoused diversity policy statements. Rice (2010) also advises top administrative leaders to connect the purpose of representative bureaucracy and the goals of their diversification initiatives to their legislatively mandated organizational missions. By linking representative democracy and diversification initiatives to organizational missions, administrative leaders may reduce the likelihood of short-term controversies that may cause internal conflicts and dysfunctional behaviors.[86] Thus, in executive branch agencies where representative bureaucracy is mission-centric, career public servants are likely to find diversity initiatives as "an extremely effective means of working and interacting in the interest of both organizational productivity and individual well-being and satisfaction."[87]

Implications for Career Public Servants

The central argument presented in this chapter is for career public servants as constitutional professionals to balance liberty and authority in bureaucratic governance. Consequently, they must be mindful of how their implementation of policies, practices, and procedures might result in abusive administrative behaviors that harm citizens. As depicted in the first concentric circle of Fig. 11.1, career public servants must first engage in a disciplined ethical inquiry to insure that their use of administrative authority is wrapped around constitutional processes. At a minimum, they must monitor their own behaviors so that they are not using their discretion to act above the law. The constitutional stewardship action planner presented in Chap. 8 provides guidelines for them to act consistently with their constitutional obligations and constitutional processes (see Fig. 8.1).

While acting in accordance within constitutional processes is necessary, it is insufficient for career public servants as constitutional professionals. As shown in the second concentric circle of Fig. 11.1, they must also use their disciplined ethical inquiry to discern regime values and to apply normative public administrative behaviors in their day-to-day operations. To help them discern and apply regime values and public administrative norms in their daily work, I have developed the regime values implementation matrix (see Fig. 11.2). Career public servants can also invite their

[86] Mitchell F. Rice, "Workforce Diversity in Business and Governmental Organizations," in *Diversity and Public Administration: Theory, Issues, and Perspectives*, 2nd ed. (Armonk, NY: M.E. Sharpe, 2010), 115.

[87] Rice and White, "Embracing Workforce Diversity in Public," in *Diversity and Public Administration*, 303.

Regime/ P.A.Values	Presence of Value in Practice	Absence of Value (Non-Compliance)	Widespread Neglect of Value (Abusive Practices)	Implementation/ Accountability
Fairness (Due Process)	• Openness • Transparent decision making	• Favoritism • Arbitrary treatment of employees & citizens • Discriminatory action • Sexual or other type of harassment	• Culture of discrimination • Accepting bribes • Advancing personal agenda • No action taken by management	• Hold employee accountable in performance appraisal process • Discipline employee • Notify supervisor • Train employees on policies to prevent harassment • Conduct open dialogue
Equal Protection	• Neutrality • Objective responsibility • Respect for citizens	• Prejudice • Intolerance • Selective enforcement • Disparate treatment • Discriminatory action	• Unlawful means to achieve organizational goals • Breach of constitutional rights (racial profiling) • Mistreatment of and harm to citizens, especially minorities	• Train employees on roles & responsibilities • Apply discipline process • Notify legal counsel • Train employees on constitutional rights • Conduct MBWA to monitor & modify abusive behaviors
Public Service	• Timely response • Respect • Efficiency	• Unresponsiveness • Inconsistency • Indifference to citizens • No follow through on service requests • Misinformation to citizens	• Provide rude service • Patronize citizens who make requests • Ignore service request	• Praise outstanding service • Model & communicate exemplary behavior • Discipline non compliance & abusive behaviors • Develop & measure excellent performance
Honesty	• Trustworthy • Accurate & accessible records • Transparent financial transactions	• Omissions in record keeping • Exaggerated reports • Lying to supervisors • Taking credit for the work of others • Reckless spending	• Insubordination • Informal code of silence to cover up abusive actions • Theft in office • Rampant illegal & criminal behavior	• Provide safe channels to report wrong doing • Discipline at all levels • Conduct regular financial & program audits

Fig. 11.2 Regime values implementation matrix

subordinates or co-workers to complete the regime values implementation matrix in a collaborative design process for their units.

Specifically, the column headings of Fig. 11.2 prompt career public servants to reflect on four questions that operationalize constitutional professionalism. First, what administrative behaviors provide evidence of the presence of the selected regime values or public administrative norms in their own behavior or in their unit's practices? Second, what administrative behaviors provide evidence of the absence or the non-compliance with the selected values or norms? Third, what kind of excessive or abusive administrative behaviors are observed that violate the selected values or norms? Fourth, what can public servants do to change problematic behaviors so that there is consistency between the presence of the selected regime values or public administrative norms and their day-to-day practices?

To illustrate how career public servants may use this matrix, I have entered content into the cells of Fig. 11.2 derived from the discussions presented in Parts III and IV of this book. My example is designed to implement the regime values of due process and equal protection (see rows 2 and 3 of Fig. 11.2). These values are associated with the Fifth and Fourteenth Amendments and have the most impact on day-to-day

administrative practices (see Chap. 8). I also chose to implement the ethical standard of public service and to operationalize the virtue of honesty. By engaging in this thought experiment, my example has uncovered the ways in which the presence or the absence of these regime values and public administrative norms may be manifested in practice. The completed cells in the last column specify the implementation practices that can correct the non-compliance and widespread neglect of the chosen regime values and norms. On implementing the actions identified in the last column, the balance between liberty and authority can be restored and sustained in bureaucratic governance.

The astute reader will observe that some cells in Fig. 11.2 involve routine situations. It is a mistake for career public servants to overlook routine matters in their process of discerning regime values because administrative routines have constitutional implications. To illustrate this point, Rohr presents the narrative of Chester Newland, the former director of the prestigious Federal Executive Institute (FEI) in Charlottesville, Virginia. The FEI is well known for providing executive development for federal executives in a residential setting and for having prominent political figures participate as guest lecturers. During Newland's directorship in the 1970s, the FEI had as a training objective to increase the awareness of FEI participants to the needs and feelings of minority groups.[88]

On occasion, the FEI's guest lecturers would request lodging at an all-white club outside of the Institute. Although the club's racial exclusionary policy did not violate state laws then, Director Newland refused to oblige the personal choices of the guest lecturers to stay in segregated lodgings. Although the FEI was acting solely as a conduit for the guests, Newland reasoned that if the FEI staff lodged them at the racially segregated club, then the Institute would have undercut its own training mission as well as violated the regime value of equality. Instead, Newland coached the FEI staff to reply to those guest lecturers who requested to stay at the racially segregated club as follows:

> Oh, I'm sure the assistant secretary [or whoever] is not aware of the club's racial policies. We wouldn't want to cause him any embarrassment by booking him there.[89]

[88] John A. Rohr, *Ethics for Bureaucrats: An Essay on Law and Values*, 2nd ed. (New York, NY: Marcel Dekker, 1989), 72.

[89] Quoted in Rohr, *Ethics for Bureaucrats: An Essay*, 73.

In response the invited lecturers dropped their housing requests. Thus, Newland prudently used a regime value to trump purely personal preferences. By astutely recognizing the constitutional implications of this routine situation, Newland not only solved the problem effectively but also chose to "do good" rather than "avoid evil."[90] While racial exclusion is now illegal, the Newland narrative applies to private clubs that choose to exclude LGBT groups or persons with disabilities.

It is important to point out that using the regime values implementation matrix does not yield commands of political or administrative right or wrong. Instead, this disciplined ethical inquiry helps career public servants understand Newland's moral reasoning and to encourage them to engage in similar reasoning. Newland's example clarifies that career public servants often have more than one right way to apply regime values in their daily work and many wrong ways. Furthermore, the regime values implementation matrix also allows public servants to go beyond purely legalistic interpretations of the Constitution, or what Rohr (1989) calls "the low road" of public service ethics.[91] The low road is a negative approach that focuses on blind adherence to formal rules to keep public servants out of trouble. It also provides a defense mechanism to help them cope with the "gotcha ethics" of the prevailing American way of ethics. Rohr considers the low road of public service ethics as the worst case scenario because it prompts career public servants not only to do the minimum but also to focus on trivial issues.[92]

In contrast, the methodology of discerning and applying regime values and normative public administration helps career public servants travel on the "high road" of public service ethics. According to Rohr, the high road provides a public interest approach to public service ethics because it incorporates social equity along with efficiency and effectiveness as the pillars of bureaucratic governance. By traveling on the high road, career public servants not only reduce the neglect or harm that disadvantaged minorities endure under the unconstrained pathologies of bureaucratic institutions but also extend the latter's economic and political well-being.[93]

The upshot is that career public servants should not to let their consideration of regime values and normative public administrative

[90] Ibid., 73.
[91] Ibid.
[92] Ibid., 64.
[93] Ibid., 64.

practices harden into an orthodoxy.[94] Lewis and Gilman (2005) suggest for career public servants to fuse the high and low roads of public service ethics. The Lewis-Gilman fusion approach allows them to reflect, decide, and act independently as constitutional professionals. Furthermore, career public servants as constitutional professionals have a responsibility to resist legal but improper acts or orders from their political and bureaucratic superiors.[95] Given their accountability to the constitutional regime, career public servants should neither enter nor stay in public service if they are convinced that the American government is unjust. By taking the oath of office, practicing public servants face an existential situation—"they assume democracy."[96] Moreover, Patrick Dobel argues, career public servants should not resign for trivial reasons or refuse to follow orders because they would prefer a different approach or a different outcome than their political superiors or bureaucratic superiors.[97] By assuming democracy, the overriding obligation of career public servants as constitutional professionals is to fix the system when it is broken, not to fix blame or to flee.[98]

In summary, the three chapters of Part IV of this book analyzed the ongoing struggle to balance liberty and authority in bureaucratic governance. Given that democratic accountability is an ongoing political process, it is never perfectly institutionalized, fulfilled, and static.[99] Therefore, Chap. 11 identified a comprehensive set of constitutional and normative public administrative controls and incentives for career public servants to use to assess complex accountability relationships and to govern as constitutional professionals. Chapter 11 concluded with guidelines relevant for public servants to implement actions that operationalize the regime values of American constitutionalism and the normative ideals of democratic public service. Finally, this chapter showed the power of the political ethics of public service in securing the liberty of all citizens while constraining bureaucratic authorities from tyrannizing them in their routine encounters with government.

[94] Ibid., 77.

[95] Norton E. Long, "The Ethics and Efficacy of Resignation in Public Administration," *Administration & Society* 25, no. 1 (May 1993): 4.

[96] Rohr, *Ethics for Bureaucrats: An Essay*, 74.

[97] J. Patrick Dobel, *Public Integrity* (Baltimore, MD: Johns Hopkins University Press, 1999), 111.

[98] Lewis and Gilman, *The Ethics Challenge in Public*, 102.

[99] Olsen, "The Institutional Basis of Democratic."

PART V

Conclusion

CHAPTER 12

The New American Way of Ethics: The Political Ethics of Constitutionally Centered Public Service

The preceding nine chapters in this book have analyzed how career public servants, rooted in constitutional governance as recommended by Rohr, fulfill Mosher's vision of reconciling normative democracy and American public service. The main argument of this chapter is that the political ethics of constitutionally centered public service provides this reconciliation, resulting in the restoration of cordial relations between American citizens and government and between career public servants and elected officials (as well as the latter's appointees) in democratic governance. This reconciliation also sets the conditions for career public servants to function effectively as "the people's champion" as they care for the public and its multiple public interests. Like Goodsell, I view constitutionally centered democratic public service as a social asset that protects the freedoms of Americans while enhancing their public and private lives.[1] Thus, career public servants who govern based on the constitutionally centered political ethics of public service deserve the American people's respect rather than their scorn.

The plan for this concluding part is as follows. First, I explain why the political ethics is a better ethos to govern pluralist US society than the prevailing American way of ethics. Next, I offer five reasons that qualify democratic public service as a bastion of public trust. Subsequently, I argue that the three leadership roles of political ethics lay the groundwork for

[1] Charles T. Goodsell, *The New Case for Bureaucracy* (Thousand Oaks, CA: CQ Press/Sage, 2015), 19.

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career public servants to function as constitutional balance-wheels. My formulation of constitutional balance-wheels operationalizes Rohr's normative theory of public administrative behavior. The following discussion focuses on the education of career public servants. Specifically, I propose a leadership boot camp to prepare career public servants to exercise strong moral and political leadership in the conflict-laden field of American politics. The closing section analyzes the implications of the political ethics of public service for the future of Americans and American self-government.

The Political Ethics of Constitutionally Centered Public Service and the Great Substantive Issues of Politics

The political ethics of constitutionally centered public service is a better public service ethos than the prevailing American way of ethics. One reason is that the three great issues of politics examined in the Introduction are permanent and recurring problems faced by every generation of career public servants, and these issues are not resolved by the ethics moments, conspicuous ethics consumption, and quick ethics fixes of the anti-political American way of ethics. By contrast, the political ethics of constitutionally centered public service embraces all forms of democratic politics to address these great issues of politics.

Specifically, Part III of this book focused on how constitutionally centered public service addressed two of the great issues of politics: first, the coverage of citizenship, affecting who is free or not free in American society at a given moment; and second, the origin of government authority, whether it originates with the people as the democratic sovereign under limited government or originates in authoritarian government and undermines democratic freedoms. The resolution of these two political issues requires career public servants to mix and meld the regime values of liberty and equality in their substantive political choices. This balancing process engenders political conflicts reflecting societal divisions that are ameliorated by temporary settlements involving changing interpretations of federalism and constitutional law. Under the political ethics of public service, career public servants lead as constitutional change agents, based on their constitutional thinking and engagement in constitutional politics, and they do so by assuming the leadership role of a constitutional steward to protect and extend the democratic freedoms of Americans. The

constitutional stewardship action planner presented in Chap. 8 offers guidelines for career public servants to live up to their stewardship obligations (see Fig. 8.1).

Part IV of this book focused on how constitutionally centered public service addresses the third great issue of politics: the concentration or dispersion of government authority in bureaucratic governance. At stake is whether authority is concentrated in the executive branch bureaus such that they become breeding grounds for arbitrary rule and selective law enforcement, or is dispersed in the bureaus and supported by the rule of law and constitutional checks and balance to assure due process and the equal treatment of citizens in law enforcement. The resolution to this great issue of politics requires career public servants to mix and meld the regime values of liberty and authority in bureaucratic governance. This balancing process ameliorates social tensions stemming from the isolation of career public servants as bureaucratic authorities from the communities they serve and protect. Under the political ethics of constitutionally centered public service, career public servants in the role of a constitutional professional restore the amicable relationship between citizens and government in their communities.

In this role, career public servants discern and operationalize regime values, strengthen constitutional processes in their agencies, and apply public administrative norms in day-to-day operations. In this way, career public servants prevent the formation or maintenance of toxic bureaucratic work cultures that result in abusive administrative practices threatening public safety and tyrannizing citizens, especially minorities, in their routine encounters with government. Specifically, the regime values implementation matrix presented in Chap. 11 guides career public servants on how to monitor their own administrative practices so that they can rescind or eliminate behaviors that are inconsistent with constitutional regime values or that violate the rule of law (see Fig. 11.2).

The Political Ethics of Constitutionally Centered Democratic Public Service and the Public Interest

Another reason the political ethics of constitutionally centered democratic public service is better than the apolitical American way of ethics is that it embraces all forms of democratic politics. Specifically, the political ethics of constitutionally centered public service links to the public interest so that

the US democratic republic can adapt to changing societal conditions. Underpinning this political-ethical role is the following big question of democratic governance: what is the proper balance between elected officials (and their political appointees) and non-elected career public servants in democratic governance? The answers to this question of "who governs" reflect political differences in normative interpretations of the public interest.[2]

For example, one normative answer to the question of who governs tips the balance toward career public servants. This interpretation derives from their identity as citizens working as citizens for citizens. Embedded in this interpretation of the public interest is a provocative proposition: the citizen is supreme in democratic governance, despite what legitimately elected officials expect career public servants to do. This is an explosive proposition because the ultimate duty of career public servants is to enable citizens to realize their view of the public interest. In effect, this proposition makes career public servants through their citizen identity preeminent over elected officials in democratic governance.

Yet, shifts in the changing political environment are inevitable. For instance, before the terrorists attacked the USA on September 11, 2001, national citizenship was a secondary moral identity for most Americans (see Chaps. 3 and 6). In response to the terrorist attacks on American soil, a different interpretation of the public interest emerged, and it contained another provocative proposition: the ultimate duty of career public servants is to enable elected public officials to realize their view of the public interest. Thus, after September 11, the public interest (i.e., the national interest) meant whatever the head of the American state, the president, said it was. This interpretation made the partisan political preferences of President Bush preeminent in democratic governance so that he could aggressively wage the War on Terror to defend Americans at home. The president's interpretation of the public interest had the support of the Congress, given its authorization of the Department of Homeland Security and the PATRIOT Act.

Moreover, in the fearful times after September 11, most Americans acquiesced to the president's interpretation and accepted Draconian

[2] Norton E. Long, "Power and Administration," *Public Administration Review* 9, no. 4 (July/August 1949): 263.

Vera Vogelsang-Coombs and Larry Bakken, "Dynamic Interpretations of Civic Duty: Implications for Governance," *International Journal of Organization Theory and Behavior* 6, no. 3 (Fall 2003).

measures that placed restrictions on their democratic freedoms for the purpose of protecting their homes and the American homeland from future terrorist attacks. However, as the president's War on Terror shifted to remote overseas locations, the fears of Americans and their feelings of intense patriotism waned; normalcy returned to American society, including the antipathy of most Americans to democratic politics and their overall distrust of government. Stivers (2008) characterizes this return to normalcy as the "dark environment" of contemporary democratic governance.

As extreme interpretations of the public interest, both propositions are explosive because they invite "revolution from the right" or "revolution from the left."[3] Revolution from the right assumes devolution, and devolution, ultimately, means secession. The public discussions of federalism and the legal interpretations of secession in nineteenth-century America divided the national Union and made the Civil War inevitable (see Chap. 7). By contrast, revolution from the left assumes that the power and discretion of non-elected career public servants is beyond the control of elected officials, such that the former could seize power on their own or act as the hired gun of miscreants who aim to destroy democratic government. As discussed in Chap. 3, this possibility was real for President Lincoln. During the height of the Civil War, the president feared that General McClellan would rebel against civilian authority by staging a mutiny. Ultimately, McClellan, a career soldier educated at West Point, chose a different political route by legitimately opposing Lincoln in the 1864 presidential election.

The view of revolution from the left associates with a recurring partisan political allegation that the career public service is out of control (see Chap. 9). In reviewing the history of the twentieth century, Long finds that totalitarian political parties and anarchical legislatures, not a body of out-of-control career bureaucrats, caused the downfall of democratic governments.[4] Long concludes that American public service, despite its vast bureaucratic powers and institutional shortcomings, is "tamely obedient to civil power."[5] In fact, American public service under the bounds of constitutionalism has had a record of slowly but steadily extending democratic government instead of subverting it (see Part III).

[3] Vera Vogelsang-Coombs, "The Dialogues on Executive Reorganization" (PhD diss., Washington University, 1985), 406-7.

[4] Norton E. Long, "Bureaucracy and Constitutionalism," *American Political Science Review* 46, no. 3 (September 1952): 817.

[5] Ibid., 813.

Given the dynamics of normative interpretations of the public interest, the institutional tension over what is the proper balance between career public servants and elected officials in democratic governance is not settled by the quick ethics fixes of the prevailing apolitical American way of ethics, nor is this tension resolved once and for all. According to Lasswell, each change in the normative interpretation of the public interest serves democratic government by channeling social energy into established political institutions.[6] Given that a change in interpretation of the public interest changes the institutional source of authority in democratic governance (i.e., the presidency or the career bureaucracy), such a shift in interpretation alters the scope of political conflict.

However, political institutions are "the mobilization of bias" because they do not channel political conflict impartially, and their biases elicit political reactions and counter-reactions in pluralist US society.[7] Thus, by absorbing social energy, the changing normative interpretations of the public interest protect the democratic sovereign from the destabilizing effects of uncontrollable political conflict. In this light, changes in the normative interpretations of the public interest take on new significance—they are institutional expressions associated with the ongoing management of political conflict in democratic governance. The cycle of normative meanings of the public interest allows the democratic sovereign to change political controls over democratic governance without jeopardizing national unity.[8]

The Political Ethics of Public Trust

All career public servants hold positions of public trust. For Bok, trust is the foundation of all human relationships.[9] For John Dunn, the ethics of public trust is a public policy. As a policy, public trust "is a conscious way that a [democratic] society sees that the most fundamental human interests

[6] Harold D. Lasswell, *Psychopathology and Politics* (New York, NY: Viking Press, 1960), accessed May 8, 2015, http://www.loc.gov/rr/program/bib/elections/election1864.html, Chapter X.

[7] E. E. Schattschneider, *The Semi-Sovereign People: A Realist's Views of Democracy in America* (Boston, MA: Wadsworth, 1960).

[8] Vogelsang-Coombs and Bakken, "Dynamic Interpretations of Civic."

[9] Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York, NY: Vintage Books, 1989), 31.

depend on the future free actions of others."[10] Thus, the policy of public trust enables citizens to enjoy democratic freedoms in daily living, including the freedom of movement, as well as to accept the democratic freedoms attached to other citizens. Public trust also underpins the constitutional framers' good government philosophy. Accordingly, public trust signifies that the people as the democratic sovereign have confidence in government, allowing governmental agents to use political persuasion and conciliation rather than military force or administrative coercion to conduct public affairs. If public trust is perceived as a public good, then citizens peacefully relinquish some of their sovereign power to governmental authorities for the purpose of sustaining the American democratic republic.[11]

Furthermore, public trust is an intense passion. Public trust depends on whether citizens perceive democratic government as meeting their affective expectations for reciprocity between themselves and those who govern them.[12] Consequently, the legitimacy of American good government depends on the existence of a widespread social consensus that the operations of American government reflect constitutional (regime) ideals; these constitutional ideals have a higher order of meaning than everyday moral standards. The American people of all generations have used these constitutional ideals as the yardsticks to measure the moral conduct of career (and non-career) public servants at all levels of US government. In practice, career public servants operationalize the higher standard underpinning public trust when they formulate and defend their substantive political choices in terms of the Constitution's regime values.

According to Bok, public trust is fragile because it is "a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse."[13] On perceiving shortcomings in the higher standards of moral conduct required of career public servants, then the underlying social consensus connecting Americans not only to each other but also to democratic government is torn apart. Once the affective and social ties of public trust are unloosened, citizens may be reluctant to accept the collective decisions of government as binding. The erosion of this social

[10] John Dunn, "Trust," in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Cambridge, MA: Blackwell Publishers, 1993), 641.

[11] Goodsell, *The New Case for Bureaucracy*, 152.

[12] Dunn, "Trust," in *A Companion to Contemporary.*

[13] Bok, *Lying: Moral Choice in Public*, 26-7.

consensus and the loss of public trust may stimulate uncivil behaviors that break away from constitutional traditions. Thus, Goodsell is correct when he says that building and maintaining the level of public trust to reinforce the social consensus underlying American government is a vital function of democratic public service.[14] This social consensus makes normative democracy possible in the daily lives of citizens.

The Political Ethics of Constitutionally Centered Democratic Public Service and Public Trust

Like Goodsell, I argue that American public service qualifies a "bastion of trustworthiness," despite its negative image as a big and bad bureaucracy.[15] My argument rests on five reasons.

The first reason stems from the democratic character of American public service due to its origin and income level.[16] As a political institution, democratic public service represents the rich diversity of the American people in terms of education, skills, economic interests, race, nationalities, and religious backgrounds. Contributing to the democratic character of public service are the civil service system's merit principles of recruitment and selection (see Chap. 9). Long characterizes American public service as the "democratic *carrière ouverte aux talentes*."[17] Long's point is that American public service opens career opportunities to the talents because the merit system does not block the employment of citizens by requiring educational qualifications that are beyond the reach of the poor. Given democratic public service's openness to the talents, merit prevails over birthright in the selection of those who hold career positions in government, thereby providing paths for men and women to achieve economic self-sufficiency and a middle-class way of life. Comprising the largest segment of American government, not only does democratic public service look like the diverse citizenry it governs, but also, in experience, it "is us."[18]

[14] Charles T. Goodsell, "A New Vision for Public Administration," *Public Administration Review* 66, no. 4 (July/August 2006): 634.

[15] Goodsell, *The New Case for Bureaucracy*, 168.

[16] Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (New York, NY: Oxford University Press, 1982).

[17] Long, "Bureaucracy and Constitutionalism," 814.

[18] Cheryl S. King, Camilla Stivers, and Collaborators, *Government Is Us: Public Administration in an Anti-Government Era* (Thousand Oaks, CA: Sage Publications, 1998).

The second reason American public service qualifies as a bastion of public trust stems from the political role of career public servants. As public trustees, they provide political representation, but it is different from the traditional form of political representation found in the Congress. If one sets aside elections as the prerequisite of political representation, then the diversity and breadth of interests found in the American public service enable career public servants to function as the political representatives of the pluralism extant in US society.[19] Thus, the constitutionally infused and neutral representation of democratic public service gives a voice to traditional interests, including economic interests, the skilled professions, labor, and universities and to non-traditional interests, such as churches and civil liberties groups that serve as the "conscience of society."[20] Beyond constitutionalizing pluralism within American government, the political representation of democratic public service is the institutional medium for stimulating the formation of a public whose interests are unrepresented or underrepresented in the Congress.[21]

The third reason American public service qualifies as a bastion of public trust also derives from its distinct style of political representation. Its neutral political representation of pluralism compensates for the deficiencies of traditional political representation through the Congress. Besides overemphasizing rural and wealthy interests and the interests of self-contained political districts, congressional procedures, such as its seniority rule and interest-dominated committees, are devices marginalizing the representation of minorities.[22] Similarly, Rohr (1986) finds that the political representation provided by career public servants offsets the conspicuously undemocratic composition and irresponsible behavior of legislatures when they are dominated by one party, one racial group, or one gender. In recent years, the capture of political primaries by the extreme wings of both major parties and the election of fewer centrist politicians to the Congress have polarized the federal government, and this polarization has trickled down to the state and local levels.[23] This breakdown of traditional representation disconnects the citizenry from government, leaving many in pluralist US society without a voice.

[19] Long, "Bureaucracy and Constitutionalism," 814, 816.
[20] Ibid., 813.
[21] Ibid., 816.
[22] Ibid., 813.
[23] Morris P. Fiorina and Samuel J. Abrams, *Disconnect: The Breakdown of Representation in American Politics* (Norman, OK: University of Oklahoma Press, 2009).

Moreover, the partisan gridlock between the hyper-partisan Congress and the short-term president under conditions of divided government periodically shuts down the operations of the federal government. The partisan gaming strategies that result in shutting down the federal government disadvantage many citizens who rely on its public programs and, in turn, deepen public distrust of government.[24] Given its political representation of pluralism, constitutionally centered American public service can legitimately claim responsibility for the democratic sovereign's (i.e., the people's) steadiest institutional champion.

However, one should not infer from the previous discussion that the traditional representation provided by the Congress is invalid in democratic politics or is unessential to the forces of American constitutionalism. Without congressional representation and vigorous legislative oversight under the constitutional arrangement of checks and balances, unrestrained bureaucratic practices, such as racial profiling, can proliferate and tolerate government agents who threaten and harm undefended citizens (see Chaps. 10 and 11). Thus, by controlling the public purse and monitoring the operations of executive branch agencies, the Congress is a constitutional check necessary to restrain the behavior of career public servants in bureaucratic governance. Despite its representational defects, the Congress remains a vital part of the working Constitution.

A fourth reason American public service qualifies as a bastion of public trust derives from its permanence and the organizational missions that legislatures have assigned to executive branch agencies. Agency missions focus on public purposes that outlast the term-limited president or 2-year congressional sessions. Not only do agency missions empower Americans, but the associated public programs and policies also improve the conditions of their lives.[25] Furthermore, the ongoing agency missions institutionally position full-time career public servants to address the changing and long-term needs of pluralist US society. In effect, constitutionally centered democratic public service broadens the focus of career public servants from tackling immediate concerns and looking at the proximate future to that of change agents who play a part in charting the nation's future.[26]

The fifth reason American public service qualifies as a bastion of public trust derives from its feature as a learning organization that, in turn, promotes institutional responsibility. In Long's view, executive branch

[24] Goodsell, *The New Case for Bureaucracy*, 199-200.
[25] Ibid., 141.
Goodsell, "A New Vision for Public," 633.
[26] Goodsell, *The New Case for Bureaucracy*, 142.

agencies come closer than any other unit of government in achieving responsible behavior due to their depth and breadth in considering relevant facts. Similarly, Goodsell views agencies as "the repositories of responsibility" because they have stored within them an understanding of past laws, agreements, and attempts to act, and career public servants as the "trustees of specialized knowledge, historical experience, and time-tested wisdom."[27]

By contrast, the term-limited presidency has monarchical tendencies despite its elective characteristic, and presidential power increasingly rests on non-consultative governing methods, such as unilateral executive orders.[28] The hyper-partisan Congress, despite the absence of legislative term limits, cannot learn from its mistakes. In the contemporary context, congressional legislators may be reluctant to modify their extreme partisan stances or engage in mid-session corrections because the mass and social media, in addition to their politically active constituents, pejoratively characterize such behavior as "flip flops."[29] Thus, by working in continuing bureaucratic organizations, career public servants can and do correct their mistakes by learning from their agencies' institutional record, their own experiences, and the investigations of oversight bodies scrutinizing their conduct. Larry Terry (1995) provides evidence that constitutionally minded career public servants who conserve the missions of their agencies around shared regime values and organizational learning modalities deepen public trust because they help stabilize and renew the American democratic republic.[30]

Political Ethics and Balancing the Instrumental-Constitutive Tension of the Regime

According to Cook, American public service has the critical responsibility to create a constructive tension between the instrumental-constitutive nature of the regime.[31] On the one hand, under the American separation of powers regime, democratic public service provides subordinate leadership

[27] Ibid., 141-2.

[28] Long, "Power and Administration," 263. Kenneth R. Mayer and Kevin Price, "Unilateral Presidential Powers: Significant Executive Orders, 1949-1999," *Presidential Studies* 32, no. 2 (June 2002).

[29] Fiorina and Abrams, *Disconnect: The Breakdown of Representation*, 166.

[30] Larry D. Terry, *Leadership of Public Bureaucracies: The Administrator as Conservator* (Thousand Oaks, CA: Sage Publications, 1995).

[31] Brian J. Cook, "Politics, Political Leadership, and Public Management," *Public Administration Review* 58, no. 3 (May/June 1998): 225.

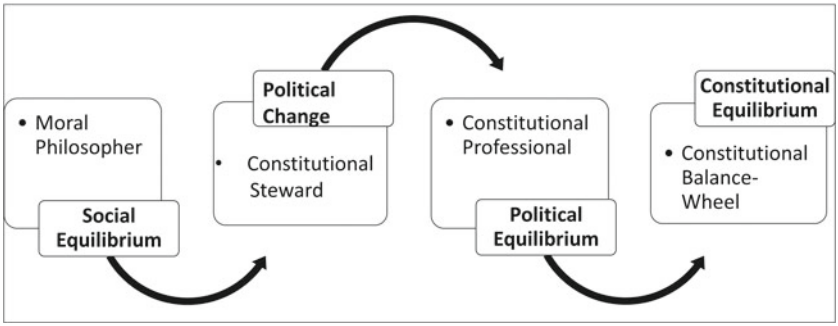

Fig. 12.1 The leadership roles of political ethics and the path to constitutional equilibrium

to all three branches of government because, as Rohr says, it "neither constitutes nor heads any branch of government."[32] On the other hand, the constitutive dimension of democratic public service means that career public servants use political power for the purpose of not only preserving the distinct American way of life but also securing political changes that impact the nation's future. By recognizing the constitutive dimension of their jobs, career public servants use regime values to pursue collective ends constitutionally rather than acting as the politically responsive instrument of elected officials to pursue partisan-driven management reforms.[33]

My formulation of the political ethics of constitutionally centered public service balances the instrumental-constitutive tension of the regime. As shown in Fig. 12.1, each leadership role of constitutionally centered political ethics of public service leads to the next one because it provides the societal conditions required for the role that follows. In other words, the leadership role of a moral philosopher yields social equilibrium, which is a precondition for career public servants to assume the leadership role of a constitutional steward; the leadership role of a constitutional steward yields political change. Given that political change is controversial and conflict laden, assuming the leadership role of a constitutional professional is necessary for career public servants. By reducing polarization and

[32] John A. Rohr, *To Run a Constitution* (Lawrence, KS: University of Kansas Press, 1986), 182.

[33] Cook, "Politics, Political Leadership, and Public," 225.

stabilizing community relationships, career public servants as constitutional professionals produce political equilibrium. The achievement of political equilibrium culminates in the role of career public servants as constitutional balance-wheels by which they maintain constitutional equilibrium. The societal effects and political outcomes of each political ethics leadership role is discussed in turn.

The Political Ethics of Moral Leadership and Social Equilibrium

In their ethical inquiries, career public servants use the philosophical methods of moral philosophers to renew the delicate emotional bonds between American citizens and American government. As discussed in Part II, philosophical reflexivity helps career public servants understand that every decision they make, including the decision not to act, shapes their sense of self.[34] As moral philosophers, they embrace the human side of politics and retain their own humanity in the conflict-laden environment of democratic public service.

Accordingly, Chap. 3 discussed how moral philosophy helps career public servants probe their divided consciences in a disciplined self-appraisal process when they are faced with urgent situations that may require them to dirty their hands politically. This self-assessment process involves a silent review and reordering of their personal loyalties and self-interests to include the public and private moralities of Americans, universal ethical standards, and the constitutional obligations of their offices. This mental reorientation provides a catharsis that contributes to the formation of their better selves. In keeping with moral philosophy, career public servants are obligated to share their better selves in a public dialogue to account to those who are most directly and adversely affected by the consequences of their substantive political choices. Besides fostering the moral development of career public servants, philosophical reflexivity broadens their outlook so that they can function consultatively.

To illustrate this type of philosophical reflexivity, Chap. 3 presented a rhetorical analysis of Lincoln's Gettysburg Address and placed it in the political and social context of nineteenth-century America. This analysis revealed how Lincoln unified his divided conscience in an undeluded way to accept public responsibility for the massive Civil War carnage associated

[34] Camilla Stivers, "Citizenship Ethics in Public Administration," *Public Administration Public Policy* 86 (2001): 146.

with his upholding his constitutional obligation to preserve the federal Union. The Gettysburg Address was tantamount to the president's dialogue with the public about the morality of his military conduct. Besides expressing compassion for the immense suffering of the military families, the president's speech articulated a vision of the USA's future as a constitutional regime that stood for both human equality and political liberty. Thus, Lincoln's Gettysburg Address eloquently redefined what it meant to be an American citizen under the twin ideals of the constitutional Union he fiercely defended.

In effect, Lincoln's moral leadership renewed the emotional bonds between the federal government and the citizens who suffered most from the morally questionable but politically necessary choices he made during the Civil War. Through the Gettysburg Address, Lincoln reduced the political polarization between Northerners and Southerners by temporarily converting their hostilities into amicable feelings, based on a higher purpose and a common cause of a joint future of positive political possibilities. By reducing the polarization of citizens, Lincoln strengthened the subtle affective ties binding the American people together in 1863—and for all time.

Furthermore, the moral leadership of career public servants may help form an emotional consensus designed to reduce political polarization in everyday situations. For example, philosophically reflexive career public servants can perceive the perverse consequences of social actions related to the special loyalty citizens have to consuming low-quality public goods, such as K-12 public education. Chapter 5 analyzed the ways in which different conceptions of self-interest can lead citizens to pursue avoidance behaviors and politically correct choices that render them callous and cynical regarding the suffering of others, resulting in the political polarization of their communities. The chapter then guided career public servants on how to use their capacity to discern second-order moral reasons (discussed in Chap. 4) to change the production of degraded public goods and, by extension, any objectionable state of affairs in the workplace or the larger society.

Philosophical reflexivity also helps career public servants reshape themselves into inclusive administrators by embracing citizens as the co-producers of public goods so that together they may adapt public organizations to address urgent social needs. By listening to and accommodating the interests of those who cannot escape from communities producing degraded public goods, career public servants help reduce tension levels between government and citizens on important public issues. The

reduction of tension levels in communities creates an emotional consensus on important public issues that contributes to the formation of social equilibrium. The significance is that the ethical development of career public servants as inclusive administrators allows them to act on difficult ethical choices without losing their own humanity or draining it from others.

The achievement of social equilibrium is the precondition for changing the political status quo.[35] Each time career public servants adapt public organizations to achieve social equilibrium, they not only accommodate changing human conditions in pluralist US society but also preserve American self-government. As indicated in Fig. 12.1, this achievement of this social equilibrium sets the stage for them to function as constitutional stewards.

The Political Ethics of Constitutional Stewardship and Political Change

As constitutional stewards, career public servants engage in constitutional thinking and constitutional politics in the policy-making process to address public problems from a community perspective. In this role, career public servants inform collective policy goals for the purpose of stimulating long-term political change.

Specifically, career public servants function as constitutional change agents by adopting integrative governing methods as part of their political representation of pluralism. Their use of integrative governing methods replaces the procedures of aggregative politics that relies on the strength of competing interest groups to formulate public policies. As discussed earlier, the aggregative politics inside the Congress leads to the overrepresentation of advantaged interest groups and the maintenance of the partisan political status quo. Moreover, the interest-based coalitions formed in aggregative procedures are dominated by partisan politicians, and their practice of majority rule, and their sensitivity to short-term election cycles often produce quick fixes to satisfy the self-interests of active constituents.

As shown in the introductory case study, the ethics reforms under the apolitical American way of ethics prompted changes in the structure of Cuyahoga County's corrupt government. These reforms were aggregative responses to the constituency and electoral pressures for political change

[35] Lasswell, *Psychopathology and Politics,* Chapter X.

in the wake of the federal corruption investigations. The newly elected county officials under the reformed government authorized quick ethics fixes that pinned blame on the people in Cuyahoga County's public service—all of them—instead of fixing the shortcomings in its underlying system of democratic representation. Ultimately, the apolitical American way of ethics implemented by recycled politicians holding elective positions under the reformed Cuyahoga County government reinforced the partisan political status quo.

The integrative procedures used in the political representation provided by career public servants countervail the representation function of legislatures. In practice, career public servants are embedded in intergovernmental arrangements, cross-sector partnerships, civic associations, as well as global professional networks, all of which transcend the boundaries of their jurisdictions. Hence, they interact more frequently with public and private actors in shared policy and governance networks than do elected officials, most of whom are part-time, or their short-term political superiors. Thus, career public servants are less beholden to particular interests because they are not subject to reelection cycles dominated by powerful moneyed interests. On applying integrative procedures of pluralist political representation, career public servants search for common cause rather, instead of finding common ground between competing groups.

Underpinning their integrative governing methods is an affective consensus held both by officeholders and citizens. This consensus entails the widespread agreement that officeholders will use consultative procedures to reassure citizens that their trust in government is sound. The use of consultative procedures in their political representation of pluralism satisfies the condition of potential responsiveness. According to Pitkin, potential responsiveness requires citizens to have "[a]ccess to power rather than its actual exercise.… There need not be a constant activity of responding, but there must be a constant condition of responsive*ness*, of potential readiness [of government] to respond."[36] On perceiving potential responsiveness, citizens feel that they can trust career public servants to do the right thing instead of having to initiate action on their own. If citizens perceive potential responsiveness, then they are likely to accept the collective decisions of government as binding, despite their lack of direct political participation or awareness of what government officials are doing

[36] Hanna F. Pitkin, *The Concept of Representation* (Berkeley, CA: University of California Press, 1972), 233.

most of the time. Thus, the consultative procedures associated with the integrative governing methods of political representation do not eliminate political conflict but civilize it.[37]

In practice, career public servants operationalize potential responsiveness by openly articulating, debating, selecting, or rejecting different policy alternatives or legal interpretations, in addition to communicating explicitly why they are using one set of regime (constitutional) values over another to operationalize their substantive choices for political change. The use of consultative governing procedures, additionally, applies to their judgments as to the success or failure concerning their own implementation decisions.[38] Given the communal and constitutional constraints placed on career public servants, the integrative governing methods of their pluralist political representation are legitimate sources of ethical judgments in the public service.[39]

The political representation of public interests by career public servants also legitimates the practice of their serving as the loyal opposition to elected officials rather than the latter's loyal soldiers. Given the weaknesses of the two-party system, executive-branch agencies have a large share of responsibility to organize and promote public policies. Based on their special technical competence and a "shrewd understanding of what is politically feasible, career public servants have a rightful place" in the policy initiation process by providing "loyalty that argues back."[40] Career public servants may use the knowledge and information they gathered through their integrative governing methods to give a voice to powerless or vulnerable citizens who are underserved, misrepresented, or neglected by other institutional actors.[41]

[37] James G. March and Johan P. Olsen, *Democratic Governance* (New York, NY: Free Press, 1995), 30.

[38] Amy Gutmann and Dennis F. Thompson, *Why Deliberative Democracy?*(Princeton, NJ: Princeton University Press, 2004).

[39] Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987).

Robert E. Goodin, "The Contribution of Political Science," in *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit (Cambridge, MS: Blackwell Publishers, 1993).

[40] Long, "Power and Administration," 259, 263.

In James P. Pfiffner, "The Institutionalist: A Conversation with Hugh Heclo," *Public Administration Review* 67, no. 3 (May/June 2007): 420.

[41] Brian J. Cook, "Regime Leadership and New Public Governance," in *New Public Governance: A Regime Perspective*, ed. Douglas F. Morgan and Brian J. Cook (Armonk, NY: M.E. Sharpe, 2014), 205.

As noted by Goodsell (2015), career public servants are loyal to their agencies' missions, programs, clienteles, and policy interests. These sources of institutional loyalty give expression to major policy alternatives that bubble up from the grassroots; career public servants can share these policy alternatives with elected officials. Furthermore, as loyal opponents, they may help legislators avoid unnecessary vagueness in their policy formulations, besides helping their political superiors avoid the improper delegation of power.[42] Moreover, as loyal opponents, career public servants are obligated to inform political executives and legislators of the problems evolving out of the legal interpretations and the implementation of public policies that require the redrafting of unconstitutional laws (such as DOMA) or from abusive administrative practices, such as racial profiling, that require rescission. In these ways, the institutional loyalty of career public servants to their agency missions, programs, and clientele heal the representational flaws of legislatures while enhancing the policy-making processes in both the legislative and executive branches of government.[43]

Finally, as constitutional stewards, career public servants are a part of "a moral community extended over time," giving them definable obligations to future generations.[44] For Frederickson, political institutions are a form of social equity between generations, and their implementation decisions enable the present generation of Americans to act favorably on behalf of future generations. Thus, career public servants act as constitutional stewards when they include an inter-generational perspective in their policy formulations and communicate their "informed and non-exaggerated articulation" of the likely effects of social equity policies on future generations to other institutional policy-making actors (Frederickson 1994, 463).[45]

Thus, the integrative governing procedures used by career public servants as constitutional stewards, along with their asserting "loyalty that

Richard T. Green, Lawrence F. Keller, and Gary L. Wamsley, "Reconstituting a Profession for American Public Administration," *Public Administration Review* 53, no. 6 (November/December 1993): 520.

[42] Cook, "Politics, Political Leadership, and Public."

[43] Green, Keller, and Wamsley, "Reconstituting a Profession for American."

Cook, "Regime Leadership and New Public," in *New Public Governance: A Regime*.

[44] George H. Frederickson, "Can Public Officials Correctly Be Said to Have Obligations to Future Generations?," *Public Administration Review* 54, no. 5 (September/October 1994): 461.

Specifically, Frederickson (1994, 460) defines equity to mean the philosophical treatment of fairness and social equity as "a more equal distribution of opportunities, costs, and benefits in social and political domains."

[45] Ibid., 463.

argues back" and their inter-generational equity perspective, contribute to the achievement of significant political change. Given that the achievement of political change is controversial, it is not automatically accepted in pluralist American society (see Chap. 8). Therefore, it is necessary for career public servants to stabilize the constitutional regime by assuming the political-ethical role of a constitutional professional.

The Political Ethics of Constitutional Professionalism and Political Equilibrium

The purpose of the political-ethical leadership role of a constitutional professional is to balance liberty and order for the purpose of preventing bureaucratic tyranny. To achieve this balance, career public servants have to reduce their isolation from their communities they serve and to prevent the formation of toxic bureaucratic subcultures that tolerate administrative practices undermining the liberty of citizens. Besides preventing bureaucratic tyranny through internal monitoring, career public servants, as constitutional professionals, open those executive branch agencies with closed and tenured-in personnel systems up to the community. In this way, constitutional professionalism eases strains in society that reduce the polarization of citizens and government; the reduction of polarization is necessary to achieve political equilibrium and stabilize the constitutional regime (see Fig. 12.1).

One way career public servants prevent bureaucratic tyranny and reduce the polarization of citizens from government is through the "experiencing function" of administration. According to Cook, the experiencing function involves career public servants in monitoring the conditions that affect the public health and safety of citizens and in devoting resources for remedies and prevention.[46] For example, the experiencing function involves career public servants in checking the use of discretion in frontline activities, such as police patrols. Another aspect of the experiencing function derives from the melding of the separation of powers inside executive-branch agencies. Given that career public servants interact on an ongoing basis with political executives, the courts, legislators, and legislative staff, their collaboration with these institutional actors helps secure changes in legislation or administrative practices to curb institutional pathologies, such as racial

[46] Cook, "Regime Leadership and New Public," in *New Public Governance: A Regime*, 205.

profiling or overzealous prosecutions (see Chaps. 10 and 11). Therefore, it is necessary for career public servants to conceive of legislative and judicial interventions into bureaucratic governance not as meddlesome but as the way the Constitution comes alive.[47] Moreover, the experiencing function can guide the decisions of career public servants over what to continue and what to change in bureaucratic governance without jeopardizing political stability. In effect, career public servants insulate the political institutions of government from succumbing to "turnover paralysis" due to periodic elections and changes in political offices.[48]

Another way career public servants prevent bureaucratic tyranny and reduce the polarization of citizens and government is by standing up to an established political regime to pursue a more just society. This aspect of constitutional professionalism aims at transforming a polarized community where deeply held values are in conflict and cause emotions to soar.[49] Career public servants fulfill this role of constitutional professionalism through their facilitation of community dialogues around constitutional (regime) values, court opinions, and constitutional law. An exemplar of constitutional professionalism is Sylvester Murray, Professor Emeritus of CSU's Levin College of Urban Affairs.

Before joining CSU, Murray was the city manager of Inkster, Michigan, Cincinnati, and San Diego. While at CSU's Levin College, he engaged in significant public service outreach and technical assistance. On one assignment, Murray facilitated the work of a Blue Ribbon Commission in Parma, Ohio, an inner ring suburb of Cleveland and the state's seventh largest city. Murray was charged with the responsibility of helping this financially stressed city to reform its police department after a series of problematic interactions of law enforcement with residents of color. The Blue Ribbon Commission also asked Murray to develop strategies to improve the city's image and diversity.

Accordingly, Murray facilitated a community-wide dialogue around the regime value of representative bureaucracy that applied democratic-civic standards of assessment of the police department. In his report to the Parma citizenry, the Blue Ribbon Commission Chair acknowledged Murray's leadership as follows:

[47] John A. Rohr, "Professionalism, Legitimacy, and the Constitution," *Public Administration Quarterly* 8, no. 4 (Winter 1985): 415.

[48] March and Olsen, *Democratic Governance*, 240.

[49] Cook, "Regime Leadership and New Public," in *New Public Governance: A Regime*.

> What was once seen as a challenge can also be seen as ... [Parma's] great advantages … our vast ethnic diversity, our changing business environment, and also our multi-faceted religious representation, to name a few. New collaborative efforts have already begun as a result of the Commission's work; efforts that are fostering the right environment for brilliant minds to work together for the common good …. This city offers a place for everyone, regardless of race, color, or creed. As we all work together …. passions will be stirred, standards will be raised, and dreams will become reality …. even in the face of, and often because of, the challenging obstacles that we will face and overcome as one. Parma will continue to be a vibrant city that represents all the good that is America.[50]

Murray's facilitation of a community dialogue around the regime value of representative bureaucracy and his constitutive professional practice helped reorient the city's police force to act as "one of us and for us rather than against us."[51] Moreover, the collaborative efforts of active citizens and government enabled this municipality to create an environment of public trust in the incumbent regime of elected officials. By restoring public trust, Murray's leadership stabilized the municipality's democratic government. Murray's example shows career public servants that the leadership role of a constitutional professional not only contributes to the reconstitution of public morality in a polarized community but also helps keep a political regime vibrant.[52]

Finally, career public servants, as constitutional professionals, have the capacity to prevent political entropy. To prevent political entropy, career public servants may use the knowledge they gained in the experiencing function "to prop up the duties of others" to help institutional actors fulfill their constitutional responsibilities.[53] For example, career public servants may help legislators engage in "deliberative lawmaking" that is

[50] Chairperson Biermann, 2007, quoted in Vogelsang-Coombs, Keller, and Murray, "Council-Manager Government at 100," in *Citizenship: A Reality Far*.

[51] Ibid., 183.

[52] Green, Keller, and Wamsley, "Reconstituting a Profession for American," 520. A financial crisis and community unrest drove the mayor to share power with citizens, but he used citizen empowerment as an instrument to maintain his political support in a changing and increasingly diverse community. Given the instrumental nature of citizen empowerment and the turnover in the mayor's office, the achievement of political equilibrium in this municipality derived from Murray's leadership as a constitutional professional was temporary.

[53] Green, Keller, and Wamsley, "Reconstituting a Profession for American," 521.

"grounded in the governing experience."[54] In effect, the constitutional professionalism of career public servants compensates for legislative bodies that cannot (or will not) perform their deliberative lawmaking function on their own. If legislative bodies neglect deliberative lawmaking, then they expose their jurisdictions to political entropy. By neglecting their deliberative lawmaking function, elected officials choose to advance personal agendas or pursue partisan goals related to higher office in lieu of addressing broader community (public) interests.[55] By preventing political entropy, career public servants, as constitutional professionals, preserve American self-government.

The Political Ethics of Constitutional Balance-Wheels and Constitutional Equilibrium

To reconcile normative democracy and American public administration, Rohr conceives of career public servants playing the role of constitutional balance-wheels.[56] As shown in Fig. 12.1, the three leadership roles of the political ethics of public service culminate in the leadership role of a constitutional balance-wheel and provide a path for the achievement of constitutional equilibrium. Thus, my formulation of constitutionally centered public service gives meaning to Rohr's normative theory of public administrative behavior.

In the separation of powers system, career public servants, as constitutional balance-wheels, are subordinate to all three branches of government. Appleby characterizes their distinctive competence as leadership that is "on tap, not on top."[57] However, the collapse of the separation of powers inside the public bureaucracies, discussed in Chap. 9, means that career public servants exercise the powers of all three branches. For example, career public servants function autonomously as constitutional balance-wheels when they apply the rule of law, due process, and codes of professional conduct in handling individual cases without the involvement

[54] Cook, "Regime Leadership and New Public," in *New Public Governance: A Regime*, 205.

[55] Vogelsang-Coombs, Keller, and Murray, "Council-Manager Government at 100," in *Citizenship: A Reality Far*.

[56] Rohr, *To Run a Constitution*, 181-2.

[57] Paul H. Appleby, "Making Sense of Things in General," *Public Administration Review* 22, no. 4 (December 1962): 175.

of elected politicians, the courts, or organized interests.[58] Thus, career public servants do the work of "statesmen" by "think[ing] like judges, as well as like legislators, and executives, because they are all of these."[59] By playing this constitutional balancing role, career public servants, says Rohr, fulfill the role originally intended for the US Senate.[60]

The subordinate leadership role of a constitutional balance-wheel does not mean that career public servants are the feckless pawns of the political leadership in the three governmental branches. If career public servants assume the role of a feckless pawn, then democratic public service is vulnerable to political manipulation and the domination by private interests that threaten the democratic freedoms of Americans. Rohr contends that American public service can never be purely instrumental because there is no way of telling whose instrument it will be.[61] Rohr advises career public servants not to wait to be captured by legislatures, political executives, or the courts, all of which are independent branches and in competition with each other in the ongoing struggle to control bureaucratic governance. Instead, he recommends that they choose which political master (or branch of government) to favor on a particular policy most likely to advance the public interest at a given time and for how long.[62] Their choice, he says, depends on which branch they judge needs strengthening to maintain the correct constitutional balance for achieving the goals stated in the Constitution's preamble. By linking the constitutional subordination of career public servants to their freedom to choose among competing political masters, Rohr balances the instrumental-constitutive character of democratic public service "without succumbing to the naive view of administration as apolitical."[63]

Underpinning the role of a constitutional balance-wheel is the exercise of "responsible administrative discretion." Rohr provides two justifications for career public servants to exercise responsible administrative discretion. One justification rests on the overriding value of career public servants as the instrumentality of the Constitution. The other justification derives from the oath of office in which career public servants promise to defend

[58] Johan P. Olsen, "Maybe It Is Time to Rediscover Bureaucracy," *Journal of Public Administration Research and Theory* 16, no. 1 (March 2006): 18.

[59] Rohr, *To Run a Constitution*, 181.

[60] Ibid., 182.

[61] Rohr, "Professionalism, Legitimacy, and the Constitution," 415.

[62] Rohr, *To Run a Constitution*, 183.

[63] Ibid., 184.

and protect the Constitution. This oath of office vests them with an independent source of autonomy so that they may choose legitimately among constitutional masters to carry out their assigned activities.[64] Both justifications ground responsible administrative discretion in the permanent Constitution rather than in statutes drawn up by temporary partisan political majorities.

From Rohr's perspective, the promise to uphold the Constitution in the oath of office is morally binding on career public servants and stronger than other types of promises they might make. The higher morality of this oath connotes much more than a commitment to obey. For Rohr, the oath of office is a covenant that defines a common way of life for the American people. Under the oath of office, career public servants are initiated into a democratic community based on "a disciplined discourse to discover, renew, and adapt the fundamental principles that support ... [the American political] order"; the oath also initiates them to join the American people together in a band of civic friendship.[65] Therefore, Rohr views the upholding of the oath of office as an act of civility rather than submission. Besides suggesting self-restraint by career public servants, their use of responsible administrative discretion, based on their oath of office, civilizes administrative politics. Civility in administrative politics enables career public servants to govern with their political superiors and the other branches of government as institutional friends.

In practice, career public servants are caught in the ongoing political struggle of the three competing branches to assert control over bureaucratic governance. As they uphold the Constitution, career public servants are expected to remain respectful of their political superiors while acting firmly in the face of their contending governance perspectives.[66] Often, career public servants may find themselves in situations in which the legal commands from political executives, governing bodies, and the courts and their political superiors are vague, inconsistent, or outside of the Constitution. Even if commands are clear and in harmony with the Constitution, career public servants still face important situations in which the law empowers but does not command them.

[64] Ibid., 187.
[65] Ibid., 192.
[66] Green, Keller, and Wamsley, "Reconstituting a Profession for American," 522.

Rohr gives the example of President Nixon, who established a system of warrantless wiretapping for national security purposes.[67] However, Nixon used these dubious wiretaps for reelection purposes rather than in the public interest of the state. Thus, Rohr argues that it is legitimate for career public servants to use their discretion to resist constitutionally questionable activities, as with Nixon. According to Rohr, this use of responsible discretion requires them to deal "more with history than with the present, with insight rather than advocacy, with argument rather than law."[68] In this way, career public servants fulfill the spirit of the Constitution in concrete situations even if it does not expressly command them. This type of constitutional autonomy also helps them avoid doing harm or to right a wrong.[69]

In using their discretion as the constitutional balance-wheels of government, career public servants are likely to encounter demands for their immediate removal. Thus, they need protection from the constituency pressures, emotions, and threats associated with the aggregative politics of hyper-partisan legislatures, as well as from the absolutism of "true believers," fundamentalists, bigots, and the sin police extant in pluralist American society.[70] These situations require career public servants to have exemptions from their subordination to political leadership to serve the constitutional regime.[71] Rohr rests his justification for exempting career public servants on the provisions extant in the professional codes of conduct of the American Society for Public Administration (ASPA) and the International City/County Management Association (ICMA). Rohr argues that these professional ethics codes of conduct convert and codify the exemptions of career public servants from their subordinate leadership position into "principled demands" for them to serve public interests and the broader society.[72] Besides accommodating the self-serving (survival)

[67] Rohr, *To Run a Constitution*, 193.

[68] Ibid., 193.

[69] Brian J. Cook, *Bureaucracy and Self-Government: Reconsidering the Role of Public Administration in American Politics*, 2nd ed. (Baltimore, MD: Johns Hopkins Press, 2014), 236.

[70] March and Olsen, *Democratic Governance*, 89, 135.

[71] John A. Rohr, "The Problem of Professional Ethics," in *Essential of Government Ethics*, ed. Peter Madsen and Jay M. Shafritz (New York, NY: Meridian Books, 1992), 437.

[72] Ibid., 432, 434.

needs of career public servants, these codes have provisions for protecting or at least minimizing the political manipulation of their members.[73]

Furthermore, as Cook notes, responsible administrative discretion does not imply domination of government over citizens, nor does it mean that career public servants have complete freedom from external regulations.[74] Yet, elected officials and the public may be reluctant to accept the constrained independence of career public servants operating as constitutional balance-wheels. Instead of responding to their own political interests or acquiesce to constituency pressures demanding the removal of career public servants who exercise responsible administrative discretion, elected officials must protect them. Thus, elected officials must be socialized into understanding and respecting the constitutional balance-wheel function of career public servants, instead of perceiving the latter's use of responsible discretion as insubordination. Until elected officials protect career public servants from inappropriate political interference or manipulation, the latter as the constitutional balance-wheels cannot play a major role in democratic governance.

Nevertheless, the use of responsible administrative discretion by non-elected career public servants remains controversial because it gives them some independence "in living out their oath in practice.[75] This institutional independence is also the source of academic criticism of Rohr's normative theory of democratic public service. Eminent scholars, such as Theodore Lowi (1993), are uncomfortable with Rohr's conception of career public servants as constitutional balance-wheels because his theory neglects situations involving bureaucratic tyranny. My formulation of constitutionally centered political ethics of public service addresses this criticism. As shown in Fig. 12.1, the role of a constitutional balance-wheel

[73] For example, the American Society for Public Administration (ASPA 2013a) has as a core principle "to demonstrate personal integrity." In a companion document, ASPA members are guided to practice this principle by "resist[ing] political, organizational, and personal pressures to compromise ethical integrity," by "support[ing] others who are subject to these pressures," and by "conduct[ing] official acts without partisanship and favoritism" (ASPA 2013b). Similarly, the ethics code of the International City/County Management Association (ICMA 2015) advises city and county managers to "resist any encroachment on professional responsibilities, believing the member should be free to carry out official policies without interference, and handle each problem without discrimination on the basis of principle and justice." Sanctions may be imposed on ASPA or ICMA members who fail or refuse to uphold their professional ethics codes.

[74] Cook, *Bureaucracy and Self-Government: Reconsidering*, 234.

[75] Rohr, *To Run a Constitution*, 188.

is preceded by the role of a constitutional professional, and the primary purpose of constitutional professionalism is to prevent bureaucratic tyranny (see Chap. 11).

Education for Democracy and Public Service

The formation of the ethical and political values necessary for public service takes place, in part, in university-based MPA programs. In partnership with the National Association of Schools of Public Affairs and Administration (NASPAA), the MPA curriculum does an excellent job of preparing students for existing public service occupations and jobs. The formation of ethical and political values necessary for public service also happens in professional associations, such as ICMA and ASPA. Their training workshops hone the technical, management, and leadership skills of practitioners and prepare them for the public service jobs most likely to emerge in the near future.

The argument I present in this section is that the leadership education for American public service requires a rigorous developmental experience that supplements the traditional MPA education. Specifically, I am proposing a leadership boot camp for constitutionally centered public service. My rationale is that graduating from an MPA program does not automatically make people fit into the conflict-laden, political environment of democratic public service. In other words, career public servants, especially at the higher levels, must be acclimated to the personal, psychological, and intellectual challenges that shape their sense of self and their capacity to exercise strong moral and political leadership in the crucible of American politics. Therefore, my boot camp education proposal has the following five features.

First, career public servants must embrace democratic politics rather than shield themselves from it. A foundational political science class is useful to introduce them to the recurring great issues of politics that they are most likely to encounter on the job. It is also necessary for career public servants to tap into the human side of politics and its pathologies. Therefore, the boot camp education formalizes the self-assessments conducted by career public servants in their ethical inquiries. Working with licensed medical professionals, career public servants have opportunities in their boot camp education to uncover the conscious and unconscious dimensions of their personalities that shape their character on the job. According to Lasswell, “Knowledge of the self, by the self,

intelligence concerning past decisions in the decision process, enter into the vast and continual redefinition of role, personality, and development."[76] Under the guidance of psychiatrists or psychologists, in safe learning settings, career public servants can learn how to manage their vulnerabilities so that they can work collaboratively with others as they fulfill the leadership roles of political ethics under stressful situations. This type of learning enables the unconscious elements of their personalities to become allies to support their human potential for achieving a high level of effectiveness in constitutional governance.[77]

Second, career public servants must understand that politics is "the art of the possible," based on the "pursuit of moral ideas in the public sphere."[78] This learning objective is accomplished by educating career public servants in the practical uses of moral philosophy in public service. As shown in Part II, moral philosophy enables career public servants to understand, justify, and defend the Constitution and the political institutions of government under which Americans live. By applying philosophical methodologies, career public servants develop the capacity to assess arguments and evidence that express value judgments based on second-order moral reasons. Value judgments resting on second-order moral reasons are more persuasive than choices based on restatement of facts, personal opinions, or everyday morality. Philosophically reflexive career public servants know how to account to others why their substantive political choices are right or wrong in a particular situation and are willing to engage in public dialogues to receive confirmation or refutation, as well as to invite modification.

Third, given the enormous power of career public servants over the lives of citizens, they need expertise in governing based on constitutional competence. At a minimum, the boot camp education insures that career public servants know the basics of constitutional law and constitutional processes. Beyond the basics, constitutional competence also requires a blend of political philosophy and constitutional law. Accordingly, Rohr (1982) has proposed the two courses, both of which achieve this blend. His first course emphasizes the great political ideas underpinning the constitutional foundations of public service, including the nation's twin foundings (discussed in Chap. 6) and the founding of the civil service

[76] Lasswell, *Psychopathology and Politics*, 291.
[77] Ibid., 312.
[78] Goodin, "The Contribution of Political," in *A Companion to Contemporary*, 175.

system in 1883 from which emerged the field of public administration. This course, Rohr says, examines the extent to which the three foundings are normative events that can be reconciled with each other.[79] The second course proposed by Rohr explores constitutional themes in public service over time. Its focus is on how career public servants can proactively interpret the Constitution, based on the great constitutional debates, instead of their waiting for judicial decisions to provide them with authoritative interpretations.[80]

Fourth, the boot camp education encourages career public servants to think differently about how they govern and serve citizens. Therefore, it should draw from Douglas Morgan's extensive multi-disciplinary liberal arts curriculum. His liberal arts curriculum has the following four learning objectives to (1) "make sense out of muddles"; (2) discern the moral purposes of human action; (3) foster openness to multiple and critical perspectives to look for potential solutions that are "outside the box"; and (4) develop prudential judgment and practical reasoning based on learning from experience.[81] An important outcome of Morgan's liberal arts approach is that it develops in career public servants an appreciation for and the need to balance regime values and contending governance perspectives.

The last feature of the boot camp education emphasizes the role of career public servants to educate citizens for meaningful participation in democratic governance. As Stivers notes, career public servants play a significant role in shaping the knowledge and perception of citizens who interact with government as clients, taxpayers, motorists, patients, prisoners, foster children and parents, residents of public housing, and others.[82] Besides contributing, in part, to their sense of self, citizens' interactions with government shape their judgment about whether to obey or disobey collective decisions.

However, not all citizens are interested in active participation. For those that do participate voluntarily or by mandate (as in jury duty), career

[79] John A. Rohr, "The Constitution in Public Administration: A Report on Education," *American Review of Public Administration* 16, no. 4 (Winter 1982): 430.

[80] Ibid., 430-1.

[81] Douglas F. Morgan, "Educating Leaders for New Public Governance," in *New Public Governance: A Regime Perspective*, ed. Douglas F. Morgan and Brian J. Cook (Armonk, NY: M.E. Sharpe, 2014), 271.

[82] Camilla Stivers, *Governance in Dark Times: Practical Philosophy for Public Service* (Washington, DC: Georgetown University Press, 2008), 144–5.

public servants, in their educative role, can sponsor training opportunities to insure that active citizens are not participating "cold." For example, California citizens who participate in civil grand juries receive training in the law, fact-finding investigative skills, and report writing, all sponsored by the Superior Court (see Chap. 11. This type of training fosters in both citizens and career public servants a process of collaborative governance. Collaborative governance that is based on reflection and discourse helps develop the confidence of citizens and their government sponsors in their "mutual good spirit and capabilities for reason."[83] Besides solidifying the identities of both citizens and government officials as civilized humans, collaborative governance in the democratic processes of politics civilizes conflict while they make a moral account of political institutions in terms of democratic-civic standards.

Implications

Four implications flow from the political ethics of public service. The first implication relates to the synthesis of the four leadership roles of the political ethics of public service. As depicted in Fig. 12.1, career public servants, as moral philosophers, strengthen the ties between citizens and government; as constitutional stewards, they achieve political change by defending and extending the democratic freedoms of Americans; as constitutional professionals, they prevent bureaucratic tyranny and political entropy to stabilize the American constitutional regime; as constitutional balance-wheels, they achieve constitutional equilibrium. This synthesis enables each generation of career public servants to fulfill Lincoln's Gettysburg legacy: that "government of the people, by the people, and for the people shall not perish from the earth" (see Fig. 3.3). The fulfillment of the Lincoln's Gettysburg legacy is a priceless outcome of the political ethics of constitutionally centered public service.

The second implication is that the work of constitutionally centered career public servants is more than a vocation; it is a noble calling. A calling is way of life that shapes one's identity: "fitting work is what the individual needs to do and what society needs done."[84] The political ethics of constitutionally centered public service gives career public servants a distinct and enduring

[83] March and Olsen, *Democratic Governance*, 60, 181.

[84] Evan Berman et al., *Human Resource Management in Public Service: Paradoxes, Processes, and Problems*, 4th ed. (Thousand Oaks, CA: Sage Publishers, 2013), 476.

democratic identity because it rests on timeless (higher second order) moral and political values linked to fundamental constitutional, legal, and social relationships in the USA. Given the transcendent nature of the Constitution, the identity of constitutionally centered career public servants is not wrapped around their holding a particular public service job. As a calling, constitutionally centered public servants are dedicated to the Gettysburg legacy—of preserving both human equality and political liberty in American government and society. This dedication connects them to the founding generation's great achievement in human history—the constitutionalization of the American experiment.

The third implication concerns the ignorance of American political history. If career public servants neglect to learn from political history, then their historical illiteracy may lead to misunderstandings and political choices that perpetuate the marginalization and exploitation of minority groups. Therefore, I have devoted Part III of this book to the history of American constitutional law. My reason is that it is important for today's public servants to have an awareness of how the Constitution has been used and misused to secure and undermine the liberty of Americans and how the Constitution's powerful amending process and constitutional politics have slowly but steadily produced political change and enabled the ethical progress of the nation.

The fourth implication emphasizes the importance of honoring ethical public servants as well as excoriating felonious ones. Therefore, I call on the national public administration community to embrace this task. This task gives the public administration community a significant role to check the dangers of the "gotcha ethics" associated with the prevailing apolitical American way of ethics. This task also involves more than a recognition ceremony or an annual public service recognition week. I am suggesting that the public administration community engage citizens in a nationwide strategic dialogue to define the affective and affirmative standards for American public service. Besides giving meaning to the highest aspirations of citizens, this task reinforces the democratic freedoms of Americans and the stability of American society while endowing twenty-first-century Americans with a future of ethical progress and great political possibilities.

Ultimately, the political ethics of public service offers a realistic, multidimensional, and uplifting ethos for the twenty-first-century governance of the American democratic republic. It also gives constitutionally centered career public servants the capacity to exercise

strong moral and political leadership in the contemporary "dark" environment. Given this "dark" environment, the need for constitutionally centered public service matters now more than ever. The political ethics of public service is the lifeblood of the diverse and ever-changing pluralist American society. Without the political dimension of political ethics, the survival of the diverse American society is at risk; without the ethical dimension of political ethics, its survival has no moral value.

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