

3-1998

# A Constitution of Democratic Experimentalism

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## Recommended Citation

Dorf, Michael C. and Sabel, Charles F., "A Constitution of Democratic Experimentalism" (1998). *Cornell Law Faculty Publications*. 120.  
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## A CONSTITUTION OF DEMOCRATIC EXPERIMENTALISM

*Michael C. Dorf and Charles F. Sabel\**

*In this Article, Professors Dorf and Sabel identify a new form of government, democratic experimentalism, in which power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems. This information pooling, informed by the example of novel kinds of coordination within and among private firms, both increases the efficiency of public administration by encouraging mutual learning among its parts and heightens its accountability through participation of citizens in the decisions that affect them.*

*In democratic experimentalism, subnational units of government are broadly free to set goals and to choose the means to attain them. Regulatory agencies set and ensure compliance with national objectives by means of best-practice performance standards based on information that regulated entities provide in return for the freedom to experiment with solutions they prefer. The authors argue that this type of self-government is currently emerging in settings as diverse as the regulation of nuclear power plants, community policing, procurement of sophisticated military hardware, environmental regulation, and child-protective services.*

*The Article claims further that a shift towards democratic experimentalism holds out the promise of reducing the distance between, on the one hand, the Madisonian ideal of a limited government assured by a complex division of powers and, on the other hand, the governmental reality characteristic of the New Deal synthesis, in which an all-powerful Congress delegates much of its authority to expert agencies that are checked by the courts when they infringe individual rights, but are otherwise assumed to act in the public interest. Professors Dorf and Sabel argue that the combination of decentralization and mutual monitoring intrinsic to democratic experimentalism better protects the constitutional ideal than do doctrines of federalism and the separation of powers, so at odds with current circumstances, that courts recognize*

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\* Michael C. Dorf is Professor of Law, Columbia University. Charles F. Sabel is Professor of Law and Social Science, Columbia University. For extraordinarily helpful discussions, the authors are indebted to Bruce Ackerman, Mark Barenberg, David Charny, Joshua Cohen, Sherry Colb, Archon Fung, Gary Herrigal, Brad Karkkainen, James Liebman, Debra Livingston, Peter Lindseth, John Manning, Jerry L. Mashaw, Frank Michelman, Steve Page, Peter Strauss, Laurence Tribe, Roberto Mangabaeira Unger, Jane Waldfoegel, and Jonathan Zeitlin. For research assistance, they wish to thank Alex Cohen, Tricia Hoefling, Christopher Kirkham, Andrew Mainen, Gian Neffinger, Tara Newell, Abrielle Rosenthal, and especially Robert Liubicic. For insight, patience, and good humor, they thank Eric Bravin and Seda Yalcinkaya.

*the futility of applying them consistently in practice by limiting themselves to fitful declarations of their validity in principle.*

*For example, conventional administrative law imposes external judicial checks on administrative agencies, obliging judges to choose between superficial scrutiny of formal proprieties and disruptive, indeed often paralyzing, inquiry into what an idealized agency might be expected to do. By contrast, democratic experimentalism requires the social actors, separately and in exchange with each other, to take constitutional considerations into account in their decisionmaking. The administrative agency assists the actors even while monitoring their performance by scrutinizing the reactions of each to relevant proposals by the others. The courts then determine whether the agency has met its obligations to foster and generalize the results of this information pooling. Agencies and courts alike use the rich record of the parties' intentions, as interpreted by their acts contained in the continuing, comparative evaluation of experimentation itself. In the administrative and related settings, the aim of democratic experimentalism is to democratize public decisionmaking from within, and so lessen the burdens on a judiciary that today awkwardly superintends the every-day workings of democracy from an external vantage point.*

*Finally, the Article reconceptualizes constitutional rights. Relying in this and other regards on ideas associated with early-twentieth-century American pragmatism, the Article treats disagreements over rights as principally about how to implement widely shared general principles. Under the heading of "prophylactic rules" and related doctrines, the United States Supreme Court has recognized that there are often a variety of acceptable remedies for a violation of rights or a variety of acceptable means of achieving a constitutionally mandated end. The authors argue for a radical extension of these doctrines, in which judicial recognition of a general, core right, permits substantial experimentation about how to implement that right. They propose institutional mechanisms to facilitate such experimentation. The authors contend, however, that with rights, as with other constitutionally entrenched principles, means and ends cannot be neatly separated, so that experimentation at the periphery also redefines the core, ultimately challenging the very distinction between core and periphery.*

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## I. THE CONSTITUTIONAL PREDICAMENT AS PROLOGUE

A. *The Crisis*

The defining and revolutionary features of American constitutionalism—separation of powers, federalism, and the very idea of a written Constitution that constrains government—are losing their vitality as organizing principles of our democracy. None functions as originally intended; it is debatable whether any functions at all.

The distress of our constitutional system is of a piece with the rise of the administrative state in the New Deal and its subsequent disorganization. The emergence of agencies that formulate rules, bring enforcement actions, and adjudicate grievances distanced American government from the founders' attribution of these powers to separate branches. Moreover, the Supreme Court's acquiescence to congressional assertions of a virtually plenary police power, contained within the authority to regulate interstate commerce, displaced the older model of a federal system with a central government whose powers are sharply limited with respect to those of the States.

The judicial decisions allowing the expansion of the administrative state and the extension of national authority were partly a response to decades of criticism of the Court for interfering with political judgments, and therefore might have been expected to end that criticism. They did not, in part because the Warren and Burger Courts soon found themselves embroiled in their own political controversies, but even at its inception, the post-New Deal Court's jurisprudence promised trouble. Although that jurisprudence formally respects democracy by deferring to most political decisions, the decisions to which it defers often look profoundly undemocratic. Thus, constitutionalism after the New Deal and its familiar revisions of the founding frame—especially the creation of a "fourth branch" of government,<sup>1</sup> never freed from the diacritical marks of tenuous constitutionality, and the effacement of State sovereignty—could be justified only so long as they were self-evidently effective. They no longer are.

These constitutional perplexities are all the more daunting because they seem inevitable given two circumstances generally taken as hard facts of our political life. The first is that our national affairs are too complex, diverse, and volatile to be governed by lapidary expressions of the public will—laws of Congress, administrative rules, judicial judgments—that indicate precisely how to dispose of most of the cases to which they will eventually be applied.

The second is that our national life is so factious that declarations of sovereign intent general enough to be workable open the way to divergent, often self-interested, interpretations. The more encompassing the

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1. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 578–79 (1984) (noting that the term originally applied only to so-called independent agencies).

legislation (or the broader the delegation of legislative authority to an administrative agency), the more its application must be guided not merely by the text of the enactment, but also by reference to the legislators' intention as revealed in the debates attending passage of the law. Anticipating this, interested groups simply manipulate the discussion that becomes the legislative history to favor the interpretation they will subsequently urge of it.<sup>2</sup>

Even, or perhaps especially, recognition of general constitutional rights to, say, freedom of speech or equal protection of the laws, quickly splinters as it travels the long arc from authoritative text to guiding rule of interpretation.<sup>3</sup> Again and again, general principles that command respect in the abstract are devalued through contradictory application. In these circumstances, whatever government does, including efforts to correct defects of preceding enactments or police its own boundaries, contributes to its undoing.

Acknowledging these hard facts, many of the Americans most familiar with the operation of our public institutions would save the administrative state, and, in the bargain, reinforce the representative democracy it serves by having much less of it. When the chief concern is inefficiency, the remedy is generally fiscal starvation aimed at stopping the state from doing things that private citizens can do better for themselves. When the concern, on the contrary, is the worry that free-wheeling delegation of interpretative authority in the name of efficiency is a menace to democracy and the rule of law, the remedy is generally a return to the pristine constitutionalism of the founding generation.<sup>4</sup>

These broad and fundamental designs for reform merge in appeals for a new federalism in which the states appear as virtuous republics. Smaller and more homogeneous than the nation state, the states are supposed to govern themselves better when nearly alone, while somehow purging themselves of the taint of localist corruption with which they

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2. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 16-18 (1980); Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* 81-105 (1997). For an analysis of the legislative process as interest-group bargaining that predates modern public choice theory, see generally Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* 42-63 (2d ed. 1979).

3. The existence of "tests" of constitutionality in a variety of areas hardly obscures the degree to which even agreed-upon texts, such as the First Amendment's prohibition upon the "Establishment" of religion, U.S. Const. amend. I, take on a cipher-like quality in their application. See generally Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup. Ct. Rev. 323 (1995) (describing the lack of stable principles of adjudication in Religion Clause cases).

4. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994) (claiming originalist and textualist support for the view that the President possesses exclusive authority to superintend execution of federal law).

were long associated.<sup>5</sup> These calls reverberate with more elaborate appeals for the decentralization and limitation of national authority by those who accept the New Deal administrative state as a formal starting point, but urge, as remedies to the current confusion, judicial self-restraint, changes in the scope of delegation of congressional authority to administrative agencies, or modifications in the exercise of agency authority. Added to all these conflicting designs for reform is the confusion created by fragmentary and likewise conflicting successes in realizing each of them. No wonder the New Deal state and the constitutional understanding on which it rests today lead a ghostly existence: Too present in daily life and debate to be forgotten in a netherworld, they are nonetheless too yielding when opposed, and too dumbstruck when criticized to count as more than historical shadows in the battle for their own survival.<sup>6</sup>

### B. *Proposed Solutions*

If the foregoing is alarming, much of the explicitly programmatic constitutional discussion currently directed to these themes is frankly and deliberately alarmist. Its premise is that constitutional order and democracy in practice have diverged so substantially and irremediably that we must choose between them: *either* the Constitution, *or* democracy as we live it.

Self-described originalists (on the Supreme Court, in the universities, and elsewhere in public life) are moved by abhorrence of an overweening state to choose a return to the Founders' vision.<sup>7</sup> But between criticism of particular usurpations and evocation of the distant world in which such abuses were supposedly prohibited, the originalists offer little or nothing by way of a program to reconcile the vast activity of the actual administrative state with the discipline they believe it requires.<sup>8</sup> Despite their large restorative ambitions and the intensity of their passion, most originalists have been careful to talk in the measured tones of insiders in the constitutional bar, preferring careful, apparently technical, commentary on the

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5. We address the latest resurgence of federalism in constitutional doctrine, *infra* Part VI.

6. See Suzanna Sherry, *The Ghost of Liberalism Past*, 105 *Harv. L. Rev.* 918, 934 (1992) (observing that even New Deal admirer Bruce Ackerman cannot provide a substantive defense of New Deal institutions).

7. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143-60 (1990) (arguing that constitutional interpretation must seek the text's original meaning for the enterprise to be legitimate); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 37-44 (Amy Gutmann ed., 1997) (same).

8. For example, there appears to be no political support for the abolition of paper money that a return to the principles of the Founding would entail. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 744 (1988).

rules of interpretation to programmatic declarations.<sup>9</sup> Their ideas of democracy and constitutional order can be known by inference, if at all. Their silence leaves others to wonder how the restored federalism they encourage can avoid the defects that caused Madison himself to recoil from the localism he knew, and seek protection against oligarchic state governments in an extended republic.<sup>10</sup>

For theorists of public choice<sup>11</sup>—experts in the modern sciences of collective action—the program is “face the facts.” They choose democracy over the Constitution. But the *democracy* they describe does not merit the name. For, in their science, the very institutions that in the public mind taint our polity, are depicted as a workable, perhaps optimal, response to fundamental problems of social choice that threaten the stability of any representative democracy. Without legislative logrolling, agenda setting by powerful committees or committee chairpersons, and the apparently ramshackle compromises to which these lead, for example, legislators would chase themselves about in an endless search for majorities, preferring B to A, C to B, and then A to C. Without the figurative fire alarms of concerned citizens to direct their efforts, congressional oversight committees would waste their scarce resources in a fruitless attempt to patrol all the activities of administrative agencies. Even the cacophonous debate that attends complex legislation, and so bedevils the courts, the administrative agencies, and the public itself, can be rendered intelligible by a science that instructs us which voices actually do count for democracy to work.<sup>12</sup>

But “face the facts” is not a program for a democracy that insists on some assurance that measures taken in its name are not just procedurally impeccable, but also effective and legitimate. Thus, the public choice theorists do not say whether the compromises produced by the decision machinery of the legislative chambers are substantively coherent, let alone addressed to the needs of the nation. Indeed, if legislation is just a jumble of proposals that together attract a majority, or, if coherent, reflects first and foremost the logic of congressional decisionmaking, why should the public and courts defer to it either as an expression of the democratic will or as the promise of an effective solution? Reverence for what works without regard to constitutional foundations appears as impractical as reverence for constitutional foundations in disregard of practicality.

Alongside these calls for hard choices, there is less urgent, more knowing commentary: now critical, now apologetic or justificatory in

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9. See, e.g., Scalia, *supra* note 7, at 37–41 (describing how originalists supposedly use historical sources).

10. See *The Federalist* No. 10, at 83–84 (James Madison) (Clinton Rossiter ed., 1961).

11. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533, 547 (1983).

12. See generally Mashaw, *supra* note 2 (offering a qualified defense of the public choice view of the legislative process).



tone, but always so willing to understand our dilemmas that it risks resignation to them. The critical tones in this discussion are sounded by those who carry forward in constitutional law the program of unmasking law as politics, central to American Legal Realism and its successor, Critical Legal Studies.<sup>13</sup> But when the constitutional bench itself worries openly about the prospects of its politicization, this unmasking seems more like *Schadenfreude* than the analytic foundations of reform.

The moralists and philosophers, who take the American Constitution to be the nearest thing we know to an embodiment of the deep principles of liberal social order, sound justificatory rather than critical themes.<sup>14</sup> In part by reinterpreting the categories of liberalism itself in light of constitutional experience, and in part by reforming constitutional law in light of our deeper philosophic understanding, we can improve the good work that our history bequeaths.<sup>15</sup> Perhaps this view of current dilemmas would seem less self-absorbed and more attentive to the institutional turmoil of the age if it did not culminate in the claim that our confusions would soon be revealed to be mere misunderstandings—if only judges would think more like philosophers.

At its most comprehending, beyond criticism and apology, the corpus of constitutional commentary becomes, literally, a list of all the inevitable and irreducible tensions in our constitutional life, and the ties that lead, cyclically, from one to another.<sup>16</sup> But the very idea of a taxonomy of constitutional dilemmas underscores the assumption that in the end unites restorationists, public choice theorists, moralists, and critics: There is a fixed set of answers, each with equally fixed limits, to all the large questions raised in alarmed debate.

### C. *Limitations of the Existing Categories*

What is missing in constitutional discussion, and in legal reflection more broadly, is an effort to rethink American constitutionalism and the design of our representative democracy in the light of those urgent doubts about the possibilities of democratic government in an age of complexity, and with attention to the principles of constitutional design that inform our democratic traditions. The genius of American constitutionalism has been its ability to synthesize and resynthesize, as circumstance demanded, two contrary understandings of democracy articulated

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13. See generally Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988) (critiquing most approaches to constitutional interpretation).

14. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 34 (1996).

15. Thus, some moralists don the garb of originalists, at least in claiming that their progressive vision of constitutionalism is rooted in historical acts of consent. See Bruce Ackerman, *We the People: Foundations* 154–56 (1991). For an analysis of Ackerman as moralist-cum-originalist, see Sherry, *supra* note 6, at 933.

16. See Philip Bobbitt, *Constitutional Interpretation* 114 (1991).

at the time of the French and American Revolutions.<sup>17</sup> The first understanding is deliberative and aimed at the good of all in abstraction from the diversity of everyday affairs. The second is calculative, aimed at the good of each as measured by success in the most diverse practical activities.<sup>18</sup> The current impasse in constitutional design derives from the limits of these underlying, mutually defining conceptions, not a misstep of synthesis; a fresh advance, correspondingly, will depend on reconceptualizing deliberative democratic choice in relation to modern practical affairs.

The first understanding, inspired by the ideal of the Greek *polis* and the North Atlantic tradition of civic republicanism it nourished, sees public decisionmaking as deliberation or reason giving among free and equal citizens.<sup>19</sup> It sees in legislative debate a form of discussion in which members, mindful that they are acting for citizens who regard themselves as free and equal, look beyond the advantage of particular interests to the common good; majority vote merely formalizes the truth revealed to serene reason by persuasive deliberation. In its pure form, faithful to its origins in the *polis*, this conception of democracy is disdainful of the economy or practical activity in general. The ideal citizen or legislator sets aside all such distracting entanglements upon entering the place of public debate, and the lawmaking assembly is so fixed in its attention to the great matters of state—above all, the measures needed to protect democracy itself—that it does not stoop to consider them.<sup>20</sup>

The counterview, with antecedents in the clientelistic exchange of votes for favors in Republican Rome, Whig England, or the early American Republic, exalts the particulars of self-interest and emphasizes the vote as an instrument of self-advancement for both citizens and their representatives.<sup>21</sup> The latter solicit the votes of the former by promising to act to their advantage in politics. Debate and discussion in the legislature or its antechambers discover not the enduring truths of statecraft but the momentary possibilities of compromise that appease a majority of the represented interests while securing the positions of their representatives.

17. See generally Bernard Manin, *The Principles of Representative Government* 102–31 (1997).

18. See Robert A. Dahl, *A Preface to Democratic Theory* 31–32 (1956); Manin, *supra* note 17, at 153–54.

19. See generally J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975).

20. For contemporary invocations of this ideal, see Hannah Arendt, *The Human Condition* 194–95 (1958); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 33–34 (1993); Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 130–33 (1996); see generally Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992).

21. See generally Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840* (1969) (reviewing the reconceptualization of self-interested political action from subversive factionalism to partisan politics).

Thus, in the traditional contrast, deliberation as reason giving is and can only be a rarefied activity reserved in effect to an elite of the demos yet detached from it, while the daily affairs of democracy are carried out almost wordlessly by political merchants buying and selling votes.

The first and fundamental synthesis of these views in American constitutionalism is famously Madison's. For Madison, the rivalries and conflicts resulting from a division of powers between the states and the federal government, among the judicial, executive, and legislative branches, and within the legislature, between the more deliberative Senate and the more calculative House of Representatives, would disorient and disorganize factional interests.<sup>22</sup> This result, in turn, would reduce the chance that majorities could entrench themselves at the expense of minorities or that any branch or level of government could usurp the powers of others or the rights of citizens. Amidst the indecision created by these conflicts, senatorial deliberation (originally cleansed of the worst dross of particularity by indirect election of Senators) would speak with an authority it could not claim if any one interest were to predominate. Constitutional review by a Supreme Court, still further removed from the politics of *do ut des*, would defend the ideal of a deliberative republic in those seldom instances where faction managed to rally itself despite the impediments of constitutional design.<sup>23</sup> Madison's synthesis was premised frankly on the idea—reasonable for his day—that society is largely self-governing, and hence it is better to make a few good laws arduously than to make many laws easily, some almost certainly bad.<sup>24</sup>

The second and current synthesis crystallized during and after the New Deal. Its premise—which was common knowledge in the years of the Great Depression—is that the rise of large-scale industry, organized on mass-production principles so disrupted the preceding local and regional economies into which they intruded that society was no longer, for practical purposes, self-governing. For one thing, the mass producers were so large in relation both to other economic actors and to the state itself that these producers could exercise market power unrestrained by the normal check of competition or the traditional police powers of a state that still conceived of economic activity as commercial and agricultural more than industrial. For another, the spread of the mass producers and the employment relations they created undermined traditional

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22. See *The Federalist* Nos. 10 (discussing virtues of an extended Republic in defusing faction), 47 (discussing the Constitution's inclusion of a principle of separation of powers) (James Madison).

23. See *The Federalist* No. 78 (Alexander Hamilton) (assuming the Supreme Court's power of judicial review), No. 63 (James Madison) (discussing senatorial deliberation).

24. Madison held this view especially with respect to the federal government. Thus, his argument in *The Federalist* No. 10 for the extended republic should not be mistaken for an argument for a powerful central government. Indeed, the limits placed on the national government by the strategy of enumerated powers was, for Madison, essential to his defense of the 1787 Constitution. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 209–12 (1995).

forms of self-insurance and provision for old age, putting vast numbers of citizens at risk of pauperization.

The precondition of a response was to relax certain rulings of the Supreme Court that interpreted the Commerce Clause, the Due Process Clauses, and other constitutional provisions in a way that barred federal and state regulation of most relevant aspects of economic activity.<sup>25</sup> The innovative resynthesis came through the application and extension of certain principles of mass production to the structure of government itself. As the problem-solving capacities of the legislature were taken to be limited, Congress was permitted to delegate responsibility for regulating the economy to agencies such as the Securities and Exchange Commission, conceived of as the “board of directors” of the industry under its supervision, or to entities such as the National Labor Relations Board, whose purpose was to establish a collective bargaining regime within which labor and capital in the mass-production industries could compose their differences.<sup>26</sup> The provision of old-age and other kinds of insurance that citizens could no longer provide themselves was entrusted to bureaucracies patterned after organizations selling similar types of insurance in the private sector.

The result was a system more respectful of Madisonian distinctions than either its critics (aghast at the extension of federal power)<sup>27</sup> or its advocates (exhilarated at the prospect of a government at last with instruments equal to its tasks)<sup>28</sup> imagined.<sup>29</sup> Deliberation was still conceived as the exceptional task of establishing enduring, not to say everlasting, frameworks for social action. What did it matter that Congress delegated its framework-making authority to agencies or boards if these delegations in the end provided stable arrangements by which the concerned parties could order themselves? This was an accommodation to the new organizational complexity of society itself; indeed, precisely by removing concern for the day-to-day problems of this complexly organized society from Congress and the state legislatures, the New Deal synthesis honored the

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25. See, e.g., *United States v. Darby*, 312 U.S. 100, 113–17 (1941) (sustaining Congress’s very broad view of what effects commerce); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (applying a deferential standard of review to sustain a minimum wage law for women).

26. See generally James M. Landis, *The Administrative Process* (1938) (inquiring into the origins, nature, and potential of administrative process).

27. See, e.g., Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 *Tex. L. Rev.* 695, 696–99 (1996) (urging a narrow interpretation of the Commerce Clause on originalist grounds).

28. See, e.g., Ackerman, *supra* note 15, at 105–30 (celebrating the New Deal as a “constitutional moment” that radically transformed the pre-existing Constitution).

29. The basic point was made by those who identified political mechanisms that safeguarded federalism even if the Supreme Court would not. See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 171–259 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 558–60 (1954).

Madisonian ambition of preserving the dispassionate deliberative power of the democracy against the entanglements of clienteles and faction. Although the system of checks and balances now included various forms of congressional and judicial review of the exercise of delegated authority,<sup>30</sup> whether the checks and balances disorganized factional interests sufficiently to allow deliberation to prevail remained an empirical question, as it had been since the inception of the constitutional order.

Today, of course, it is commonplace to see the New Deal synthesis as inviting, rather than obstructing, the self-serving politicization of regulation and public administration generally. But this view confuses a contingent outcome with a historical inevitability. To be sure, the users of the new administrative state—firms in regulated industries and beneficiaries or potential beneficiaries of social insurance and welfare programs—were quick to game the rules, urging the extensions and exceptions to regulations that suited their interests. But from roughly the New Deal through roughly the mid-1970s, the new arrangements worked well enough to satisfy the citizenry and suppress questions about the constitutionality of the synthesis.

When the agencies and bureaucracies did lose the capacity to frame action within their appointed areas, and came to be seen as manipulated by those they were meant to regulate, much of their failure was directly connected to analogous disorientations in private-sector firms and flowed in large measure from a common cause: the increasing volatility and complexity of social and economic circumstances. Firms found it increasingly difficult to apply their own uniform routines to increasingly differentiated problems; how could regulatory agencies establish a minimum uniformity of routines at the level of whole sectors of the economy? If the firms' halting efforts to adjust to the volatility in their markets led to continual changes in the conditions of employment and the prospects of employability of large parts of the work force, how could government social welfare and insurance programs premised on the risks, remedies, and inflexible organizational structures of the stable mass-production economy perform adequately?<sup>31</sup> Agencies that held fast to their rules were decried politically for their rigidity; agencies that made local accommodations to changing circumstances were suspected of favoritism and caprice. By the mid-1980s, the accumulation of these grievances changed the debate about the purpose and prospects of the administrative state. From a dis-

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30. The Administrative Procedure Act provides for one check, judicial review of agency action. See 5 U.S.C. §§ 701–706 (1994). The most potent congressional check, the legislative veto, was held unconstitutional in *INS v. Chadha*, 462 U.S. 919, 951–59 (1983).

31. See, e.g., Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 64–68 (1983) (detailing the difficulties of disability programs of the Social Security Administration in responding to changes in their environment, including changes in the understanding of disabilities); see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1796–97 (1975) (reporting the general difficulty of representing, within administrative institutions of the New Deal settlement, interests that arose subsequently).

cussion of whether it was possible to limit the extension of entitlements, emerged a new debate about government's capacity to translate its general responsibilities to regulate economic and social life and protect vulnerable citizens into rules and social services worth their price.

Disorder brought forth partial correctives that disavowed the institutional premises of the New Deal synthesis without providing an alternative synthesis, and begot, in consequence, more disorder. As Congress and the executive, for example, came to doubt the fidelity of administrative agencies to sovereign purposes, each began to disregard the very limitations of its own decisionmaking capacities that had given rise to the administrative state, and attempted to achieve directly what it could no longer achieve through delegation. Thus, Congress increasingly resorted to detailed statutes to limit the interpretive latitude of agencies.<sup>32</sup> The executive, with its own agenda, subjected administrative rulemaking to review by new, highly centralized agencies whose purpose was to determine if particular rules conformed to that agenda—often phrased in terms of a cost-benefit analysis.<sup>33</sup> On the legislative side, the increased complexity of statutes and their accompanying reports invited interest groups to manipulate the legislative record. At the same time, centralized executive review increased the bargaining power of the executive as against the quasi-independent agencies. However, the same bureaucratic centrality that gave the new monitoring agencies their power cut them off from the information they would need to use that power for any end more deliberate than decreasing the volume of regulation.

Meanwhile, two convergent developments have embroiled the Supreme Court in the disorganization of the national administrative state, with the result that the Court's own judgments have often become as confused and contentious in their detailed application as have congressional enactments or general administrative policies. The first is the triumph of the legal realist adage that much of law is politics. As a result, the sententious claim that it is decidedly the province of the judiciary to say what the law is,<sup>34</sup> has come to be seen as the exception to a more general principle of judicial acquiescence to political judgment—even when, as in the case of administrative interpretations of statutes, majoritarian principles arguably provide greater support for judicial intervention than acquiescence.<sup>35</sup> Against this background, occasional ju-

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32. For a pessimistic assessment of this phenomenon and related congressional responses to judicial rules of construction that take an oversimplified view of the legislative process, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 Mich. L. Rev. 1, 26–40 (1994).

33. For a critical assessment of this process in the Bush-Quayle administration, see Malcolm D. Woolf, *Clean Air or Hot Air?: Lessons from the Quayle Competitiveness Council's Oversight of EPA*, 10 J.L. & Pol. 97, 101–04 (1993).

34. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

35. See *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 865 (1984). For analysis of this principle, see Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev.

dicial invocations of the importance of checks and balances or state sovereignty appear to be little more than formalism,<sup>36</sup> as all actors understand the deep truth that the Court would not dare disrupt the deeply entrenched features of the post-New Deal order.<sup>37</sup>

Cases such as *INS v. Chadha*, which invalidated a unicameral legislative veto on the grounds that it violated the Constitution's prescription for lawmaking,<sup>38</sup> shed harsh light on a constitutional reality at once unassailable and manifestly at odds with itself. Thus, some commentators puzzled how delegation of lawmaking authority by Congress to one legislative chamber could be less constitutional than delegation of comparable powers to administrative agencies.<sup>39</sup> For others, however, the more obvious and troubling question was just the opposite: How, given *Chadha's* seemingly straightforward rule, could the delegations to administrative agencies be lawful?<sup>40</sup> Yet critics who voiced this objection went unheard. On matters of structure, the Court and its defenders have made their peace with modern reality—however uneasy or unprincipled that peace may be.

The second aspect of the Court's entanglement in the ongoing constitutional crisis followed directly from its acquiescence in the nationalization of politics by the New Deal. Expansion of federal powers left citizens looking for a substitute for traditional doctrines limiting the reach of government; at times, the Court was willing to provide these in the form of guarantees derived from the Bill of Rights and the Fourteenth Amendment.<sup>41</sup> Petitions for redress were addressed to the Court, some-

759, 767–68 (1997); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 454–55 (1989); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 971–72 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2074 (1990).

36. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 496–502, 516–17 (1987); Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 97–101 (1995).

37. Thus, for all of the well-founded fear generated by recent Supreme Court decisions striking down national legislation as too intrusive on state sovereignty, see discussion *infra* Part VI.A, it should be noted that the Court has gone out of its way to *reaffirm* those New Deal era precedents that, in their time, were correctly understood to establish Congress's virtual (if not quite actual) omnipotence with respect to economic regulation. See, e.g., *United States v. Lopez*, 514 U.S. 549, 554–57 (1995) (accepting the authority of *Wickard v. Filburn*, 317 U.S. 111 (1942), *United States v. Darby*, 312 U.S. 100 (1941), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

38. 462 U.S. 919, 928 (1983).

39. See, e.g., H. Jefferson Powell, *Rules for Originalists*, 73 Va. L. Rev. 659, 672 (1987); Strauss, *supra* note 1, at 636–37.

40. See, e.g., Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L. Rev. 1, 4–11 (1994) (arguing that existing constitutional theories do not justify the administrative state).

41. Thus, we take issue with the contention that the New Deal revolution in the Supreme Court was primarily about judicial restraint. But see generally Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483 (1997) (arguing that the New Deal constitutionalism is not especially nationalist).

times, as in the case of *Brown v. Board of Education*,<sup>42</sup> with modest success, sometimes, as in the case of *Roe v. Wade*,<sup>43</sup> with more contested results.

Whether as reluctant arbiter or rulemaker of last resort, the Court was no better at connecting shared general principles (for the Court, those found in constitutional text) to particular applications of those principles (here, concrete doctrines) than were other branches of government. Efforts to regulate constitutional matters directly produced a now familiar sequence of principled pronouncement, disagreement over the application of that principle, and eventual retreat. The Court's recent rediscovery of enforceable federalism-based limits in the Tenth Amendment, the Eleventh Amendment, and the general pattern of the Constitution,<sup>44</sup> seems destined to repeat this sequence, as the Court's wistful categories collide with the reality of a world economy in which the global and the local are being connected with startling directness.<sup>45</sup>

The cumulative result has been, first, a fight over the Madisonian heritage between two broad camps that include most of the participants in the constitutional controversies surveyed at the outset, and, then, the beginnings of a truce as some of the chastened partisans find common ground at the traditional center of American jurisprudence. On one side of the dispute are the hard-nosed advocates of minimal government who maintain that true deliberation in the Madisonian sense is impossible. This camp includes many of the originalists and theorists of public choice. They would sacrifice democratic ideals for a constitutional order that protected liberty at the cost—assuming, as they may not, that it is indeed a cost—of paralyzing government. The most practical among them sense that their program has a future on the condition that restoration of the eighteenth-century Republic is used as a threat to deter further expansion of the administrative state, perhaps even to reinforce certain of its weakened structures, and not as a blueprint for disassembly.<sup>46</sup>

On the other side are the heirs to the civic republican tradition. These are the activists among the moralists and philosophers who would modify our current order to create an interpretive elite able to deliberate in Madison's sense. The most practical among them sense that their program has an audience only if the prospective administrative elite, mindful

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As even Gardbaum concedes, the federal government exercises greater authority *relative* to the states than it previously did. See *id.* at 486.

42. 347 U.S. 483 (1954).

43. 410 U.S. 113 (1973).

44. See *Printz v. United States*, 117 S. Ct. 2365 (1997) (invoking the Tenth Amendment to prohibit federal commands to state officials); *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (holding that Indian Commerce Clause does not authorize Congress to abrogate state's Eleventh Amendment sovereign immunity); *United States v. Lopez*, 514 U.S. 549 (1995) (invoking general principles of limited government to limit scope of Interstate Commerce Clause).

45. See *infra* Part VI (discussing federalism).

46. See, e.g., Mashaw, *supra* note 2, at 201–02 (noting that public choice insights do not require originalism).



of the limits of the New Deal, promises to resort to philosophical speculation only in the infrequent cases when all rules of thumb and other modest means fail.<sup>47</sup> Here, too, animating principle dwindles to last resort.

The common ground for the practically minded of both sides is marked out by the assumptions and categories of the legal process school that has held sway in American jurisprudence and law teaching in the post-War period. This school, as developed originally in the works of Hart and Sacks, takes for granted that the branches of government have the functions attributed to them as a matter of practical and constitutional necessity.<sup>48</sup> The task of judges and lawyers is to apportion responsibility for deciding a particular case to the branch institutionally best fitted to the job at hand. The "new" legal process school that emerged in the late 1970s and early 1980s reaffirmed the integrity of the branches of government, but argued that the rules for assigning institutional responsibility for decisionmaking should be modified to accommodate the growing significance of statutory as against common law.<sup>49</sup>

The newest elaboration of the legal process view makes more modest assumptions about the capacities of the basic institutions themselves; hence, it is as much concerned with reducing the total burdens the branches of government bear together as guarding against the danger that one branch is overtaxed by responsibilities assigned to it by others.<sup>50</sup> For those approaching the traditional center from origins in civic republicanism, diminished expectations are born of a sense of the limits of the ultimate powers of theory, and, beyond that, cognition itself. However virtuous the institutions, they do not allow for the theoretically informed foresight in deliberation that would be necessary to avoid the welter of unintended consequences that thwart even the most dispassionate designs for a better republic; institutions limited in the ability to discharge their own affairs must be sparing in what they expect of others similarly disabled.

For those approaching the center from origins in public choice, the institutional infirmities result from a combination of the counterintuitive perversities both of choosing one of numerous, competing proposals by majority vote, and the extensive opportunities for rent-seeking concealed by the forms of deliberation that these perversities, in part, create.<sup>51</sup> Respect for these infirmities sets limits on the obligations one institution may place on another, and so counsels against overzealous application of

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47. See, e.g., Cass R. Sunstein, *Legal Reasoning and Political Conflict* 56–57 (1996).

48. See generally Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in Making and Application of Law* (1958).

49. See, e.g., Guido Calabresi, *A Common Law for the Age of Statutes* 2 (1982); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv. L. Rev.* 405, 411 (1989).

50. See, e.g., Sunstein, *supra* note 47, at 56–57; Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 *Harv. L. Rev.* 4, 7 (1996).

51. See, e.g., Mashaw, *supra* note 2, at 81–105.

constitutional checks and balances as a means of restoring pristine government. For both civic republicans and public choice theorists, these limitations rule out the first-best world of deliberation unambiguously in the service of the public good, but they do not, on either view, exclude the possibility of second-best management, able to do better than current arrangements precisely because it is no longer enthralled by the idea of the best. The common hope is that we can learn enough about the limits of our capacity for collective self-determination to make constitutionally serviceable use of the current institutions of our democracy.

The assumption that American institutions cannot be fundamentally improved because of their inherent limitations may well prove no more durable than the earlier assumption of the legal-process school that those same institutions were practically invulnerable to disruption because they were functioning well. How bizarre the assumption that the one feature of our institutions that remained fixed as they somehow slipped from unimprovable to incorrigible is their inaccessibility to deliberate alteration! Perhaps the early assumption of institutional inviolability even obscured possibilities for reform that could have reduced the disruption. In that case, the legal-process idea of taking the institutions for granted becomes a form of self-fulfilling prophecy. Or leaving this possibility to the side, why not suppose simply that the institutions of government worked well in the immediate post-War period because by design, or by good fortune, they fit well with their environment? In time the environment changed, and the lack of fit explains the poor performance of the institutions. Whatever their defects, assumptions like these are surely as plausible as the notion that, whatever happens, the basic features of our government must remain as they are. Perhaps we have, in fact, no basic choices in the construction of our governing institutions. But how would we know unless, abandoning the legal-process assumption that we do not, we try to conceive what those choices might be?

#### D. *A New Form of Deliberation*

To reinvigorate our Madisonian heritage, therefore, we need a new model of institutionalized democratic deliberation that responds to the conditions of modern life. Such a reconceptualization must avoid the presumptions and coyness of an immediate partisanship claiming to speak for a revolution that speaks for itself. It must also resist the contrary rationalizing impulse that denies the possibility of all innovation by reducing novelty to a problem of classification in familiar categories or to new rules for rearranging the familiar furniture of our institutions. The foundation of this architecture would be a new connection between the broad pronouncements of the legislature and the courts, and applications of these pronouncements to particular situations. This connection would have to leave room for experimental elaboration and revision to accommodate varied and changing circumstances, yet credibly limit the opportunities for self-dealing that this very openness of necessity seems to

create. It would have to address both the Madisonian concern about the self-aggrandizing tendency of government and the equally Madisonian concern about the menace of oligarchy in the closed communities of small republics.<sup>52</sup> In addressing these concerns, the design would have to show the respect for individual rights that, in the American constitutional tradition, provides crucial protection against both the tyranny of the majority and the tyranny of entrenched interests. Finally, the design would have to show how the judiciary could protect these rights without paralyzing experimentation or usurping the sovereignty of the democratic people.

In this Article, we make a first effort to elaborate such an architecture and to show how Congress, the courts, administrative agencies, and the states would function within the structure it defines. We claim that many of the elements of this structure have already been established in the practices of state and local governments, Congress, administrative agencies, and the Supreme Court, and that its adoption might be accomplished piecemeal by drawing on the available precursors. To illustrate both the operating principles of the design and the possibility of its incremental realization, we bring it to bear on the recharacterization of the three central but troubled institutions of American constitutionalism: federalism, separation of powers, and judicial protection of individual rights. Within these broad categories, we examine particular controversies, including conflicts of economic interest, the provision of public services, and disputes over rights arising from moral differences. Our choice of controversies obliges us to develop a claim that a common set of experimental methods can be used to define legal boundaries in a wide variety of contexts. Our aim in introducing the detail required to address the full range of cases is to exemplify the class of solutions generated by our design principles, and, thus, make them available to an initial, informed appraisal; we do not aim to provide conclusive answers to particular controversies. A method founded on the generalization of experimental corrigibility would belie itself in proceeding otherwise.

The backdrop of our design is the pragmatist account of thought and action as problem solving in a world, familiar to our time, that is bereft of first principles and beset by unintended consequences, ambiguity, and difference. Thus, a central theme of the pragmatism of Peirce,<sup>53</sup> Dewey,<sup>54</sup> and Mead<sup>55</sup> is the reciprocal determination of means and ends. Pragmatists argue that in science, no less than in industry and the collec-

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52. See *The Federalist* No. 10, at 83–84 (oligarchy in small republics) (James Madison) (Clinton Rossiter ed., 1961); *The Federalist* No. 51, at 322–24 (self-aggrandizing tendency) (James Madison) (Clinton Rossiter ed., 1961).

53. See generally Charles Sanders Peirce, *How To Make Ideas Clear* (1878), reprinted in *Pragmatism* 26 (Louis Menand ed., 1997).

54. See generally John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (1916).

55. See generally George H. Mead, *Mind, Self, and Society: From the Standpoint of a Social Behaviorist* (1934).

tive choices of politics, the objectives presumed in the guiding understandings of theories, strategies, or ideals of justice are transformed in the light of the experience of their pursuit, and these transformations in turn redefine what counts as a means to a guiding end. Art epitomized for Dewey the essentials of pragmatist investigation, because in art means *become* ends, and the relation between them commands attention because of this immediacy: The picture is constantly reconceptualized in the painting.<sup>56</sup> Pragmatism thus takes the pervasiveness of unintended consequences, understood most generally as the impossibility of defining first principles that survive the effort to realize them, as a constitutive feature of thought and action, and not as an unfortunate incident of modern political life.<sup>57</sup>

This view of ambiguity of means and ends focuses attention on the possibilities of improving our ability to respond to shocks to our expectations, rather than on the search for first principles that will be immune to disruption. The pragmatists understood doubt as the recurrent yet always surprising breakdown of some of the settled beliefs and expectations upon which we must depend for active investigation of the world, not as the expression of a global skepticism about the very possibility of knowledge. Seen as localized breakdowns in our expectations, doubt spurs inquiry into remedial action and reforms conceptions. To emphasize just how much doubt depends on surprise, and how little on a first principle of skepticism, the pragmatists urged a simple test: Try to doubt a belief you hold deeply, and you will discover you cannot.<sup>58</sup> Thus, pragmatism guides us in better coming to grips with a circumstance that we have come to anticipate: That experience will again and again disrupt our habits and the understandings that rest on them.<sup>59</sup>

Pragmatism guides us further in characterizing as irreducibly social the inquiries that doubt prompts. More exactly, because of the ambiguities of means and ends, the early pragmatists argued, the intelligibility and actionability even to ourselves of our very own utterances and projects depends on how others interpret and react to them.<sup>60</sup> The collaborative investigation of differences in response to doubt is thus central to self- and mutual understanding. This view seems addressed to an age in which the diversity of opinion and situation seem at once to render

56. See John Dewey, *Reconstruction in Philosophy* 183–84 (1948).

57. Compare most forms of liberalism, and neoclassical economics in particular, in which ends are fixed once and for all by the wants individuals happen to have, and reason simply satisfies those wants as far as possible with the available means.

58. See Charles Sanders Peirce, *The Fixation of Belief* (1877), reprinted in *Pragmatism*, *supra* note 53, at 7, 13.

59. Compare again economics and contemporary social science generally, which habitually portray behavior and institutions as conducive to or resulting from some self-reinforcing pattern or equilibrium.

60. See generally Mead, *supra* note 55.

collective problems almost intractably complex, and yet, perhaps, to provide a resource for their solution.<sup>61</sup>

Pragmatism guides our project, finally and most directly, because it cuts across various spheres of human activity. Thus, it qualifies as a candidate for linking breakdowns and emergent solutions throughout public and private life. As a theory of thought and action through problem solving by collaborative, continuous reelaboration of means and ends, pragmatism suggests that advances in accommodating change in one area often have extensive implications for problem solving in others. Democracy was the method for reflecting on the connection of means to ends in social activity. Specifically, for Dewey, it was a method for identifying and correcting through public debate and action the unintended consequences of coordination among private actors. He was concerned to know what democracy, so understood, could learn from the methods of public scrutiny and experimentation by which science discerned and adjusted unworkable ideas about the natural world.<sup>62</sup> Today, when private solutions often seem to work and public ones often do not, this inquiry, limited and tentative though it remained, invites us to consider the possibility that the explanation for what we observe may lie not in the intrinsic features of the public and private spheres, but rather in historically contingent and publicly corrigible differences in the problem-solving methods currently applied in those spheres.<sup>63</sup>

The immediate instigation of our design for democracy is a series of innovations by private firms that suggest institutional devices for applying the basic principles of pragmatism to the master problem of organizing decentralized, collaborative design and development under conditions of volatility and diversity. The innovations, inspired by organizational breakthroughs in Japan, but no longer limited to Japanese firms or those in close association with them, are a response to markets that have become so differentiated and fast changing that prices can serve as only a general framework and limit on decisionmaking. To determine what to make and how, firms in this new economy must therefore resort to a collaborative exploration of disruptive possibilities that has more in common with pragmatist ideas of social inquiry than familiar ideas of market exchange. For instance, to establish initial product designs and production meth-

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61. Compare again economics, which generally assumes that knowledge is public and available to individuals either for free, when it is common, or at a price, when it is proprietary—unless it is irretrievably private because lodged, tacitly, in the intuitions and inarticulate experience of other individuals.

62. See John Dewey, *The Public and Its Problems* 166 (1927); Dewey, *supra* note 56, at 84–85.

63. Compare yet again, and finally, neoclassical economics and the public choice school directly influenced by it. These both assume that efficient problem solving is possible only in markets characterized by competition among firms maximizing profits given prices. In this view, politics in general and democracy in particular is then just the realm in which private actors try to influence public choices to correct market outcomes in their favor.

ods, firms turn to *benchmarking*: an exacting survey of current or promising products and processes which identifies those products and processes superior to those the company presently uses, yet are within its capacity to emulate and eventually surpass. This benchmarking comparison of actual with potential performance disrupts established expectations of what is feasible. By casting pragmatic doubt on the advisability of current methods, benchmarking spurs exploration of the possibilities immediately disclosed and may lead to discovery of entirely new solutions through investigation of the surprising similarities and differences among various approaches.<sup>64</sup>

Following this initial benchmarking, distinct and effectively independent operating units of the firm, each responsible for one component of the overall project, propose changes to the provisional design based on the units' respective capacities and take account of implications for their own activities of the changes proposed by others. The discipline by which the whole and the parts are elaborated together is called *simultaneous* or *concurrent engineering*. Once production begins, breakdowns in the new routines trigger error-detection and error-correction systems that correct weaknesses of the design or production process that escaped earlier examinations. Continuous adjustment of means to ends and vice versa is, as in pragmatism, the means and end of collaboration among the producers. Moreover, the exchanges of information required to engage in benchmarking, simultaneous engineering, and error correction also allow the independent collaborators to monitor one another's activities closely enough to detect performance failures and deception before these latter have disastrous consequences. Because it ties mutual assessments of reliability to joint explorations of capability, we will speak of the system of collaboration as a whole as *learning by monitoring*.

The private sector institutions of learning by monitoring suggest a public sector model of problem solving adapted to a polity in which omnibus, national measures can rarely address the particularities of local experience, yet locales in isolation from one another are unable to explore and evaluate even the most immediately promising solutions to their problems. The model requires linked systems of local and inter-local or federal pooling of information, each applying in its sphere the principles of benchmarking, simultaneous engineering, and error correction, so that actors scrutinize their initial understandings of problems and feasible solutions. These principles enable the actors to learn from one another's successes and failures while reducing the vulnerability created by

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64. In this sense, benchmarking makes use of the exploratory power of analogy to suggest novel recharacterization of the familiar settings by examining the interplay of similarities and differences that connect them. See Keith J. Holyoak & Paul Thagard, *Mental Leaps: Analogy in Creative Thought* 19–38 (1995). For a closely related view of the revelatory power of metaphor, see generally Hans Blumenberg, *Shipwreck with Spectator: Paradigm of a Metaphor for Existence* (Steven Rendall trans., MIT Press 1997) (1979); Hans Blumenberg, *Wirklichkeiten in denen wir leben* 55–94 (1981).

the decentralized search for solutions. The system in which citizens in each locale participate directly in determining and assessing the utility of the services local government provides, given the possibility of comparing the performance of their jurisdiction to the performance of similar settings, we will call *directly deliberative polyarchy*.

The chief role of Congress in such a system would be to authorize and finance experimental reform by states and other subnational jurisdictions in such broad areas of public action as welfare, vocational training, or environmental protection. But this authorization would only be granted on condition that those who engage in the experiment publicly declare their goals and propose measures of their progress, periodically refining those measures through exchanges among themselves and with the help of correspondingly reorganized administrative agencies.

Accordingly, the primary role of courts would be to ensure that subnational experiments fall within the authorizing legislation and respect the rights of citizens. Judicial standards for both sorts of inquiry would be defined in part by reference to the possibilities successively revealed in the experiments themselves. Thus, the price communities must and should want to pay in this world for the right to experiment is to provide individuals in their own and other jurisdictions with information to judge their performance (including the methods by which performance is judged); this information allows individuals and groups to challenge arrangements they think violate their constitutional and other rights by reference to working alternatives that do not. In this way the vindication of individual rights encourages mutual learning and vice versa, and judges' discretion in applying broad principles is schooled and disciplined by actual experimentation with possibilities they could never have imagined. We call the overall system of public problem solving that combines federal learning with the protection of the interests of the federated jurisdictions and the rights of individuals *democratic experimentalism*.

Using the novel forms of local participation in service provision as well as the informative performance comparisons that democratic experimentalism provides, citizens of individual jurisdictions can hold their institutions to account. Looking at the ensemble of results against the background of changing goals, the electorate as a whole can judge the overall success of reform efforts. Eventually, this accountability could give rise to a new local politics of detailed debate on the advantages and disadvantages of current choices, given possibilities demonstrated elsewhere, as well as a new national politics focused on differing interpretations of the broad patterns of experimental results, and their implications for redirecting experimentalism and its institutions. Thus, democratic experimentalism does not pursue the chimera of replacing conflict with consensus. Its aim, rather, is to change the reasons and evidence produced in public debate, and with them the conditions for participation in civic life, so that our disputatious democracy is made both more effective

as an instrument of public problem solving and more faithful to its purpose of assuring the self-determination of free and equal citizens.

### E. *Constitutional Interpretation*

We offer the model of democratic experimentalism not as an alternative to the American constitutional tradition but as an interpretation of it. In doing so, we are mindful of John Hart Ely's observation that a rule of social order, whatever its virtues, is not a constitutional principle unless anchored in that tradition.<sup>65</sup> Democratic experimentalism, we claim, is precisely such a principle: It reinterprets democratic deliberation to advance the Madisonian project of using the institutions of government itself to foster practical cooperation despite the human propensity for opportunism, including especially the abuse of public power for private ends. It rests, moreover, on the bedrock of respect, associated in Madison's time with the idea of religious toleration, for diverse, changing understandings of the world, and the contentious varieties of individual and group life they inform, as antecedent to and protected by the Constitution.

In saying this, however, we do not mean to suggest that democratic experimentalism is solely, or even primarily, a matter of doctrinal reinterpretation to be accomplished without disrupting established institutions. Nor, on a broader understanding, do we mean to suggest that it is so exceptionally suited to (the famously exceptional) American circumstances that it is for practical purposes applicable only to them. In both regards our view is more nearly the opposite. We argue that *given* the interlocking institutional changes we propose, certain doctrinal reinterpretations in areas such as federalism and the separation of powers show the way beyond the current impasse, and bring the process of constitutional interpretation into accord with its Madisonian inspiration—by which we do not mean a return to the original understanding, but a focus on experimentation and structure as the keys to both good and limited government.<sup>66</sup> Precisely because of the centrality of institutional change to our project, we suggest its feasibility by indicating instances, current

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65. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 949 (1973).

66. Madison's penchant for experiment is well captured by his observation about lawmaking generally: "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." *The Federalist* No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961). As Jack Rakove notes, Madison shared the dominant view among Federalists of the founding era that "[t]he real interpretation of the Constitution would occur as decisions taken within government gradually settled its operations in regular channels." Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 345 (1996). But Madison's understanding of the crucial role of power allocation led him to believe that "[t]he end of constitutional [as opposed to statutory] interpretation was to determine which branch or level of government possessed the right



and historical, where public administration anticipates reforms of the kind proposed, and, more generally, by indicating why the preconditions for reform may be less demanding than commonly supposed.<sup>67</sup> Conversely, we note cases where the absence of corresponding institutional reform has vitiated doctrinal innovations of the type we urge. The aim is to underscore that institutional and doctrinal change require and complement each other in the project of democratic experimentalism, without suggesting that, because the changes are potentially self-reinforcing, the progress of the project as a whole is somehow automatic.

Similarly, in constructing democratic experimentalism from the materials of American institutions and constitutional doctrine, we mean to be offering an extended and, to us, particularly pertinent example of how a familiar type of representative, constitutional democracy may be transformed into a novel, directly deliberative one; we do not mean to suggest American exceptionalism. The principles of direct deliberation are informed by fundamental and widely diffused changes in the organization of cooperation, and could be connected to a renewed understanding of the concepts of freedom and equality of citizens that form the common heritage of modern constitutional democracies.<sup>68</sup>

In presenting democratic experimentalism and the private sector developments with which it has affinities, we draw contrasts with hierarchically centralized organizations. In describing these latter organizations, we do not mean to suggest that the industrial or administrative world was ever in fact governed by a single comprehensive principle. Indeed, on the regulatory side, we will be at pains to show that many of the entities and practices that developed under the nominal aegis of the Progressive Era and the New Deal were in fact guided by principles more congenial

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to act in a particular area of governance, and in doing so, to preserve the equilibrium among institutions that the Constitution intended to establish." *Id.*

67. In particular, we show how incremental reforms in different jurisdictions can create the structure that might otherwise be thought to be a precondition for experimentalism. We call this process *bootstrapping*, and discuss it *infra* Part IV.

68. Although we do not pursue the point in detail here, it is worth noting that in recent years the organs of the European Union have arguably been converging on experimentalist methods similar to those we propose in the American context. For example, the European Commission acts very much like a regulatory agency in pooling the experience of the member states regarding types of regimes, and employs experimentalist systems of rolling rules of a type we explore below. See Volker Eichener, *Entscheidungsprozesse in der regulativen Politik der Europäischen Union* 1–41, 332–82 (1997) (unpublished postdoctoral thesis, Ruhr-Universität Bochum) (on file with the *Columbia Law Review*); Adrienne Heritier et al., *Ringling the Changes in Europe: Regulatory Competition and the Transformation of the State* 152–55 (1996) (air pollution regulation). Similarly, a recent decision of the European Court of Justice may be used as a model of experimentalist judging. See *infra* text accompanying notes 430–438. Finally, for a preliminary exploration of directly deliberative polyarchy as a model for an emergent democracy in the European Union, see generally Oliver Gerstenberg, *Law's Polyarchy*, 3 *Eur. L.J.* 343 (1997). These convergent developments do not, of course, imply the universality of our design principles, but they do suggest that the claims we make in the American context have the potential for wider applicability.

to our project than to the principles associated with those periods. (A similar argument could be developed on the private sector side, although we will not develop it here.)<sup>69</sup> Furthermore, our sustained argument for continuing incremental transformation as both a descriptive account of social developments and a blueprint for reform flies in the face of any neat periodization. Thus, in the Conclusion, we challenge the leading epochal account of American constitutionalism precisely because it overemphasizes cataclysm and particular forms of popular mobilization at the expense of incremental change. Nonetheless, hierarchical organizational principles have been extraordinarily influential in the architecture of existing institutions. Fighting fire with fire, we aim to propose a set of alternative principles. Therefore, we will refer to "New Deal" institutions knowing that the appellation is partly misnomer.

In the succeeding parts, we develop our notion of democratic experimentalism and locate it within the American constitutional tradition. Part II recounts the development and global spread of learning by monitoring in the private sector. Part III explains the ways in which learning by monitoring can function in the public sector, as democratic experimentalism. Part IV fleshes out the details of democratic experimentalism by recounting its partial emergence in a diverse group of settings. Part V then explains how such piecemeal reforms might be integrated into a new national framework by describing some of the new roles for familiar institutions within the context of democratic experimentalism.

The final three parts of the Article test and refine democratic experimentalism by showing how it suggests mutually reinforcing solutions to central dilemmas of constitutional interpretation. In Part VI, we use ideas about the relation of means to ends that are at the core of democratic experimentalism to derive a model of federalism that specifies limits to the authority that the national legislature should exercise over subnational jurisdictions and conditions on the experimental autonomy of the latter. Our model suggests criticisms of recent efforts by the Supreme Court to revive traditional federalism distinctions effaced by the New Deal, as well as standards for distinguishing those current federal-state programs that already incorporate principles of democratic experimentalism, from other methods of devolving power from the federal government to the states—such as current welfare reform legislation—that do not. In Part VII, we propose a democratic-experimentalist resolution to the delegation problems associated with administrative law and with the crisis in separation of powers more generally. Finally, in Part VIII, we explain how democratic experimentalism can be used to guide application of the broad individual rights that the Court finds protected by the Constitution to particular circumstances, thus relaxing the tension be-

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69. See Charles F. Sabel & Jonathan Zeitlin, *Stories, Strategies, Structures: Rethinking Historical Alternatives to Mass Production*, in *World of Possibilities: Flexibility and Mass Production in Western Industrialization 1*, 29–33 (Charles F. Sabel & Jonathan Zeitlin eds., 1997).

tween the very concepts of entrenched constitutional rights and self-termination by the polity.

## II. CENTRALIZED AND DECENTRALIZED ORGANIZATIONAL FORMS

The organizing features of the American economy play an important role in shaping our governmental institutions, and, beyond that, our ideas of what public administration and even the democratic public can do.<sup>70</sup> Thus, the public administration archetypal of the New Deal is largely patterned on the giant, mass-production corporations that dominated the American economy from the last decades of the nineteenth century until the last decades of our own. Government improved the efficiency of its own organizations by adopting the corporations' successful techniques. To monitor and limit the corporations' power in American life, it created regulatory institutions that meshed with corporate forms.<sup>71</sup> The congruities produced by deliberate imitation and accommodation were renewed and extended as government recruited successive generations of corporate managers, schooled in the vast private bureaucracies that dominated the post-War economy, to apply their lessons to the modernization of public administration. To grasp the logic and limits of our administrative state, we begin, therefore, with a review of the operating principles of the economic organizations on which it was modeled. To grasp the possibility of fundamental reform of that state, we show how, under competitive threat, the corporate model has been so profoundly transformed as to redefine our very idea of an organization, and thus enlarge the possibilities of joint action in public and private affairs.

The corporations that embodied the idea of efficiency for most of the last hundred years were centralized, hierarchical, and vertically integrated: Headquarters set goals, and hierarchically ranked, specialized subunits realized them. As long as they worked, these features were seen as expressing basic, incontrovertible, and mutually reinforcing principles of efficiency, governance, and cognition that became synonymous with effective human action.<sup>72</sup>

The first of these principles, efficiency, concerned the division of labor. Adam Smith gave powerful reasons for thinking that a top-of-the-widget maker and a bottom-of-the-widget maker can produce more per

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70. To take an example familiar to students of American constitutional law: The enormous growth in the national economy over the last two centuries may be thought to justify the concomitant growth of Congress's regulatory power under the Commerce Clause. See, e.g., *United States v. Lopez*, 514 U.S. 549, 568-70 (1995) (Kennedy, J., concurring) (describing the evolution of the Supreme Court's Commerce Clause jurisprudence during a period of economic expansion).

71. On the affinities between the New Deal regulation of the economy and the principles of mass production, see Michael J. Piore & Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* 73-104 (1984).

72. The classic history of such firms is Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (1977).

unit time than two whole-widgit makers working separately, and that addition of more and more specialized resources will yield commensurate increases in productivity. Smith's ideas culminate in the familiar notion of economies of scale associated with mass production: The greater the production volume, the lower the unit cost of the product.<sup>73</sup> Mass production supposes a superintendent with comprehensive knowledge of market possibilities and production techniques who will design the product and initiate subdivision of production into specialized tasks, each of which can be further decomposed by subordinates. Consequently, the hierarchical firm separates the conception and execution components of production, centralizing the former at the top of a corporate hierarchy.

The second principle, governance, in many ways a corollary to the first, concerns the vulnerabilities created by efficient specialization itself. The more highly subdivided the production of any product, the tighter the connections among the single components of the production process. Conversely, the less likely it is that any of those components can be put to use in other production processes. (Consider the example of an auto-body maker outfitted with the highly specialized equipment to produce at the lowest possible cost all the bodies for a particular make and model of car.) Owners of highly specialized, complementary resources cooperate, therefore, at great risk. Whoever invests first in the joint project can be held up by a partner who simply refuses to commit the complementary resources—without which the initial investment is worthless—except under terms more favorable than originally agreed. (The auto-body maker has no market without the assembler; the assembler has no product without the supplier.) But the threat of expropriation deters the initial investor, so the joint project is paralyzed by the prospect of the vulnerabilities it creates. Vertical integration (the assembler, say, buys the auto-body maker) is the organizational answer to this danger of opportunism. If a single owner has exclusive or residual control—the power to dispose of assets unless their use is otherwise specified by prior contract—over all phases of production so specialized that there are very few sellers and buyers of the relevant goods and services, the possibility of holdups disappears.<sup>74</sup> Possession, through ownership, of these residual

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73. See Adam Smith, *The Wealth of Nations* 7–25 (Edwin Cannan ed., Univ. of Chicago Press 1976) (1776).

74. The original, most trenchant, and most general conceptualization of the firm as an organizational means for conducting certain types of transactions more efficiently than can be achieved through markets is due to Ronald Coase. See generally R.H. Coase, *The Nature of the Firm* (1937), reprinted in *The Nature of the Firm* 18, 18–33 (Oliver E. Williamson & Sidney G. Winter eds., 1991). The emphasis on the potential costs of holdups as a central motivation in the choice of vertical integration as against arms-length dealing is largely due to Oliver Williamson. See Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 104–05 (1975); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 *J.L. & Econ.*, 233, 234, 250–53 (1979). The example in the text of the Article of the takeover of the auto-body maker by the assembler alludes to key features of the amalgamation of the

control rights, moreover, arguably helps solve coordination problems that arise within the resulting integrated firm, for the owner can use the threat of dismissal to discipline employees who use ambiguities in their employment contracts for their own benefit at the expense of the enterprise.<sup>75</sup> Thus, the assignment of property rights follows the logic of vertical integration, giving the economy its basic structure and providing a means for its continuous direction.

The third principle, cognition, is more general; indeed, it largely accounts for the first two. It ties the most basic features of organizations to the limits of human cognition, and particularly our manifest inability to perform all the calculations necessary to assess fully the costs and benefits of the choices plausibly open to us at any moment in anything like the available time. To act, given this *bounded rationality*, we must economize our limited attentiveness by making use of the expedients of habit and the subdivision of complex tasks into simpler ones. By habit, we take cru-

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Fisher Body Corporation into General Motors (GM) in 1926, which is often taken as a paradigmatic case of vertical integration as a response to duress. See, e.g., B. Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 *J.L. & Econ.* 297, 308–10 (1978). Coase himself, however, disavowed any close and general connection between the boundaries of the firm and efficient transactions, citing the counterexample of a prominent supplier of auto bodies that retained its independence, and noting that Fisher Body was already sixty percent owned by GM at the time of its complete incorporation into the larger firm. See R.H. Coase, *The Nature of the Firm: Origin* (1988), reprinted in *The Nature of the Firm*, supra, at 34, 43–46, 71. Moreover, a recent study by Helper, MacDuffie, and Sabel, based on contemporary accounts and archival sources, argues that GM's paradigmatic takeover of Fisher Body is best understood in light of the principles of collaborative innovation. See Susan Helper et al., *The Boundaries of the Firm as a Design Problem* 8–18 (Nov. 14, 1997) (unpublished manuscript, on file with the *Columbia Law Review*) (paper presented to the Meeting on Make Versus Buy: The New Boundaries of the Firm, Columbia Law School). According to their findings, GM's main motivation for incorporating Fisher Body was not to foreclose the possibility of holdups, but to take advantage of Fisher's generally recognized expertise in developmental collaboration: GM wanted to learn from Fisher how to reorganize itself to become a better collaborator with its suppliers. The account by Klein et al. asserts that GM incorporated Fisher Body after Fisher refused to build stamping plants adjacent to GM assembly facilities for fear of reducing collaboration with other, non-GM customers. The evidence cited in the study by Helper et al. shows, however, that the Fisher brothers collocated the stamping plants before 1926, and continued to collaborate with other automakers, notably Chrysler, before and after that date. Moreover, far from being excluded from the management of the merger firm, the Fisher Brothers were given important positions on its key executive committee to take advantage of their expertise in collaborative supplier relations. See *id.* The spread of pragmatist institutions of decentralized coordination described below can thus be considered an empirical vindication of the Coasean intuition that firms need not select from a familiar set of fixed organizational models.

75. For the view that possession of residual control rights both structures the economy and provides principals with an effective means to discipline their agents, see Oliver Hart, *Firms, Contracts, and Financial Structure* 6–8 (1995); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 *J. Pol. Econ.* 691, 692–93 (1986); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 *Colum. L. Rev.* 1757, 1759–60 (1989).

cial elements of our situation so for granted that we can reckon with the assumptions thus made without the need to be attentive to what we are assuming and how it shapes our further thoughts. By the subdivision of mental tasks, we break problems down into chunks whose separate solutions are within our cognitive grasp, and which can then be fitted together into a comprehensive solution to the original question.<sup>76</sup>

When problems are sufficiently complex as to require collaborative solutions, the expedients of thought become the very structuring principles of organization that economic consideration already suggests: Centralization and hierarchy are both necessary to partition problems into manageable chunks. But they also ensure that subordinates, who, by definition, know things their superiors cannot, do not make self-interested use of their expertise. Routines—the organizational equivalent of habits—likewise do double duty. First, they establish the connections among the parts and the limits on the operation of each part necessary to maintain the integrity of the whole. Second, the limits set by routines constrain the possibilities for self-dealing that specialization affords. The cognitive gains from hierarchical specialization and routinization, moreover, are mutually reinforcing. The more routinized a task, the easier it is to learn (and this, as Smith observed in his analysis of the gains to subdivided labor, explains the almost superhuman dexterity of operators performing simple, repetitive jobs);<sup>77</sup> but the more routinized the operations—the more, say, it consists of a few repetitive movements of the hand—the easier it is to decompose it further. (Smith counted this possibility of further simplification as another source of the efficiency gains of the division of labor, and suggested it might be accomplished either by attentive workers or “philosophers” specializing in this very task.<sup>78</sup>)

Smith’s insights concerning specialization suggest that organizations, no less than persons, are condemned to a pathos of knowledge. To know we must specialize; yet in specializing we come to be defined by what we unknowingly take for granted. Hence, the true price to the organization of gains through specialization (beyond the risk that a shift in demand will devalue dedicated equipment) is a kind of institutional self-oblivion.<sup>79</sup> To pursue its ends effectively, the organization must stop inquiring

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76. The idea of bounded rationality in relation to routine and division of labor was introduced contemporaneously, and to great effect, into computer science and organizational theory by James G. March and Herbert A. Simon. See James G. March & Herbert A. Simon, *Organizations* 150–71 (1958). For elaborations of the original ideas, see generally Herbert Simon, *Thinking by Computers* (1966), reprinted in Herbert Simon et al., *Economics, Bounded Rationality and the Cognitive Revolution* 55 (Massimo Egidi & Robin Marris eds., 1992); *Decisions and Organizations* (James G. March ed., 1988).

77. See Smith, *supra* note 73, at 11–13.

78. See *id.* at 13–14.

79. March and Simon were aware of this problem. They imagined its solution to be a context-sensitive master routine for selecting routines. However, they had little to say about how such an adaptive master routine could be institutionalized in the setting of hierarchical organizations. Thus they write, for example:

why its ends are its ends or why it pursues them as it does. When the routines become entrenched as the inevitabilities of common sense, the organization is the prisoner of its history, choosing within the limits imposed by its forgotten initial choices.

Palliatives and partial antidotes exist. The destiny of particular institutions may be contained in their initial choices. But new institutions can be formed to address new needs; and if they are, the struggle to survive given scarce resources selects the organizations with routines most suited to the demands of their environments.<sup>80</sup> Hence, organizational efforts in the aggregate are not misdirected even if particular organizations cannot reorient their activities to accommodate change. Alternatively, anticipating their own congenital rigidity, organizations might establish counterinstitutions, such as research laboratories, whose purpose is to routinize the creation of knowledge that renews crucial aspects of current routines.

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An organization is confronted with a problem like that of Archimedes: in order for an organization to behave adaptively, it needs some stable regulations and procedures that it can employ in carrying out its adaptive practices. Thus, at any given time an organization's programs for performing its tasks are part of its structure, but the least stable part. Slightly more stable are the switching rules that determine when it will apply one program, and when another. Still more stable are the procedures it uses for developing, elaborating, instituting, and revising programs.

The matter may be stated differently. If an organization has a repertory of programs, then it is adaptive in the short run insofar as it has procedures for selecting from this repertory a program appropriate to each specific situation that arises. The process used to select an appropriate program is the "fulcrum" on which short-run adaptiveness rests. If, now, the organization has processes for adding to its repertory of programs or for modifying programs in the repertory, these processes become still more basic fulcra for accomplishing longer-run adaptiveness. Short-run adaptiveness corresponds to what we ordinarily call problem-solving, long-run adaptiveness to learning.

There is no reason, of course, why this hierarchy of mechanisms should have only three levels—or any specified number. In fact, the adaptive mechanisms need not be arranged hierarchically. Mechanism A may include mechanism B within its domain of action, and vice versa. However, in general there is much asymmetry in the ordering, so that certain elements in the process that do not often become strategic factors (the "boundaries of rationality") form the stable core of the organization structure.

. . . Organization will have structure, as we have defined the term here, insofar as there are boundaries of rationality—insofar as there are elements of the situation that must be or are in fact taken as givens, and that do not enter into rational calculations as potential strategic factors. If there were not boundaries to rationality, or if the boundaries varied in a rapid and unpredictable manner, there could be no stable organization structure.

March & Simon, *supra* note 76, at 170–71.

80. For the study of economic organization as the process by which competitive markets select for organizations with adaptive routines, see generally Richard R. Nelson & Sidney G. Winter, *An Evolutionary Theory of Economic Change* (1982). For the view, central to this school of thought, of routines as the tacit preconditions of action, see Richard R. Nelson, *Routines*, in *The Elgar Companion to Institutional and Evolutionary Economics* 249, 249–53 (Geoffrey M. Hodgson et al. eds., 1994).

But in attempting to correct the defects of organizations from without, these devices acknowledge implicitly that they could not be corrected from within, and so ratify the view that the astonishing accomplishments of hierarchically specialized institutions are necessarily associated with the danger of stultification.

During the years of the post-War expansion, these potential cognitive and economic costs were a wholly theoretical prospect, and so vastly outweighed by the benefits of specialization that these benefits alone came to be taken for granted as defining the logic of efficiency. But starting in the mid-1970s, for reasons we will not consider here, the stable markets for standard goods on which this system of production had rested became fragmented and volatile, and some of the costs of specialization were suddenly manifest and onerous.<sup>81</sup> In volatile and fragmented markets, the formerly acceptable risk of amortizing the huge initial investment in the design of highly complex products and production systems required to achieve economies of scale became dauntingly risky. Firms that responded to foreign competition with bold projects could easily miss their markets and be left with nothing but write-offs to show for their temerity. Firms that responded cautiously watched as developments passed them by. For a time, this Hobson's choice seemed a cruel fact of nature. Even as foreign firms developed new organizational forms to compete under the changed conditions, American companies found the prospect of any production system more efficient than their own so incredible that they attributed the foreigners' success to good fortune (low wages), gnile (dumping), or culture, instead of trying to learn from their example. Adjustment was therefore delayed or misdirected, for example, to forms of cost reduction that left the old system intact. But in the last decade, under continuing competitive pressure, American firms have indeed come to make sense of, increasingly adopt, and even develop an alternative to mass production that achieves efficiency without paying the price of forgetful rigidity.

This new kind of firm is federated, not hierarchical and centralized: Decisions of higher level entities are crucially shaped by the decisions of their constituent units. They are open, not vertically integrated: Components or services crucial to the final product of one firm can be provided by independent outside companies, and the firms' internal specialized producers can provide outsiders with crucial inputs.<sup>82</sup> Such outward differences are the result of distinctive principles of efficiency and govern-

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81. For extended, but still inconclusive treatments of the destabilization and fragmentation of markets, see Robert Boyer & Jacques Mistral, *Accumulation, Inflation, Crises* 124-34 (1978); Piore & Sabel, *supra* note 71, at 165-93.

82. The best analytic introduction to the differences between hierarchical mass producers and the Japanese-style, decentralized firm is Masahiko Aoki, *Information, Incentives, and Bargaining in the Japanese Economy* (1988). See also Rosabeth Moss Kanter, *The Future of Bureaucracy and Hierarchy in Organizational Theory: A Report from the Field*, in *Social Theory for a Changing Society* 63, 83-87 (Pierre Bourdieu & James S. Coleman eds., 1991); Charles Sabel, *Moebius-Strip Organizations and Open*



ance; these, in turn, are rooted in a new understanding of cognitive possibilities that makes routines accessible to deliberate evaluation without subverting them as guides to normal activity.

The basal unit of the new firm is the team or work group. This unit has the responsibility to achieve the goals it agrees upon with its collaborators by the means that it determines through deliberation as a group. Thus, unlike the specialized subordinates in the hierarchy of a mass producer, the work group is free to change its internal organization and to choose inputs (tools, engineering services, components, and so on) from within or outside the work group's company. Anticipating this need for continuous adjustment of internal and external connections, members of the group will have, or will acquire through training, related but distinct specialties, as this diversity helps the group adapt to changing circumstances. Because of its autonomy, the work group is for most purposes an independent firm, whatever its formal legal status.

Coordination of these groups is by the methods of iterated goal setting introduced above. For example, the new-van team in an automobile firm sets the general performance characteristics of the vehicle it is designing by benchmarking evaluation of the best features of current vans and the prospects of incorporating innovations under development into its own design.<sup>83</sup> It next decomposes these general goals, again by reference to leading examples and comparison of possibilities, into subtasks such as the design of an engine, transmission, or heating, ventilation, and air conditioning system, and chooses a specialist team from inside or outside the parent company to realize each of the initial conceptions.

The separate specialist teams elaborate all the subsystems concurrently, applying to that task the same kind of evaluation of competitors' successful efforts and developmental possibilities used in the van team's first round of benchmarking. In addition, they benchmark the planned capacities of the capital goods, work organization, and other production methods central to their eventual products to ensure that those employed will be at least as efficient as the ones used by the most capable competitors. Engine plants, for instance, will compare their prospective performance, measured in units such as person-hours, capital investment, or square feet of factory space per motor produced, with the actual performance of plants making engines with similar technical specifications at similar production volumes and with similar warranties of reliability.<sup>84</sup> Units producing a service rather than a physical product will benchmark the

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Labor Markets: Some Consequences of the Reintegration of Conception and Execution in a Volatile Economy, *in* *Social Theory for a Changing Society*, *supra*, at 23, 26-30.

83. For a good description of this process with abundant and detailed examples, see generally Robert C. Camp, *Benchmarking: The Search for Industry Best Practices that Lead to Superior Performance* (1989).

84. The example described in this section is drawn from the calculations contained in a major Midwest motor company's organizational engine design report (confidential report on file with the authors).

service:<sup>85</sup> The purchasing department of the automaker, for example, will aim to spend no more time and incur no greater costs, in locating potential suppliers and qualifying them as actually able to perform at the required levels, than the most proficient purchasing departments in the same or related industries.<sup>86</sup> Then, as groups begin to gain experience in prosecuting the tasks as originally defined, the initial overall goals are modified by the methods of simultaneous engineering.<sup>87</sup> Thus, the engine group may find a way to improve its target specifications or to cut the cost of manufacture if the design characteristics of the transmission are modified accordingly.

Refinement of the eventual design continues by means of just-in-time or inventoryless production methods and the error-detection and correction methods associated with it. In just-in-time production, parts are supplied to each work station only as needed—ideally, one at a time.<sup>88</sup> This production method renders disruptions and defects immediately visible. Breakdowns at one station halt production by disrupting the flow of parts to downstream operations; defects introduced in one manufacturing step make it difficult or impossible to accomplish the subsequent ones correctly. To assure the flow of production, therefore, the source of the disruption or defect must be identified in a failure of workmanship or an imperfection of design or operating organization. Such inquiries typically require tracing long causal chains back to improbable origins by an insistent series of questions sometimes called the five whys: (1) *Why is machine A broken?* Because no preventive maintenance was performed; (2) *Why was the maintenance crew derelict?* Because it is always repairing machine B; (3) *Why is machine B always broken?* Because the part it machines always jams; (4) *Why does the jam recur?* Because the part is warped from heat stress; (5) *Why does the part overheat?* A design flaw.<sup>89</sup> Again,

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85. See Camp, *supra* note 83, at 41–42.

86. Discussions with David Nelson, Vice President, Purchasing, Honda of America Manufacturing, Inc., in Marysville, OH (Nov.–Dec. 1993). Professor Sabel served with David Nelson on the Committee to Assess Barriers and Opportunities to Improve Manufacturing at Small and Medium-Sized Companies, organized by the Committee on Engineering and Technical Systems, National Research Council. See National Research Council, *Learning to Change: Opportunities to Improve the Performance of Smaller Manufacturers* at iii–iv (1993).

87. For a careful account of the advantages and disadvantages of various methods of balancing the innovative autonomy of the subunits with the need for integrity of the whole, see Allen Ward et al., *The Second Toyota Paradox: How Delaying Decisions Can Make Better Cars Faster*, *Sloan Mgmt. Rev.*, Spring 1995, at 43, 43–61.

88. Accounts by industrial engineers with substantial roles in, respectively, devising and refining the just-in-time and related methods are Taiichi Ohno, *Toyota Production System: Beyond Large-Scale Production* (1988) and Shigeo Shingo, *A Study of the Toyota Production System from an Industrial Engineering Viewpoint* 97–121 (Andrew P. Dillon trans., Productivity Press 1989) (1981).

89. For a particularly insightful discussion of this and related error-detection methods, see generally John Paul MacDuffie, *The Road to “Root Cause”*: Shop-Floor Problem-Solving at Three Auto Assembly Plants, 43 *Mgmt. Sci.* 479 (1997).

parallel questions arise for firms or units of firms providing services rather than manufacturing products.

Thus, error detection and correction, like benchmarking and simultaneous engineering, reveal possibilities for improvement in unexpected (mis-) connections among the parts of complex endeavors, and the cumulative effect of these results is captured in improvements in the benchmark standards for various processes. Just as benchmarking and simultaneous engineering are often carried out by groups or teams with diverse experiences, so too is error detection and correction: Without diversity of experience, a problem-solving group could hardly follow the zigzag path traced by the answer to successive whys.

These practices, and benchmarking above all, link the performance of the firm more directly to that of its competitors and collaborators at any one moment, while establishing a record that provokes and partially guides discussion of its own overall objectives. Benchmarking can begin with internal comparisons and investigations. Motor units in the same corporation can exchange performance data; the purchasing department asks its customers—internal units and the outside firms supplying them—to evaluate the services it provides by measures of their choice. But these measures can only be first, preparatory steps towards comparison with others. This next step requires separate companies and units within these companies to pool data on the actual performance of key processes. In volatile markets like the current ones, companies cooperate in this way—often creating industry institutes that provide comparative performance measures of each company's processes, on the condition that the request be accompanied by a full description of the inquirer's own current results—because no firm can risk assuming that its current processes, no matter how much they improve on past practice, are competitive, let alone superior.<sup>90</sup>

This swelling flood of data leads inevitably to a debate on how best to channel the information it contains; that debate becomes part of the broader discussion of the firm's direction and purpose. Once everything is in principle measurable by comparison, there is no avoiding the questions of what to measure. If the goals of the corporation could be reliably translated into progress on certain financial measures, and improvement on these connected to measurable progress on certain benchmarks of

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90. One of the most dramatic and consequential instances of such interfirm benchmarking is the pooling of extraordinarily detailed data on production layouts and capacities by leading companies in the automobile industry worldwide in the late 1980s. Japanese managers wanted to show their United States and European counterparts that their low selling prices resulted from efficient methods rather than the use of sweatshops or below-average cost dumping. Managers outside Japan wanted to learn more about Japanese methods, often in the hope of using improved documentation of the efficiency gains to buttress the case for reform in their own organizations. See James P. Womack et al., *The Machine That Changed the World* 244–45 (1990). An example of an industry benchmarking institute is Venture Economics Investor Services Group (Newark, N.J.) for venture capital.

operating activity, the answer would plainly be to focus on the latter. But under volatile conditions neither step is possible.<sup>91</sup> In some situations, profitability or return on invested capital captures the firm's overall position; in others, growth in market share, expenditures on research and development as a percent of sales, share of recently introduced products in the total product mix, product development time, or share of revenues earned from licensing new techniques may be far more revealing of the firm's prospects. The relation of any of these measures to particular operating practices is likely to change as well. All this variability entails constant reevaluation of the utility and precise characterization of both summary indicators and the operating measures associated with them. Reevaluation of performance measures can in turn prompt reconsideration of the larger, strategic purposes they reflect. Therefore, the most sophisticated of the new firms engage in benchmarking and simultaneous engineering of the measurement practices of benchmarking and simultaneous engineering themselves. These sophisticated firms use comparisons with measurement practices in related firms as a way of orienting their own use of measures, and they link changing judgments of what to measure and how in each subunit with coordinate changes in the others.<sup>92</sup> These deliberations do not suffice to steer the firm under current conditions, but they are increasingly recognized as necessary for it.

The master cognitive innovation of this new type of firm is embodied in precisely these apparently modest, surprisingly commonsensical institutions. For benchmarking, simultaneous engineering, and error-detection methods, such as the five whys, are procedures for doing just what the standard view of effective action says cannot be done given bounded rationality: routinely questioning the suitability of current routines. The initial specification of new designs (benchmarking), the concrete realization of these approximations (simultaneous engineering), and their practical application (error detection), occur at just those times when self-interrogation seems most valuable but most difficult. This timing obligates the actors to search for solutions in a circumscribed space of possibilities (the set of best current or potential designs of any activity entangled in the causes of a certain breakdown). The actors could not have anticipated the exact contours and contents of these possibilities; thus, the yield of procedures like the five whys is likely to be unfamiliar and disconcerting enough to force reevaluation of habitual responses. The

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91. See Marshall W. Meyer & Kenneth C. O'Shaughnessy, *Organizational Design and the Performance Paradox*, in *Explorations in Economic Sociology* 249, 250–54 (Richard Swedberg ed., 1993).

92. See Robert S. Kaplan & David P. Norton, *The Balanced Scorecard—Measures That Drive Performance*, *Harv. Bus. Rev.*, Jan.–Feb. 1992, at 71, 74–75; Robert S. Kaplan & David P. Norton, *Putting the Balanced Scorecard to Work*, *Harv. Bus. Rev.*, Sept.–Oct. 1993, at 134, 140–42. For a good case study, see generally Susan Rosegrant, *A Measure of Delight: The Pursuit of Quality at AT&T Universal Card Services* (1994) (unpublished case study nos. C16-94-1219.0 & C16-94-1220.0, John F. Kennedy School of Government, 1993) (on file with the *Columbia Law Review*).

new firm is therefore a member of a new class of institutions defined not by the fixed routines to which they are oblivious, but rather by the routines they use for interrogating and altering their routines (including, of course, the particular methods of self-interrogation). Think of the new institutions as pragmatist in that they systematically provoke doubt, in the pragmatist sense of an urgent suspicion that habitual beliefs are poor guides to current problems.

Group discussion of problems renders the resulting flood of alternatives tractable. Group discussion meets an immediate objection to problem solving through extensive collaboration rather than hierarchical decomposition of tasks: the geometric explosion of pairwise contacts that such collaborations might seem to entail. If A must consult first with B, then with C, and the latter two must then meet by themselves, the sheer number of consultations is unmanageable unless the group is minuscule. If, however, the collaborators meet together—a possibility, strikingly, not contemplated in the theories of bounded rationality—one meeting substitutes for many.

But group discussion does more than economize on participants' time.<sup>93</sup> It pools the diverse capacities and experiences of its members in judging the alternatives produced by benchmarking, simultaneous engineering, and problem-solving searches. Thus, the new-van team, for example, convokes specialists in engine and transmission design as well as in styling, marketing, and manufacturing to discuss proposals about the target market in relation to desired engine performance. Each proposal illuminates the others, and all are seen in light of the diversified knowledge of the group. The result is that both the group and its members are enlightened by the interplay of diverse disciplines and projects. Or the error-correction team convokes specialists in various phases of production, design, and maintenance: At successive rounds of inquiry each specialist's explanation provides a hypothesis to test, helping to evaluate the plausibility and implications of alternatives, and, in the aggregate, ensuring a sufficiently broad canvass of likely causes. The upshot in both cases is to reveal possibilities that would remain obscured if those same proposals for new designs or explanations of the causes of disruption were scrutinized one by one, or jointly by a lone evaluator. Think of group problem solving as complementing the pragmatist search institutions by providing for the pragmatist collaborative explorations of the ambiguities they reveal.

This twofold information pooling—of plans or problems on the one hand and perspectives on the other—yields efficiency gains of a distinc-

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93. Meetings can, of course, create inefficiencies of their own. Without agreed-upon ground rules, they can be chaotic. Exceedingly strict rules can be perceived as oppressive, while efforts to enable everyone to have a say can waste everyone's time. Nevertheless, the spread of work teams in environments more focused on the bottom line than expressive politics for its own sake strongly suggests that the efficiencies of group problem solving outweigh their inefficiencies.

tive kind. Where the hierarchical decomposition of tasks leads to economies of scale, information pooling yields economies of scope: The greater the variety of projects undertaken, the less costly it is to undertake yet another variety of those projects. One source of these gains is suggested directly by the cognitive properties of the new institutions. Comparisons among (in part) unfamiliar alternatives (competing designs, various possibilities for realizing these, alternative explanations of the origins of defects) reduce the likelihood of insular, self-absorbed decisions, while clarifying the implications and thus reducing the risks of discovering costly shortcomings of particular decisions long after they have been made. A second source of efficiency gains is the self-reinforcing character of disciplined information pooling itself. Just as decomposition of tasks facilitates further decomposition, so the methods of collaborative investigation of ambiguity lead, within and among work groups or project teams, to increasing facility in the use of those methods and corresponding increases in the scope of alternatives that can be canvassed, and the depth to which their several implications can be examined.

The cumulative, empirical effect of these efficiency gains is to allow firms that have mastered the pragmatist disciplines to overturn the verities of the earlier mass-production system, transforming the competing desiderata of that world into mutually reinforcing attributes of the new one. Thus, it counted as a truism of mass production that exploration of many design alternatives hindered timely and rigorous pursuit of any one. The experience of firms in the personal computer and other technologically sophisticated industries with extremely short product life cycles shows, on the contrary, that pursuit of many alternatives is the best way to understand the advantages and disadvantages of each, and so contributes to selection of the best current possibilities. The counterintuitive result is that increasing the range of design alternatives considered at the start of a product cycle *speeds* selection of one, and *increases* the quality of the choice.<sup>94</sup> Think of this as the global scanning advantage of learning-by-monitoring firms. Similarly, in mass production a decrease in efficiency was taken to be the price for an increase in quality. Isolated efforts to increase accuracy seemed inevitably to interfere with the automaticity of production, reducing the throughput of the system per unit time, and decreasing productivity.<sup>95</sup> Coordinated efforts to increase accuracy (except as the by-product of the increasing decomposition of tasks) seemed

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94. See Kathleen M. Eisenhardt, High Reliability Organizations Meet High Velocity Environments: Common Dilemmas in Nuclear Power Plants, Aircraft Carriers, and Microcomputer Firms, *in* *New Challenges to Understanding Organizations* 117, 124-26 (Karlene H. Roberts ed., 1993).

95. William Abernathy describes how, in the 1960s and 1970s, arguments for partial improvements in large firms were routinely defeated by showing that the benefits they might produce, however large, were small compared to the collateral costs of replacing (fully amortized) equipment in other parts of the plant to accommodate the local change. See William J. Abernathy, *The Productivity Dilemma: Roadblock to Innovation in the Automobile Industry* 66, 211, 214-16 (1978).

unmanageably complex.<sup>96</sup> But the error-detection and correction methods of learning by monitoring reveal local defects in the organization of production that remained hidden under less exigent conditions. Elimination of these defects affords possibilities for raising overall efficiency—through minimizing downtime due to breakdowns, through the introduction of delicate automation equipment whose operation depends on maintenance of tight tolerances, and through reduction in the reworking of botched products—that are simply unavailable in environments more tolerant of fault. The counterintuitive result is that the higher the quality of the parts of the new system, the greater the efficiency of the whole.<sup>97</sup> Think of this as the aggregate efficiency effect of local learning by monitoring.

Pragmatist information pooling provides an alternative solution to the problem of opportunism as well. That problem arises in mass production, we saw, as a direct consequence of hierarchical specialization. Resources specific to one project in such a system have only scrap value if put to another use, and expertise is so fragmented and specialized that the doings of one actor or group are inscrutable to others. Hence, in hierarchical firms, vertical integration, possession of residual control rights by a unitary owner, and the corresponding direction of the integrated enterprise by authority and incentives are a response to the temptations of holdups and deception. The new institutions, in contrast, so transform the conditions of cooperation that these incitements to trickery do not exist in anything like their accustomed form, and new forms of trickery can be countered by the very exchanges of information required for the exploration of ambiguity. The master resource in the new system is the ability to redeploy resources fluidly, as demonstrated in both the command of the novel search routines and in the capacity to reuse an increasingly high percentage of the physical equipment committed to one project in subsequent ones. The latter is accomplished, for example, by extensive use of flexible capital equipment that can be reconfigured by reprogramming the computers that guide its operation and changing one type of tool-bearing module for another. Moreover, the greater a work team's command of the search routines and problem-solving disciplines, the more accomplished the team becomes at such redeployment. The effect is that product-specific resources lose their specificity. "Despecified," in the form of general-purpose assets, they are no longer the instruments or objects of holdups.

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96. Frederick Brooks, argued, for example, that the complexity of computer operating systems tended toward a natural limit where the costs of coordinating the efforts of the additional software engineer matched the contribution of that engineer to the coordinated whole. See Frederick P. Brooks, Jr., *The Mythical Man-Month: Essays on Software Engineering* 44–50 (reprinted with corrections 1982) (1975). Brooks managed the development of the operating system of the IBM 360, the most successful time-sharing computer of its day.

97. See Ohno, *supra* note 88, at 40–41.

The pooling of proposals and perspectives breaks down the distinctions between mutually ignorant specialists, each tempted to exploit the ignorance of the other. In simultaneous engineering and error correction by the five whys, for example, actors must teach each other important elements of their respective specialties and reveal the logic of their intentions in order to make themselves comprehensible at all. Where hierarchy assumes and produces the information asymmetries of mutual ignorance, learning by monitoring in effect creates an information-symmetrizing machine in which actors must keep one another abreast of their intentions and capacities in order to advance the one and develop the other. The assignment of property rights in the sense of rights to residual control, accordingly, loses its centrality as a structuring and coordinating mechanism for the economy. If the supplier is continuously helping to modify the customer's equipment to make better use of the parts supplied (for example, by locating one of its own engineers at the latter's plant) and the customer reciprocates, then the collaborators are in effect jointly exercising residual control over the assets pooled in production; or, rather, they are in some sense partners or co-owners.

Thus, in the emerging pragmatist economy, the necessity of collaboration means that the benefits to individuals or teams of holding up production will rarely outweigh the costs. From the older perspective, this result is as counterintuitive as the results of the new logic of efficiency. Indeed, so pervasive were fears of holdups in mass production that habitues of that world initially assumed that Japanese firms braved the risks of intimate collaboration only because of certain peculiarities of the Japanese setting, and hence that the Japanese organizational model was unlikely to thrive outside of Japan. According to one view, these peculiarities were cultural. Among the obligations of the Japanese to each other is the duty to forebear from exploiting the vulnerabilities of (Japanese) partners. The mutual expectation of such forbearance is trust, and in those few and fortunate places where historically there happens to exist a culture of trust, that culture, by definition, protects the dealings of those it embraces from the shadows of opportunism that normally darken transactions among the mutually vulnerable.<sup>98</sup> From another perspective, the peculiarities of the Japanese were institutional. By a (different) historical accident, the flexibility of the Japanese economy derived from economic structures that encouraged long-term collaboration between the factors of production. Firms with lifetime employment that cannot cut costs by firing workers have incentives to retrain for new, productive tasks. Banks monitoring corporate performance are more likely to help a distressed debtor restructure if there is no prospect of recovering a loan by forcing liquidation. Economies that could not count on the loyal workforce and patient capital that these institutions produced could not build the other

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98. See Ronald Dore, *Goodwill and the Spirit of Market Capitalism*, 34 *Brit. J. Soc.* 459, 478-81 (1983).



collaborative institutions at the workplace or in customer-supplier relations that depended on these as foundations.<sup>99</sup> Either way, the prospects were slight for the diffusion of the Japanese system outside its territory of origin and those few places with accidental similarities. Nowhere were the prospects slighter than in the United States, with our culture of individual self-reliance, not mutual trust, labor-market institutions favoring hire-and-fire strategies (with some corrections for seniority), and corporate monitoring by equity markets with a sharp eye for quarterly results.

But developments have confounded these expectations. Japanese-derived organizational methods are now widely practiced in countries within the developing world<sup>100</sup> as diverse as Brazil<sup>101</sup> and Malaysia,<sup>102</sup> as well as in economically advanced countries as different as Ireland<sup>103</sup> and Germany.<sup>104</sup> In few places, indeed, have these methods been adopted with more innovative enthusiasm than in the United States, where they have spread from automobile, computer, and semiconductor industries that first came to grips with Japanese competitors adept at their use, to industries as varied as garments and meat processing.<sup>105</sup> It is difficult to measure the precise extent of the diffusion of the new methods.<sup>106</sup> But

99. For a popular version of this general view, see Michel Albert, *Capitalism Against Capitalism* 11–19 (Paul Haviland trans., Whurr Publishers 1993) (1991) (comparing U.S. capitalism to German capitalism). For the institutional view applied to capital markets, see Michael E. Porter, *A Research Report Presented to the Council on Competitiveness, Capital Choices: Changing the Way America Invests in Industry* 3–19 (1992), and to labor markets and industrial relations, see Thomas A. Kochan & Paul Osterman, *The Mutual Gains Enterprise* 19–43 (1994).

100. For overviews of the rapid spread of the new methods to developing countries, see Raphael Kaplinsky, *Easternization: The Spread of Japanese Management Techniques to Developing Countries* 271–310 (1994); Special Issue, *Industrial Organization and Manufacturing Competitiveness in Developing Countries*, 23 *World Dev.* 1 (John Humphrey ed., 1995); Raphael Kaplinsky, *Technique and System: The Spread of Japanese Management Techniques to Developing Countries*, *in id.* at 57.

101. See *A Maquina e o Equilibrista: Inovacoes na Industria automobilistica Brasileira* (Nadya Araujo de Castro ed., 1995).

102. See Rajah Rasiah, *Competition and Governance: Work in Malaysia's Textile and Garment Industries*, 23 *J. Contemp. Asia*, 3, 11–19 (1993); Rajah Rasiah, *Flexible Production Systems and Local Machine-tool Subcontracting: Electronics Components Transnationals in Malaysia*, 18 *Cambridge J. Econ.* 279, 281–85 (1994).

103. See Charles Sabel, *Ireland: Local Partnerships and Social Innovation* 29–33 (1996).

104. See Michael Schumann et al., *Trendreport Rationalisierung: Automobilindustrie, Werkzeugmaschinenbau, Chemische Industrie* 13–27 (1994).

105. The Virginia firm Agrometrics provides benchmarking data on production efficiencies on the raising, processing, and marketing of broilers, turkeys, and hogs. The firm surveys costs in all aspects of operations. Telephone Interview with Robert Rust, Program Director, Agrometrics (Feb. 17, 1998).

106. Measurement is difficult precisely because the new firm as described here can be built through many different sequences of distinct, more or less far-reaching innovations in areas such as customer-supplier relations, the reorganization of management and the workforce into project and production teams, new systems for accounting and measuring the performance of individuals, groups, and business units, and so on. Very many firms in the United States have demonstrably broken with some aspects of the old practices;

diffusion in the United States has progressed far enough so that well-informed proponents of the institutional-limitations view now see our institutions as hospitable to the "Japanese" system.<sup>107</sup> Yet there is no evidence that our system of corporate governance has shifted power from corporate managers (with incentives to boost quarterly earnings) to banks (supposedly concerned about the firm's long-term fiscal health) or otherwise encourages patience more than it used to.<sup>108</sup> Indeed, there is

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however, very few have adopted all the features of the new. Estimating the extent of the new practices depends, therefore, on a judgment of just how much has to change before a firm crosses the line from old to new. This judgment in turn will be sensitive to nuances in the understanding of what, exactly, is innovative in the new methods. Thus, Paul Osterman finds that 35% of the manufacturing firms surveyed had adopted work teams or another organizational practice of that sort. See Paul Osterman, *How Common Is Workplace Transformation and Who Adopts It?*, 47 *Indus. & Lab. Rel. Rev.* 173, 176-78 (1994). Teixeira and Mishel, referring to the same data, find that only 10% have adopted three or more of the new practices. See Ruy A. Teixeira & Lawrence Mishel, *Whose Skills Shortage—Workers or Management?*, *Issues in Sci. & Tech.*, Summer 1993, at 69, 71-72. A study of a General Motors assembly plant in Linden, New Jersey, provides a good description of the persistence of traditional forms despite the intrusion of the new in the late 1980s. See Ruth Milkman, *Farewell to the Factory* 137-80 (1997). A more recent, fine-grained study of practices in new or modernized steel-rolling mills, on the other hand, shows much more extensive, though still incomplete, change in the direction of the discussion above. See Casey Ichniowski & Kathryn Shaw, *Old Dogs and New Tricks: Determinants of the Adoption of Productivity-Enhancing Work Practices*, *Brookings Papers on Econ. Activity, Microeconomics* 1995, at 1, 53-55. For the accretion of change in a single industry in the last decade, see the results of periodic surveys of customer-supplier relations among United States auto firms in Susan R. Helper, *An Exit-Voice Analysis of Supplier Relations, in Morality, Rationality, and Efficiency: New Perspectives on Socio-Economics* 355, 355-72 (Richard M. Coughlin ed., 1991); Susan R. Helper, *Three Steps Forward, Two Steps Back in Automotive Supplier Relations*, 14 *Technovation* 633, 634 (1994).

107. See, for example, Michael Porter's comment on a recent comparison of governance regimes that presents the Japanese system as "supportive" of lean production and the American system as "not supportive." See Michael E. Porter, *Comment to Mitsuhiro Fukao, Financial Integration, Corporate Governance, and the Performance of Multinational Companies* 92, 93 (1995). This distinction, Porter finds, is "clearly too simple," because "[in]any U.S. companies have adopted lean production and closer partnerships with suppliers in recent years." *Id.* Compare Porter's earlier fears that the time horizon of U.S. markets threatened to limit competitiveness. See generally Porter, *supra* note 99.

108. Despite the spectacular dethronement of the CEO with the help of the board and institutional shareholders at such corporations as General Motors, IBM, AMEX, Westinghouse, and Apple, formal changes in corporate governance in the United States have been cosmetic, at most. See, e.g., Julia Amparano Lopez, *CEOs Find That Chums on the Board Are the Ones Most Likely to Plot a Revolt*, *Wall St. J.*, Mar. 26, 1993, at B1 (describing the pattern of upheaval leading to change at the highest level of these firms). Thus, a recent representative survey of some 100 directors of major United States corporations commissioned by the Institutional Investor Project of Columbia University (which has close ties to the institutional shareholder activists) found that the "vast majority" of those interviewed dismissed the idea of formally separating the office of CEO from the office of chairman of the board of directors, and reserving the latter for an outsider, who would presumably be a better representative of shareholders than the inside CEO. See Elizabeth MacIver Neiva, *The Current State of American Corporate Governance*

much evidence that our industrial relations have become more "American" than before.<sup>109</sup> What accounts for the capacity of the American economy to adopt the innovations in the absence of the pre-conditions for doing so?

The short answer is that the construction of Japanese production systems does not suppose the existence of long-term relations, because the system produces them in the course of its operation. Their firms' chief reservation would be fear of engaging an incompetent or unreliable partner. However, the information exchanges intrinsic to learning by monitoring would alert them to this danger before the consequences were ruinous. The same process that allows firms and their internal or external suppliers to agree on the definition of a subsystem or its components allows joint evaluation of target prices, target rates of return for collaborating partners, and a target rate of productivity improvement to be expressed in periodic price decreases.<sup>110</sup> Given the targets, simple sharing rules apportion the gains and losses from superior or inferior performance. For instance, the supplier typically keeps at least half the gains from innovations leading to productivity increases in excess of the target

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30-33 (Feb. 1996) (unpublished manuscript, on file with the *Columbia Law Review*) (funded by Institutional Investor Project, Columbia Law School, 1996). The study found further that the directors were reluctant even to *meet* (and infrequently did) with representatives of institutional investors, and that this reluctance was "tame relative to their aversion to inviting investors to serve on corporate boards." *Id.* at 63. The ideal director for the directors interviewed—the same kind of people who presumably say that the corporation should be managed in the interest of the shareholders—is, correspondingly, a person like themselves: the CEO (or, increasingly, the division president) of a large corporation. See *id.* at 24. A recent econometric study of the relation between board composition and corporate performance reinforces the conclusion that the inside managers are still very much in charge. This study finds that many boards now have investment, strategic development, and finance committees whose purpose is to evaluate long-term investment and finance decisions. But, crucially, membership on these committees is disproportionately left to inside or management directors, presumably the same people who formulated the plans in the first place, and the higher the percentage of insiders in these bodies, the (marginally) better the corporate performance. See April Klein, *Firm Productivity and Board Committee Structure* 11-17 (Apr. 1995) (unpublished manuscript, on file with the *Columbia Law Review*); Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance* 27-28 (Sept. 1997) (unpublished manuscript, on file with the *Columbia Law Review*).

109. On the potentially disruptive incoherence of American labor law and a project to reconstruct it in harmony with the transformation of the economy described above, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *Colum. L. Rev.* 753, 946-83 (1994) (proposing new institutions of workplace democracy in light of new organizational methods); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *Harv. L. Rev.* 1379, 1461-96 (1993) (contending that the Wagner Act reflected a cooperationist model of the workplace, rather than the adversarial model commonly assumed).

110. On the evolution and structuring principles of the new subcontracting systems, see generally Toshihiro Nishiguchi, *Strategic Industrial Sourcing: The Japanese Advantage* 209-15 (1994); Michael J. Smitka, *Competitive Ties: Subcontracting in the Japanese Automobile Industry* 8-11 (1991).

rate, with the share declining as the innovation matures. Persistent incapacity to meet price reduction or product-improvement targets despite continuing, joint efforts to surmount problems is often penalized by step-wise reduction in the supplier's share of the customer's total purchases of the affected product.<sup>111</sup> Suppliers that do exceptionally well in one or more rounds can then be delegated more extensive responsibility in the codesign of subsequent models; those that do exceptionally poorly will eventually be dropped from the pool of collaborators. Similarly, workers could be motivated by the prospect of acquiring general-purpose skills (especially the ability to work in the new kind of teams) under conditions where managerial incapacity or bad faith is easily detected, and superior performance can be rewarded with more responsibility in teamwork.

Another more general way to put the point is to say that learning-by-monitoring systems can be constructed by bootstrapping: the process of incremental change in which a favorable balance of risks and returns encourages first steps from many diverse starting points, and each move points the way down one of several paths that eventually leads to a roughly similar outcome.<sup>112</sup> Thus, a large firm can begin adopting the new methods simply by establishing various operating units as work teams or project groups responsible for achieving agreed-upon goals, and rewarding or penalizing them (with, for instance, larger or smaller budgets) according to results. As these teams and groups choose, in turn, *their* collaborators from inside and outside the corporation, and adjust their internal organization accordingly, reorganization proceeds in ways that could not have been anticipated by central headquarters, yet are consistent with its (developing) purposes.

But accounts of innovations that permit local yet generalizable efficiency increases at little or no institutional risk and under the most varied

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111. For data showing that the most successful suppliers to automobile assemblers in the United States expect their customers to aid them if problems arise, but penalize them further if the help is unavailing, see Helper et al., *supra* note 74, at 21–22. Recent Japanese writings on subcontracting also emphasize the importance of continuous monitoring, with corresponding incentives, as against trust, as the operative principle of long-term relations. Thus, in a leading study, Toyota was “reputed to be the assembler with the closest cooperative relationships with its suppliers.” Kazuo Wada, *The Development of Tiered Inter-Firm Relationships in the Automobile Industry: A Case Study of Toyota Motor Corporation*, 8 *Japanese Y.B. on Bus. Hist.* 23, 47 (1991). It concludes:

[T]hese close cooperative relationships were realized under a system of evaluations of suppliers by Toyota, which stimulated a competitive spirit among suppliers. It is not that Toyota was not liable to opportunistic exploitation, but that close cooperative relationships in themselves contain the means for preventing the occurrence of opportunism. The evaluation system brought into the close cooperative relationships is the important factor that raised the percentage of Toyota's reliance on external production and that brought about the tiered inter-firm relationships.

Id.

112. See Charles F. Sabel, *Bootstrapping Reform: Rebuilding Firms, the Welfare State, and Unions*, 23 *Pol. & Soc'y* 5, 7 (1995).

background conditions sound too good to be true, and, unqualified, they are too good to be true. We complete this synopsis of the new collaboration, therefore, by correcting omissions in the story so far and noting two limiting concerns in the diffusion of pragmatist institutions.

The first correction concerns the costs of shifting from the old world to the new. The shift to learning by monitoring, like any large change, produces winners and losers. But changing things piece by piece, eventually changing everything, makes it much more difficult to establish the distinction between winning and losing than in the case of punctual, once and for all changes. Abandoning the familiar system one step at a time, many will miss the attractive security that is stripped away long before they catch sight of the novel opportunities they may gain. To continue the automobile example, if the new-van design team prefers an engine which the corporation's engine division cannot manufacture at an acceptable cost, the designers turn to an outside supplier. If this happens repeatedly, and the internal unit cannot replace the lost business with orders from outsiders, its survival is in doubt. If the central engineering division cannot offer designs for new plants as attractive as those furnished by specialized outside consultancies, it shrinks or is disbanded. The idea of having to compete again and again to create and maintain a fragile version of relations, once taken for granted as constitutive of the work setting itself, is terrifying to managers and blue collar employees alike.

Concerns of economic security aside, moreover, the reconceptualization of productive activity required to move from the old organization to the new is itself daunting. Old-style managers are accustomed to making investment decisions on the assumption that most of the production system is fixed, and therefore that a good investment is one that returns large savings in production costs per dollar invested, assuming market conditions continue as in the past. For these managers, the notion of justifying projects by the cash flow they will likely generate in emergent markets, essentially without regard to the history of the firm's investments in related areas, is all but incomprehensible.<sup>113</sup> For these reasons, the new methods are typically greeted with skepticism and suspicion by those habituated to the routines and security of the hierarchical, integrated corporation, and they are implemented in established firms only under dire competitive threat.

The second limitation concerns the ability of firms using the new disciplines to set and implement large-scale objectives. The issue becomes how to monitor the viability of whole lines of businesses or divisions, to make choices among incompatible, long-term development goals, or to respond to abrupt threats or opportunities facing the corpo-

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113. For current proposals to reform financial reporting on these lines, see American Inst. of Certified Pub. Accountants, AICPA Special Committee on Financial Reporting—User's Needs Subcommittee (visited Jan. 18, 1998) <[http://www.rutgers.edu/Accounting/raw/aicpa/dbase/d\\_index.htm](http://www.rutgers.edu/Accounting/raw/aicpa/dbase/d_index.htm)> (on file with the *Columbia Law Review*).

ration as a whole. As described so far, search routines that detect the limits of habitual responses to design and operational problems are not necessarily well suited to answering these kinds of questions. Put as paradox, the potential limit is this: Only agents monitoring the (new) corporation day-to-day—which is to say participating in its routine project selection and evaluation procedures—could know enough of its highly decentralized operations to correct large errors or grasp transformative opportunities effectively. But just such agents are discredited when the errors come to light; traditional outside owners or stakeholders, whatever bundle of interests they are trying to maximize, simply cannot learn enough fast enough to be useful, as recent economic experience shows. Thus, as contingent corporate monitors, the Japanese main banks are supposed to take control of corporations they finance when sitting managers demonstrate incapacity. But during the current recession, the banks have not demonstrated much capacity to act on such contingencies, despite several decades of experience with the routines of highly decentralized decisionmaking. Firms under the banks' supervision have wasted free cash flow in American style.<sup>114</sup> German banks have had notorious difficulties monitoring firms with which they have had long-term relations as those firms adopt new methods.<sup>115</sup> For its part, the American shareholder system of monitoring has never failed at the supervision of Japanese-style corporations for the simple reason that it has not yet had the chance. Allowing decentralization to proceed produces improved performance insofar as there are gains from decentralization, but such improvement is no guarantee that permissive governance conditions are also suited to early detection of errors in the emergent system. From this perspective, the differences in the limitations between banks, with their view of the corporation as a community, and shareholders, with their vengeful selfishness, are less important than the similarities.

Eventual solutions to the governance problem might extend pragmatist principles to the higher level of monitoring by, for instance, constructing boards of directors or other bodies whose members are at once inside and outside the monitored unit. Venture capitalists with expert knowledge of the industries in which firms they finance operate, invest-

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114. For the authoritative current reference on the Japanese banking system, see generally *The Japanese Main Bank System: Its Relevance for Developing and Transforming Economies* (Masahiko Aoki & Hugh Patrick eds., 1994). On the current difficulties with Japanese bank monitoring, see Jonathan R. Macey & Geoffrey P. Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States*, 48 *Stan. L. Rev.* 73, 81–87 (1995); Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 *Harv. Int'l L.J.* 3, 57 (1996).

115. For a thorough and current review of the literature on the retreat of the German universal (savings and investment) banks from stock ownership and corporate monitoring, see Jolin Griffin, *The Politics of Ownership and the Transformation of Corporate Governance in Germany, 1973–1995*, at 111–27 (1997) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with the *Columbia Law Review*).

ment bankers with knowledge of coinvestment possibilities in related industries, and managers of related divisions of the same or different companies are all examples of such figures. Their position gives them broad and constantly refreshed knowledge of the context within which the firm is operating. This knowledge presumably allows the identification of strategic opportunities or threats, as these emerge in the interplay of internal project selection, continuing benchmarking of performance measures, and external change. Strategy would become a joint result of product design and production.<sup>116</sup> But until such solutions or others are realized, there is an interregnum in the succession of governance institutions: For now, advancing forms of co-ownership or partnership in the day-to-day use of resources coexist uneasily and disruptively with receding forms of exclusive property which, however vulnerable, are invoked whenever the new forms fail. So long as the interregnum lasts, the new economic institutions remain incomplete.

Yet for our purposes these costs and fragilities count as so many signs of the new institutions' vitality. Their rapid diffusion suggests that actors in the most diverse settings are sure enough of the limitations of organizations premised on bounded rationality and mass production to pay the enormous costs of adopting an alternative, and convinced enough of the robustness of a pragmatist alternative to adopt it in part, pending completion of its ultimate architecture. It is rare in history that prudence counsels such recklessness; the current massive and costly rejection of the known in favor of a promising but manifestly imperfect alternative recalls in form, if not yet in historical significance, those great innovations that exemplify and define our deepest ideas of collaboration, as the substitution of leaseholds and other forms of private property for feudal tenure, of representative democracy for monarchy, and of mass production for craft.

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116. In presenting methodologies for linking operating decisions at the level of business units to aggregate measures of business performance (qualified to take account of the complexities noted above), large consulting firms emphasize just this connection between the everyday and the strategic. For instance, in a brochure marketing a complex proprietary performance metric called "total shareholder return," the Boston Consulting Group stresses that "the process of mapping the strategy and resulting value drivers often has as much benefit as the quantitative analyses of alternative actions or strategies. It serves as a catalyst for surfacing opinions or assumptions and provides a forum among the operating management team for gaining consensus on action." Boston Consulting Group, Inc., *Shareholder Value Management: Meeting the Value Challenge* 22 (1995). Indeed, at the limit, "[a] properly designed and implemented value management program . . . creates a common language between line and staff, and between corporate and business units. It provides a clear link between strategy and TSR performance." *Id.* at 24–25. In Germany, the extensive reorganization of, in particular, the machine-tool industry in recent years has led to the emergence of a new corporate form—the management holding—in which a central and legally defining feature of the holding is the responsibility to draw strategic conclusions from the operations of federated companies without assuming directive responsibility for day-to-day decisions. See Griffin, *supra* note 115, at 132–35.

But this similarity aside, the new pragmatist institutions are distinct in blurring the boundaries between public and private organizations which many of the earlier waves of institutional innovation helped establish. We are familiar with the private economy as, ideally, a realm of competing organizations, each under the control of an exclusive owner who decides how to maximize profits given prices for goods and services determined by independent, identically motivated decisions of other owners. In fact, the private sector is often a realm of huge, cooperating organizations under the control of managers responding first and foremost not to markets, but to the enticements and threats of one another, and only distantly responsible to absentee equity owners. The modern ideal of the democratic polity also differs from its practical instantiation. Organizations in the ideal democracy—the state above all—have exclusive jurisdiction in their respective spheres of action. They are controlled by the public, acting through the legislature in response to broad currents of public opinion as clarified in legislative deliberation. In fact, however, there is competition among them because their jurisdictions typically overlap, and they are often controlled by more or less entrenched bureaucratic interests, sometimes colluding, sometimes contending with shifting factions in the legislature or other oversight bodies. Thus, the actual public and private sectors look as much like each other as each resembles its idealization.

Viewed against this backdrop, learning by monitoring transforms economics and politics, assimilating each to the other, in part by introducing to the one a new variant of features normally associated with the ideal of its opposite, in part by restoring to both ideal aspects apparently sacrificed to reality long ago. Thus, we have seen that learning by monitoring “politicizes” the economy by introducing a kind of workplace democracy. Group deliberation in benchmarking, simultaneous engineering, and error detection become central to all decisions, from improvements in manufacturing process to redefinition of the measures and meaning of strategic success. In obliging disputatious yet collaborative evaluation of how diverse potential products will be used in life, of conflicting ways of making them, and of the contrasting measures of corporate and individual performance, learning by monitoring strips from economic decisionmaking the veiling technicity of maximization of profits given prices, and thus distributes authority from the “rulers” to the “people.” At the same time, learning by monitoring also restores an aspect of the familiar economic ideal, “(re)privatizing” the corporation by exposing the internal units of mass-production firms, through benchmarking, to the competition with external or market suppliers from which they have long been sheltered.

Next, we want to show that the pragmatist disciplines produce a correspondingly transformative assimilation and restoration when they are applied to political institutions in the form of democratic experimentalism. They “privatize” political institutions, not by establishing well-



defined owners—for we have just seen that the very idea of exclusive ownership is losing its clear contours even in the private sector<sup>117</sup>—but rather by exposing them to the novel “market” of compelling, competitive benchmarking comparisons with the performance of like entities, and thus allowing for the substitution of superior service providers for inferior ones. They also “(re)politicize” political institutions by introducing a novel form of deliberation based on the diversity of practical activity, not the dispassionate homogeneity of those insulated from everyday experience. This form of deliberation, we will see, neither depends on consensus nor results in uniformity of view. Rather, it produces workable cooperation by continuously exploring different understandings of means and ends among those who use, provide, and are affected by government services. Just as the new pragmatist disciplines are creating novel partnerships in the governance of the economy, so their application to politics may result in new publics and new forms of public control of government institutions.

### III. DEMOCRATIC EXPERIMENTALISM

The intuitive appeal of applying the pragmatist disciplines to democracy derives from these disciplines’ potential to create a form of collective problem solving suited to the local diversity and volatility of problems that confound modern democracies, while maintaining the accountability of public officials and government essential to the very idea of constitutional order. In this and succeeding sections, we substantiate this intuition. We start by showing briefly how learning-by-monitoring solutions are well fitted to the characteristic problems of modern polities as these appear in the travails of post–New Deal institutions. Then, we construct the organizational rudiments of local, or, rather, subnational, pragmatist government, by transposing to the public sphere the institutions of benchmarking, simultaneous engineering, and error detection. These transposed problem-solving institutions, we argue, render public officials in each locale and the service providers they supervise accountable to the citizens, while affording the latter the chance to participate directly in practical deliberations concerning the matters that affect them. These same institutions, moreover, allow local jurisdictions to learn from one another. Arguments in any one jurisdiction, and the performance to which they lead, become considerations in the deliberation of similar ju-

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117. From this vantage point, the standard public choice program of reforming public institutions by subjecting them to literal or figurative private owners with residual control rights correctly identifies a problem of accountability, but incorrectly assumes that accountability can only be established on the model of traditional property rights. See Terry M. Moe, *Politics and the Theory of Organization*, 7 *J.L. Econ. & Org.* 106, 120–26 (1991). Notice that the overly restrictive assumption of this school is the mirror image of Mashaw’s view that public accountability means bureaucracy. See Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 *U. Pitt. L. Rev.* 405, 413 (1996); *infra* text accompanying note 124.

risdictions. To catalogue the novel features of these arrangements, we call the form of democracy thus created *directly deliberative polyarchy*.<sup>118</sup>

A. *Good Government Under Conditions of Volatility and Diversity*

A central lesson of the limitations of New Deal institutions is that effective government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions, where local may mean municipal, county, state, or regional as the problem requires. This adaptability is just what the separate, centralized agencies of the New Deal, and the doctrines authorizing delegation of rulemaking power to them, lacked. The constant effort to adjust programs, regulations, and doctrines to changing circumstances has been the agencies' undoing.<sup>119</sup>

More precisely, and with all the advantages of hindsight, the lesson of New Deal distress is that the success of any one government program or regulation depends not only on its local adjustment, but also on the availability of other, equally well-adjusted services and rules. Successful training for employability, for instance, must be carefully coordinated not only with developments in the local labor market, but also with the provision of day-care and family-support services (themselves a composite that must address problems as diverse as substance abuse, domestic violence, and foster care), as well as various kinds of social insurance that likewise reflect the conditions of local life. By the same token, comprehensive health, occupational, accident, and other forms of social insurance will be affordable in the long run only if accompanied and informed by local services that provide the insured with the information and means necessary to reduce the risks to which they are exposed (e.g., preventive medicine, occupational health and safety measures, and training for employability).

Looked at this way, effective government is first and foremost local government; local government itself is a complex service product composed of discrete programs so mutually dependent that difficulties or successes in one may suggest or require changes in the others, or in the connections among them. From this vantage point, the dilemma of government adaptability is just an instance of the general and apparently intractable design problem of continuous, mutual adjustment of parts and wholes to which simultaneous engineering now provides a solution.

But if local knowledge and simultaneous engineering are indispensable to government under diverse and volatile conditions, there is no reason to assume, and many reasons to doubt, that they are sufficient. Lo-

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118. This term and the ideas associated with it are developed in the eponymous companion piece by Joshua Cohen & Charles Sabel, *Directly Deliberative Polyarchy*, 3 *Eur. L.J.* 313 (1997). For this use of the term polyarchy, see Robert A. Dahl, *Democracy and Its Critics* 221-22 (1989).

119. See, e.g., *infra* Part V.C.1 (discussing the experience of the National Highway Traffic Safety Administration).

cales may be diverse and changing, but they are not unique. To the extent that there are similarities in their current situations or the kinds of changes they face, the efficient search for large improvements to current practice, or for early warning that apparently promising alternatives are in fact dead ends, starts with the experience of units facing analogous problems. Just as discussion of the relation among programs and rules within a single locale reveals strengths and weaknesses concealed when each is considered in isolation, so comparison among individual programs' variant rules and methods of coordinating them allows each jurisdiction to see its viewpoints and its proposals in the light of alternatives articulated by the others. Looked at this way, of course, learning among locales is an instance of the systematic questioning of routines through the circumscribed examination of alternatives now formalized in benchmarking. Beginning with these analogies, we can easily imagine an open, federated structure for local government that could both encourage and respond to the changes—not least in its own routines—prompted by the new pragmatism.

*B. Local Government on Pragmatic Lines: Directly Deliberative Polyarchy*

The basal cell of this structure is a stylized institution, corresponding to the design team, that we will call the *governance council*. Nowhere fully established, this construct nonetheless draws together and connects as a whole crucial features of current, partial innovations in state and local government. Its core members are the public officials charged with specifying and organizing provision of the services required in the jurisdiction, and answerable to the jurisdiction's senior elected executive official; ex officio membership is accorded local officials of administrative agencies or other public entities that make rules or provide services relevant to these core activities.

The council's initial task is to characterize the goals of government in its various departments as informed on the basis of past practice, benchmarking examination of relevant experience elsewhere, and the simultaneous-engineering proposals of council members from complementary service areas. Then, it chooses service providers to achieve those goals within a fixed period, and evaluates their performance and its own initial goals in the light of the experience as captured in the pragmatist disciplines. At the end of the period, if necessary, it redefines its goals and its own organization, suggests changes in rules under which it operates, and selects collaborators for the next round. Just as the design group is free to pick suppliers from outside the firm as well as inside, so, both to experiment at first and solve problems as they are identified, the governance council must be free periodically to choose service providers from among specialist government bureaucracies operating within its own or other jurisdictions, nonprofit corporations, or for-profit firms. For the purpose of solving particular problems it may choose to federate with other jurisdictions like itself or delegate responsibility to more or

less comprehensive units of government. Thus, while the governance council is located in the here and now of a particular place with particular problems, it is not by nature either a geographic or functional unit defined as doing certain tasks fixed in a certain place; rather—like the states whose similar motility we describe in more detail below—it goes where its constituents and their problems take it.

The service providers are the link between the government of officials and the local knowledge of citizens. Like their private-sector homologues, they are responsible for refining and suggesting alternatives to initial design specifications. If necessary, they choose additional suppliers. Alone or with these lower-tier suppliers, they pursue the agreed-upon goals, and propose further refinements and alternatives as operations bring difficulties to light. To do all this effectively, they must combine expertise in their respective areas of specialization—education, transportation, policing, and so on—with the ability to collaborate closely with citizen users in the specification of services and the detection of errors in their provision, as well as with other parties who may suffer damages as a side effect of the service activity. As the consumers of the service, citizen users have unique knowledge of those particulars of their own, local circumstances that must be taken into account if even the most apparently routine and impersonal services are to be of value to them; conversely, those exposed to potential side effects are likely to have the sharpest eye for threats to their well-being. The more directly an effective service must be coproduced by its beneficiaries, and the more complex the service's side effects, the more directly providers must cooperate with citizen users and those with affected interests. Similarly, to generate effective rules, rulemakers must cooperate with those subject to the rules. Consider some schematic examples, beginning with the most routine.

Buses that arrive punctually and frequently at times that are not synchronized with the commuting rhythms of potential riders do not increase the availability of public transportation. Potential riders know more about (changes in) their regular comings and goings than any department of public transportation or private bus operating service. Similarly, current riders are more likely to notice sooner than any fleet operator which bus stops could be relocated to reduce the risk of crime, which routes must be redrawn to permit access to new job opportunities, and which buses are not properly cleaned. Meanwhile, (sedentary) residents whose property abuts a proposed bus stop will be the first to insist on precautions to prevent the new waiting area from becoming a magnet for crime. Periodic community surveys and meetings, together with telephone hot lines and other customer-service devices, are likely to provide the kind of participation necessary in such circumstances.

The police and public housing form an intermediate category. Here the quality of service provided depends so directly on the contribution of the beneficiaries that their active participation manifestly makes them coproviders. Police on the beat can only identify and avert the situations

that lead to disorder and crime—e.g., rival gangs crossing paths on the way to different schools, landlords who tolerate drug dealing, and racist officers—with the help of knowledgeable residents, and those residents can only address these problems of public order with the help of the police and other municipal authorities. Similarly, the way the occupants of public housing use their homes shapes the maintenance, public security, and other services they need from the housing authority, and the services provided by the housing authority plainly shape the conditions of occupancy.<sup>120</sup> In these situations, effective participation is likely to be tiered: Beat meetings and project councils provide fora for solving chains of particular problems, while police/civilian review boards, housing authority advisory councils, and ad hoc municipal task forces involving these and other agencies provide the opportunity to address larger questions of institutional architecture.

Perhaps closer and more nearly continuous collaboration between service providers and citizen users will occur in those frequent instances where the very aim of the service is to increase the citizens' ability to furnish it for themselves, and, as a step towards this, to learn to monitor the provider's capacities. This condition generally holds when the purpose of the service is to further learning, and most directly the case when learning is associated with mastery of the new disciplines. Thus, to take only one of many possible examples from current developments in schooling, an increasingly influential school of American pedagogy argues that high school and vocational students learn most when they learn to identify their difficulties in learning. They do so by beginning with questions that arise in familiar environments and uncovering the ways their habitual methods of problem solving obstruct a solution.<sup>121</sup> Such methods turn the traditional student-teacher relation into an ongoing, consultative exchange between more nearly equal partners in the choice and execution of pedagogic projects.<sup>122</sup>

A similar redefinition of the learning process occurs when small and medium-sized firms seek technical services from specialized consultants skilled in the new disciplines.<sup>123</sup> The most effective services help firms to

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120. For discussion of the similarities of the two settings, see Mark H. Moore, *Creating Public Value: Strategic Management in Government* 193–200, 240–55 (1995) (discussing the problems and successful efforts to rehabilitate public housing in Boston).

121. See John T. Bruer, *Schools for Thought: A Science of Learning in the Classroom* 31–50 (1993). The affinities with Dewey's views on education are striking; see generally John Dewey, *The School and Society* (1900) and *The Child and the Curriculum* (1902) (Univ. of Chicago Press 1990).

122. See Adria Steinberg & Larry Rosenstock, *Cityworks: Redefining Vocational Education*, in *Creating New Educational Communities: Ninety-fourth Yearbook of the National Society for the Study of Education, Part I*, at 147, 147–164 (Jeannie Oakes & Karen Hunter Quartz eds., 1995).

123. See generally Special Issue, *Evaluation of Industrial Modernization*, 25 *Res. Pol'y* 181 (1996) (collection of articles using different methodologies to evaluate industrial Modernization—the process of “mutual learning, cumulation, adaptation as programs in one location become aware of and try to improve upon what is being done elsewhere”);

benchmark themselves as a means of identifying crucial problems (for instance, whether their difficulties stem from outdated technology or poor organization), and to use error detection methods to attack them. The more knowledgeable firms become, the more outdated they find the initial presentations of the consulting service, and the more they insist on refreshment. Learning becomes an exercise in error detection, and the firm's ability to find and eliminate faults in itself is a measure of the service provider's own utility. In the public sector, this form of learning entails continuous collaboration between service providers and citizen users—through, for instance, industry or sector-specific advisory councils composed of representatives of former or current clients, and companies and other public-sector institutions that work with them. Collaboration becomes a precondition for the service provider's ability to monitor itself, and the ability to organize such collaboration (again taking account of other affected interests and the relevant public bodies) becomes correspondingly more important as a criterion for selection as a service provider.

Hence, the service providers and their subcontractors are accountable, on the one side, to the citizen users, and, on the other, to appointed and elected political officials, who are themselves accountable to the citizenry. Citizens whose interests are likely to be affected for better or for worse by the provision of various services participate in the formulation of the strategy for service providers and help determine why services break down or fall short; they also take part periodically in benchmarking reviews of the providers' performance. These reviews can begin with comparisons of results obtained by various units of all like providers in the local jurisdiction, and extend (with the administrative assistance discussed below) to comparison of results obtained by providers in similar jurisdictions pursuing comparable ends by various means. These same reviews allow the responsible officials on the governance council to determine whether the providers have met the officials' (and the citizen users') expectations and whether, in any case, the providers demonstrate sufficient capacity to learn from their mistakes to improve. Benchmarking of the governance councils' decisionmaking routines—the procedures for selecting service providers, monitoring their performance, and correcting by simultaneous engineering the problems arising from mis-specification of the division of labor among them—combined with the service-specific reviews, allows the elected official to assess the council as a whole.

The citizens then evaluate the official(s) in elections, using the accumulated benchmarking information to compare the strategic choices and operating results of their governance council with those in similar locales

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Charles F. Sabel, *A Measure of Federalism: Assessing Manufacturing Technology Centers*, 25 Res. Pol'y 281, 281–307 (1996) (assessing collaboration among manufacturers to reach quality standards and the effectiveness of learning through decentralized localized autonomy).

elsewhere. Electoral campaigns publicize the comparisons, underscoring the missed opportunities revealed in better outcomes, criticizing mismanagement at home by the measure of others' accomplishments, or simply provoking discussion of novel possibilities or reconsideration of discarded alternatives by recognizing promising developments in other jurisdictions. Inevitably, elections raise questions about the reorganization of public administration: If some public service providers compare poorly to others, or to private ones, the relevant electorate will want to know what conclusions to draw. By thus situating problems of local government in a broader context, democratic experimentalism suggests an alternative to the familiar idea of politics as concerned ultimately with the public posing of fateful choices based on conflicting ideologies.

Awkwardly balancing the needs of precision and the needs of euphony, we will use the term *directly deliberative polyarchy* to describe the form of democracy that results when a polity makes public choices by means of tiered governance councils—councils that organize service provision with the collaboration of local citizens, and pool their experience to inform their separate decisions. It is direct because citizens act for themselves in elaborating solutions to problems that affect them, rather than delegating responsibility to representatives. It is deliberative because decisions regarding the provision of services are normally made by means of reason giving through discussion, not (except in cases of deadlock) the counting of votes. It is a polyarchy because the deliberations and performance of each jurisdiction count as considerations in deliberations of those like it. Polyarchy is a general name for a polity in which citizens, grouped in plural jurisdictions, can hold the officials of their jurisdiction sufficiently to account by democratic means to replace them when they perform badly. Jurisdictions in this general view are as free to ignore one another as they are to compete or cooperate. In directly deliberative polyarchy, the underlying pragmatic motives for local deliberation are the same as for pooling information among locales. In this sense, relations among jurisdictions are like relations within jurisdictions: An unanticipated alternative commands as much attention when chanced upon in response to local error as when remarked in distant innovation. Just as benchmarking others' experience illuminates and informs the diversity of disciplinary interests brought to bear in simultaneous engineering—and vice versa—so too deliberative polyarchy complements local problem solving as a means of loosening the hold of routine on public action.

This ability to evaluate routine gives directly deliberative polyarchy efficiency advantages and governance properties that appear as counterintuitive from the point of view of traditional public administration as do the corresponding features of pragmatist firms in comparison to mass producers. Thus, it counted as a truism in public administration that an increase in quality, taken as an effective adjustment to local circumstance, came at the price of a decrease in overall efficiency and, beyond that,

public accountability.<sup>124</sup> So long as rules are made centrally and are only legitimate when so made, this was almost a bookkeeping proposition. Seen from higher up, the exercise of local discretion required to make adjustment effective in particular cases would render the actual operation of administration opaque, inaccessible to coordinated improvement, and perhaps unlawful as well. Police on the beat were the canonical example of "street level bureaucrats," doing justice by (nearly) breaking the law and operating in a cloudy zone of informality equally inaccessible to organizational reform, judicial oversight, and public scrutiny.<sup>125</sup>

But an experimentalist local government that looks to local adjustment for direction in higher level reform makes virtues of these vices. Motivated through open discussion of its purposes and measured with respect to its effects, local experimentalism sufficiently formalizes the informal to give it the character of deliberate and innovative accommodation, rather than furtive caprice. Because its purpose and performance are public, successful local adjustments can lead to broad institutional changes. The same kinds of information that allow scrutiny of motives and outcomes, we will see repeatedly, permit judgments of lawfulness. Thus, in directly deliberative polyarchy, local initiative increases the quality of services while bettering the conditions for their efficient organization and, in any case, augmenting the public accountability of the providers.

Decisions in directly deliberative polyarchy no more rest on deep prior consensus than does collaboration among pragmatist firms. Nor do they depend on the log-rolling compromises of aggregative democracy, or on the abstraction from the particular interests through which the deliberations of Rousseau and Madison arrive at rules fair to each by regulating only what is common to all.<sup>126</sup> Rather, in the pragmatist polity,

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124. For a recent statement, see, e.g., Mashaw, *supra* note 117, at 413 (contending that few government programs could be restructured to pursue objectively determinable goals and reduce congressional micromanagement without loss of political accountability).

125. See Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* 3 (1980); see also Aaron V. Cicourel, *The Social Organization of Juvenile Justice* 87, 188 (1968). For a recent treatment of the resulting dilemmas for criminal law, see generally Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *Colum. L. Rev.* 551 (1997) (explaining why traditional means of controlling police discretion were either ineffective or excessive). The gap between rules and reality has long been a central theme of the sociology of organizations, and of firms and work in particular. In the sociological account, informal groups exercise the discretion needed to adapt routines to cases, and the art of managerial leadership is to motivate such groups to use their interpretive autonomy for the purpose of the enterprise. See Chester I. Barnard, *The Functions of the Executive* 170-71 (30th anniversary ed. 1968). For the shop-floor or street-level perspective, see generally Melville Dalton, *The Industrial "Rate-Buster": A Characterization*, *Applied Anthropology*, Winter 1948, at 5, 13.

126. Here we follow Banning in sharply distinguishing Madison's conception of public deliberation from the interest-group bargaining interpretation of *The Federalist No. 10*. See Banning, *supra* note 24, at 205-12 (making what should be the obvious point that



workable, long-term collaboration can issue from, and aid the construction of, the institution of problem-solving deliberation itself. Facing urgent problems that none can solve alone and seeking methods of establishing joint accountability, parties will often prefer to explore a potential solution, even if they are unsure of its outcome, than to do nothing. This collaboration arising from urgency is why direct deliberation, as our examples will show, in fact emerges first where the breakdown of traditional institutions is most conspicuous and its consequences most menacing: family-support services, policing, and military contracting. Once begun, pragmatic problem solving loosens the hold of interest by fitfully darting, as it were, beyond its reach, thereby discovering solutions bit by bit in the unfamiliar territory beyond the reach of bounded rationality and habitual calculations of advantage.<sup>127</sup> Such discoveries beget others: The value to all of the current, partial innovation (measured as improvements in the performance of current problem-solving institutions) will likely be increased substantially by the next innovation, and (as in the case of learning by monitoring in firms) the continuous exchange of operating information among the collaborators will reduce the risk that any party can use the novel arrangements for self-dealing. In time, therefore, emerging solutions change what the actors do and how they rely on one another. Their very ideas of what is possible come to reflect these entanglements; "self"-interest assumes as the starting point for subsequent calculations the surprises of practical deliberation that formerly confounded it. Thus, it is the very practical particularity of this deliberation—above all the novelty that results when diverse standpoints are brought to bear on unfamiliar alternatives—that advances the good of all participants.

The freedom of maneuver accorded local jurisdictions in directly deliberative polyarchy and the obligations of mutual regard that are its precondition both favor exploratory problem solving and become the more effective for it. Above all, an experimentalist regime gives locales substantial latitude in defining problems for themselves. The goals and methods of trash removal might appear to be relatively uncontroversial.<sup>128</sup> Not so with schooling: Whether, for example, academic excellence is best realized, or certain values best inculcated, in single-sex rather than coeducational schools is a matter of dispute.<sup>129</sup> Instead of arguing the relevant matters of principle at long range through the institutions of representative democracy, local jurisdictions in directly deliberative polyarchy can in

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Madison defended an extended *federal* republic in which faction would be controlled, not celebrated).

127. For the distinction between bargaining as the compromise of antagonistic interests and deliberative decisionmaking as the discovery of new possibilities through consideration of diverse viewpoints, see M. P. Follett, *Creative Experience* 156-78 (1930).

128. Of course, no problem is forever immune to controversy; whether, what, and how much to recycle as opposed to dump are questions that increasingly occupy state and local governments.

129. See Jacques Steinberg, *Crew Says No to Compromise On All-Girls Middle School*, *N.Y. Times*, Sept. 25, 1997, at B3.

such cases initially act on their own best understanding of ends and means. The possibilities for diversity inherent in this freedom pose problems, of course, for the maintenance of the uniformity of performance measures needed for benchmarking and other comparisons, as well as for the fundamental integrity of constitutional values; we take these up in the discussion of experimentalist administration and courts, respectively. But, problems aside, experimentalist decisionmaking is largely self-starting precisely because it invites the actors to begin with what, on reflection, they take for granted: who they are and what they want.

Alternatively, when such autonomy does not prompt experimentalist exploration, local jurisdictions, or parties within them, have recourse to the apparatus of deliberative polyarchy. Thus, one of the tasks of the agencies responsible for benchmarking is to help the parties advance past blockages in local decisionmaking. They do so, for example, by suggesting how features of apparently irreconcilable alternatives have been combined into new hybrids elsewhere, or by proposing that clashing strategies be investigated separately as independent, concurrent pilot projects, or, more simply still, by chairing meetings by rules that all recognize as fair. Nor must this framework for generalizing results be fully established to be effective. As with workable collaboration, the institutional ligatures of participation can be an outcome of, not a requirement for, initiating change. Although benchmarking is formalized in a fully fledged system of democratic experimentalism, it can begin informally as a rough comparison of competing models and alternative performance measures. So long as the comparisons meet the pragmatist criterion of casting doubt on the assumption that current arrangements cannot be improved and suggest directions for improvement (including refinement of the comparisons), they count as polyarchic benchmarking, and encourage the generalization of forms of deliberation on which their own improvement depends, whether institutionalized or not.

Thus, we do not claim that practical deliberation can never be paralyzed by the clash of interests. It often will be. The argument, rather, is that sometimes it will not. If even one part of a system of democratic experimentalism succeeds in avoiding such blockage, the institutions that frame the regime as a whole can use that success both to help unblock the others and to increase their own ability to do so.

#### IV. PIECES OF THE NEW POLYARCHY: EXAMPLES OF BOOTSTRAPPING REFORM

If directly deliberative polyarchy as a whole is still unrealized, partial variants of it—with features that appear disruptively novel from the vantage point of current experience—are already widely practiced and spreading rapidly in the United States and other countries. In some of these, the emphasis is on benchmarking and close collaboration between citizen users and service providers; in others, the accent is on simultane-

ous engineering. All depart fundamentally from the New Deal model of provision of public services by hierarchically organized government bureaucracies with exclusive jurisdiction in their respective activities. These departures from the old model are not, of course, a demonstration of the viability or inevitability of a new one. But they are evidence of the possibility of change in the direction we prospect, and there is no reason to assume that it will be harder to connect these partial innovations into a new order than to have created them amidst the recalcitrance of the old. As coarse-grained indications of current possibilities for reform, we present highly compressed case studies of pragmatist service provision: the reform of state family-support services, community policing, and the design of a submarine-launched missile system.

The examples are chosen both for the clarity with which they reveal the connection between the details of institutional design and general operating principles and for the way they illuminate the construction of new institutions from the materials provided by the old. The reform of one institution both leads to and depends upon the reform of the institutions with which it collaborates. In this sense, the examples illustrate the *bootstrapping* nature of reform.<sup>130</sup> The examples are, in addition, suggestive because of the sheer improbability of the hostile settings in which they arise. No one was likely to look for the rudiments of new forms of participatory service provision in scandal-ridden social-service bureaucracies, crime-ridden neighborhoods, or military-industrial complexes. So their existence under inhospitable circumstances may be a harbinger of diffusion in more congenial contexts.

#### A. *Family Support Services*<sup>131</sup>

The failures of child- and family-protective services, ranging from child welfare and mental health, to school-based counseling, to juvenile justice and foster care, have become a leading symbol of the failures of government as a service provider and, beyond that, of the limits of public action in the face of urgent social distress. Too often families that might

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130. See *supra* text accompanying note 112.

131. The best published account of family support services is Jane Waldfogel, *The New Wave of Service Integration*, 71 *Soc. Serv. Rev.* 463 (1997), which focuses on Maryland. Additionally, case studies conducted at the Kennedy School of Government trace developments in Colorado and Arkansas. See Kristen Lundberg, *Integrating Child and Family Services: Colorado* (unpublished case study no. C16-91-1082.0, John F. Kennedy School of Government, 1991) (on file with the *Columbia Law Review*); Kristen Lundberg, *Integrating Child and Family Services: Colorado, Sequel—1994* (unpublished case study no. C16-94-1082.1, John F. Kennedy School of Government, 1994) (on file with the *Columbia Law Review*); Kristen Lundberg, *Integrating Child and Family Services: Arkansas* (unpublished case study no. C16-91-1083.0, John F. Kennedy School of Government, 1991) (on file with the *Columbia Law Review*); Kristen Lundberg, *Integrating Child and Family Services: Arkansas, Sequel—1994* (unpublished case study no. C16-94-1083.1, John F. Kennedy School of Government 1994) (on file with the *Columbia Law Review*).

have remained intact with timely help dissolve because agencies that focused on narrowly defined problems could not coordinate an effective, comprehensive response. Too often the dissolution results in the horrifying physical abuse of partners and children, and the foster-care and other institutions intended to protect the victims inflict new wounds instead. In states as different as Georgia, Idaho, Iowa, Maryland, Missouri, and others besides, the reaction to this has been to attempt a wide-ranging reform that gives citizen users and local communities a greater say in determining the services they need and how they shall be provided, and to use their decisions in turn to restructure the relevant parts of public administration.<sup>132</sup>

The common and defining features of this reform are concurrent and mutually dependent reorganizations of the central (state) and local (county and sometimes neighborhood) levels of service provision. Thus, at the state level, a "governance collaborative" (such is its generic name), consisting at a minimum of representatives of the key child and family services agencies, develops the general outlines of systemic reform and the principles and standards for establishing local collaboratives in consultation with local groups. This state governance collaborative also defines the core results to be achieved as well as measures of progress. Local collaboratives then form under these guidelines. These collaboratives convoke providers and citizen users, and present the state with plans for service delivery in their jurisdictions. As the process continues, the choices and experiences of each level influence the decisions of the others and the overall result is what we are calling the bootstrapping reform of both.

In practice, reflecting the confusion and uncertainty from which the reforms emerge, the composition and distribution of responsibility between state and local governance collaboratives, and the budgetary ties between them, vary sharply from state to state; these can change significantly within any one state in a short time. In Oregon, for example, the governor appoints a Commission on Children and Families of about fifteen members, including representatives of business and civic groups, social services, county commissions, and agencies. The heads of the concerned state departments serve *ex officio*. Membership on the corresponding county commissions is open, but must include a majority of lay citizens, among whom may be, again, business and civic leaders, or representatives of nonprofit service providers. In addition to administering the delivery of specific programs (Healthy Start, FRCs, Great Start), the county commission may plan the general reorganization of local ser-

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132. See Stephen Page, *The Emergence of Disciplined Collaboration for Human Services: Iteration and Participation in the Policy Innovation Process 29-32* (May 1997) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with the *Columbia Law Review*). Further, we draw heavily on Page's research for the institutional detail presented in this section and for the analysis of the political efficacy of discursive problem-solving strategies.

vices for children and families, and draw upon the combined expertise of their own staffs and those of the state commission to pursue their plans.

In Georgia, the governor, lieutenant governor, and speaker of the state house together appoint about twelve members to a Family Policy Council that groups together business and religious leaders as well as state legislators. Here, too, state service department heads are members *ex officio*. The county counterparts include local elected officials, representatives of business, public agencies, and community and civic groups. The mandate of these entities is extremely broad: to achieve results with the Policy Council through comprehensive service plans financed by funds created by pooling the allocations of separate state agencies normally available to each area.

Maryland, to take a final variant, has created a sub-Cabinet for Children, Youth, and Families, to which the governor appoints about nine members, including the secretaries of the pertinent state departments. This sub-Cabinet collaborates with county-level Local Management Boards (LMBs), including the county commissioner or manager and local representatives of providers of education, social, juvenile, health, and mental health services. The emphasis is on the reduction of out-of-home or foster placements, with LMBs allowed, in effect, to reinvest savings achieved in this area as they see fit.<sup>133</sup>

These reforms are still too new to permit any overall assessment of their effectiveness, or even to say which methods of composition and collaboration encourage effective monitoring and dissemination of best practices. Nonetheless, observers note two features of the reform that suggest that it is politically viable enough to survive to be judged on its substantive successes and failures. We call attention to them to suggest the kinds of mechanisms that may contribute to the bootstrapping diffusion of experimentalist methods more generally.

The first is that the very process of reciprocating consultation between central and local levels, and horizontally within each, necessary to formulate and adjust reform plans, is frequently judged by proponents of and participants in reform to be politically expedient as well. Interests that may oppose change find it hard to pursue a strategy of pure obstructionism in settings where many others are attempting sincerely to collaborate; once the potential obstructionists do begin to participate, they typically must counter proposals with other proposals, not vetoes. In this way, they become accomplices to the outcome, and subsequent criticism, if any, is blunted by this complicity. We take this finding as a fragmentary and preliminary indication of the disruptive effects of deliberative problem solving on settled interests. At the very least, it demonstrates in a context directly connected to the larger frame of reform under discus-

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133. See Stephen Page, *State and Local Governance Structures for Comprehensive, Integrated Services: Options and Strategic Rationales* 13 (July 1996) (unpublished manuscript, on file with the *Columbia Law Review*).

sion that bootstrapping incrementalism can be self-reinforcing rather than self-blocking.

The second politically relevant feature of the reform movement in social services concerns the diffusion of information. Although neither systems of evaluation nor performance measures have yet been consolidated, it appears that the reforms reduce the possibilities for information hoarding—and particularly the hoarding of unfavorable results. Performance failures, accounting anomalies, or abusive exercises of discretion are very likely to come to light because the constant consultation inherent in the articulation and redefinition of standards places many persons with expert knowledge in the know about current projects. The same forms of publicity that make it unlikely that the reforms will become hostage to particular interests make it similarly unlikely that they will become hostage to scandals and the manipulations that go with them.

Whether jurisdictions that wish to learn about one another's successes and failures will be able to find each other and usefully pool their results remains to be seen; thus far, innovators and bureaucrats coexist in a complicated patchwork. Nonetheless, inconclusive as it is, the record of the reforms suggests that they will not fail for a utopian disregard for the political conditions required to test them.<sup>134</sup>

#### B. *Community Policing in Chicago*<sup>135</sup>

The movement for community or problem-oriented policing in large American cities such as Chicago, Houston, and New York closely resembles reform of child-protective services. As in the latter, formal change begins with the creation by central (here municipal) authorities of local (neighborhood) service-provision units whose substantial autonomy is to be exercised in collaboration with citizen users. And also as with child- and family-protective services, the central policing authorities find it easier to catalyze decentralization than to pool usefully the resulting local experience.

The differences concern the sheer difficulties of the task. However difficult reform of child-protective services proves to be, reform of big-city police departments appears in prospect harder still. First, there is the extraordinary centralization of police organizations. Large police departments were professionalized first on the military model during a wave of Progressive reform in the first half of the century, then professionalized again in the image of the mass-production corporation during a second reform wave in the 1960s.<sup>136</sup> With their use of rank nomenclature, barracks, military-style roll calls at the start of each watch, minute direction

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134. See Page, *supra* note 132, at 29–32.

135. The account presented here draws heavily on the current research of Archon Fung. See Archon Fung, *Street Level Democracy: Social Experimentation in Theory and Urban Practice* (forthcoming 1998) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (draft on file with the *Columbia Law Review*).

136. See Livingston, *supra* note 125, at 565–68.

of the rank and file by voluminous written orders and direct daily commands, and designation of outsiders—citizens and employees of other public agencies alike—as “civilians,” police departments seem a pastiche of the most centralized and hierarchical features of military and mass-production corporate organizations.

Then there are the apparent incapacities of the citizen users most in need of better police services. Crime concentrates in distressed neighborhoods whose residents, impoverished and without much formal education or skill, would seem unqualified for, as well as disinclined to take part in, voting and the other routine forms of participation in representative democracy.<sup>137</sup> How are these residents to meet the manifestly greater demands of directly deliberative problem solving under favorable conditions, let alone in collaboration with organizations as rigid, hierarchical, and separated from the broader public by rifts in understanding and culture as the police? That there is demonstrably effective citizen participation in community policing in cities such as Chicago suggests that experimentalist institutions can serve two complementary functions. On the one hand, they act as organizational emollients, making hierarchies more fluid internally and more open to the outside. On the other, they validate local knowledge as a form of expertise by demonstrating its utility, thus fostering participation (and the learning it occasions) by those usually held incapable of it.

The backdrop to the current reforms was the extended attempt in the 1970s and 1980s to make the best of police isolation from local communities and the growing realization in the last decade of the profound limits of that accommodation.<sup>138</sup> At the most abstract level, the responsibility of the police is to ensure the greatest possible social order with full respect for the rights of citizens. Yet, in isolation from the communities in which they operate, the police have no information with which to render that responsibility more precise. For want of an alternative, they typically came to define their task as responding as effectively as possible to indisputable signs of disorder, such as 911 calls. But, naked deterrence aside, rushing to scenes of disorder cannot make local society more orderly. Thus, even as response times were reduced<sup>139</sup> and the prison pop-

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137. See Arend Lijphart, *Compulsory Voting is the Best Way to Keep Democracy Strong*, *Chron. of Higher Educ.*, Oct. 18, 1996, at B3 (observing link between low voter turnout of the poor and uneducated on the one hand, and regressive social policy on the other); see generally Steven J. Rosenstone, *Economic Adversity and Voter Turnout*, 26 *Am. J. Pol. Sci.* 25 (1982) (noting correlation of voter turnout with wealth and employment).

138. For the background and emergence of community policing in the sense under discussion here, see generally Herman Goldstein, *Problem-Oriented Policing* (1990). For the view of crime as the self-reinforcing breakdown of moral discipline, and of community policing as the strategy of restoring order at the first sign of potential disruption, see James Q. Wilson, *Thinking About Crime* 203–07 (1975).

139. Emergency dispatch systems typically deliver patrol cars to crime scenes within 15 minutes of a serious call in most cities. See, e.g., Nicole Cox, *911 Response Took Longer*, *Report Finds*, *Newsday* (New York City ed.), Apr. 1, 1996, at A25 (reporting an eight-

ulation swelled enormously,<sup>140</sup> police officials and academic observers increasingly came to realize that more effective policing required anticipating and interrupting the causes of disorder—not just reacting decisively to it.<sup>141</sup> But for such anticipatory intervention the police would need to determine what to count as disorder, what the sources of disorder might be, how to address them, and how to determine the effectiveness of the resulting measures. Learning all this would require, in turn, the organization of discussion between police and citizens, as experts in the life of their communities and as direct users of police services, and perhaps even criminals, as particularly knowledgeable “users” of the criminal justice system, and then further discussion of what to do next and what to do better given the outcome. From these considerations has emerged the broad movement for community policing. Within that movement, certain wide-ranging institutional reforms, such as the Chicago Alternative Policing Strategy (CAPS), unmistakably exhibit the features of democratic experimentalism.<sup>142</sup>

The Chicago Police Department (CPD) introduced pilot versions of CAPS into five of the city’s twenty-five districts in 1993 and expanded the program to the entire department in 1994.<sup>143</sup> The reform has been guided by three principles from the beginning. First, the business of rank-and-file policing is defined as the identification and resolution of particular, persistent problems of crime and disorder at the street or community level, rather than the execution of tasks defined by higher orders of command. Second, for purposes of this problem solving, “beat teams” are formed of seven or eight line officers, jointly responsible for a specific neighborhood (Chicago is divided into 279 beats) and assigned there for substantial periods.<sup>144</sup> The closer and more durable relation between the officers in the team and the neighborhood that is meant to result is called “beat integrity.” Finally, in a sharp reversal of the historical effort to insu-

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minute response time for 1995 in New York City); Eunice Moscoso, *As City Elections Near, Austinites are on Alert for Crime Solutions*, *Austin Am. Statesman*, Mar. 30, 1997, at A1 (reporting response times of 7.5, 7.4, and 4.1 minutes for the Texas cities of Austin, Dallas, and Houston, respectively for 1996); Peyton Whitely, *Two Rape Victims Win \$300,000 from City*, *Seattle Times*, Apr. 10, 1996, at B1 (reporting response time of 9.2 minutes in Seattle for 1996).

140. For example, between 1970 and 1997, the federal prison population grew from under 22,000 to over 100,000. See Federal Bureau of Prisons, *Quick Facts* (last modified Dec. 27, 1997) <<http://www.bop.gov/fact1297.html>> (on file with the *Columbia Law Review*).

141. See Livingston, *supra* note 125, at 575–77.

142. See Jim Sulski, *Officer, New Beat System A Good Fit*, *Chi. Trib.*, Nov. 10, 1993, § 8, at 33 (describing the then-new program).

143. See Chicago Community Policing Evaluation Consortium, *Community Policing in Chicago, Year Three* (Ill. Criminal Justice Info. Auth. 1996). The detail in this section regarding community policing in Chicago is drawn from this source.

144. Reformers thought quite reasonably that officers would require persistent assignments in order first to know the problems on their watches and then to have time to implement solutions.



late the force from the surrounding community, beat teams cooperate extensively with local residents, primarily in monthly community problem-solving sessions called "beat meetings," at which priorities are assigned to crime problems and strategies are developed to address the most pressing ones.

The beat meetings at the heart of the reform are typically attended by five or six patrol officers, of whom one may be a sergeant or other supervisor, and by anywhere from five to thirty beat residents, some representing community groups and others simply citizens concerned by crime in their neighborhood. As beat meetings have grown into primary centers of community and neighborhood problem solving, officials from aldermanic offices, city service departments, and the Mayor's office have begun to appear with increasing regularity. The usual practice is for the participants to locate a pressing problem—such as an apartment building being used as a center for selling and using crack cocaine—to specify a linked series of measures in response, and to assign responsibility for accomplishing them. Thus, in the case of a crack house, one subgroup might determine whether the landlord is especially permissive with drug dealers or neglectful of the property and, if so, begin informal negotiations with the landlord or consider countermeasures to be pursued in housing court. A second might contact tenants or neighbors to enlist their aid in gathering evidence against the dealers or landlord. Yet a third might consult with specialized drug-detail units within the police force about the possibilities of increased enforcement or with municipal maintenance services about the possibilities for repairing street lights and other public amenities. A map of the beat, annotated to reflect pooled knowledge of the problem, and a list of pending tasks frequently records the results. Thus, the first phase of CAPS created a novel administrative unit—beat teams and resident-participants convoked in beat meetings—capable, within broad limits, of setting its own goals and choosing the means for reaching them, even when these strategic choices breached formal barriers within the police department and between it and other city agencies. By inviting direct resident participation in the identification of problems, formulation of strategies, and evaluation of results, the plain intent of the reform was to ensure that the choice of experimental projects and their evaluation would immediately reflect the judgment and preferences of those who, as the primary consumers of police services, must bear the brunt of police failure.

A recent study of CAPS indicates the breadth of participation and the counterintuitive make-up of the participants. In 1995, some 5000 residents were attending community police meetings in their neighborhoods each month. The counterintuitive finding is that beat-meeting turnout was greatest in those neighborhoods where crime levels were highest. This might seem a straightforward expression of need, but for the association between crime and poverty and the inverse association between poverty and political participation, noted above. Thus, in fla-

grant exception to the de facto exclusion of the poor and the uneducated from the politics of mass democracies, the high-crime Chicago neighborhoods with lower aggregate levels of education and wealth had higher participation rates than those that are better off.<sup>145</sup> Whatever the precise explanation for this outcome, moreover, the realization by beat-meeting participants that their own participation mattered surely played a central part. A survey found that some sixty-four percent of problems brought up at these meetings were being addressed and that full or partial solutions had been implemented in some sixty percent of the cases.<sup>146</sup>

The initial CAPS emphasis on beat integrity and the reform associated with it went hand in hand, however, with inattention to the problems of corresponding reforms at the center of the CPD to coordinate to best advantage the results of the local learning. Indeed, as first implemented, CAPS reforms seemed to presume that decentralized and informal problem solving would proceed with virtually no support from the center at all, let alone coordinating direction. Only when many beats floundered in their problem-solving endeavors and others began to demand help from the CPD in implementing solutions, did managers at central headquarters respond by formalizing the core of the new procedures in a set of General Orders. These require documentation of problem-solving efforts, evaluations, and justifications of priorities and strategies.<sup>147</sup> These reporting requirements not only assure line-level accountability to management, but provide data that can be used to benchmark problem-solving teams and efforts against one another. The Research and Development group at CPD is investigating implementation of electronic collection and distribution of this information.

All these efforts have been complemented, meanwhile, by attempts to benchmark and pool information initiated from below. In the course of the new problem solving, patrol officers and community activists have realized that decentralization can bring a kind of isolation: Though they may face similar problems with open-air drug markets, abandoned buildings, problem parks, poor city services, or low beat-meeting participation levels, neighborhood residents proceed separately, and therefore without benefit of the experiences of others. As a result, emergent leaders in community policing in some areas—sometimes police officers and sometimes residents—dispatch successful problem solvers in one beat to assist less successful counterparts nearby by making available their expertise and, less often, additional resources.

Viewed through the lens of democratic experimentalism, the very recent project of Chicago community policing reforms is therefore prom-

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145. See Chicago Community Policing Evaluation Consortium, *supra* note 143, at 20–23.

146. See *id.* at 30–31.

147. See Wesley G. Skogan & Susan M. Hartnett, *Community Policing, Chicago Style* 161–93 (1997); see also Archon Fung, *Residents Can Use Police General Order to Solve Specific Neighborhood Problems*, *Neighborhoods*, Spring 1997, at 1, 5, 9–10.

ising but incomplete. Though the fundamental elements of experimentalism are in place, the essential institutional machinery of benchmarking discipline has yet to be installed. Whether the reform will proceed along this path is an open question whose answer will in large measure depend upon whether reformers inside and outside the CPD at the center can join forces with those active in the beats to solve the difficult organizational problem of capturing, pooling, making sense of, and then diffusing the vast range of experience that these problem-solving efforts instigate and reveal.

### C. *Simultaneous Design: Military Procurement*

The disciplined decentralizations of the kind associated here with Japanese-inspired production methods have been discovered and rediscovered independently many times in this century by various armed services and their civilian suppliers. Typically this occurs when complex projects involving the integration of discrete, highly sophisticated subsystems must be developed and produced quickly, and yet—given the menace of catastrophic failure—with extraordinary reliability.<sup>148</sup> In the context of sophisticated and demanding military procurement, secrecy attends matters of national security, tradition favors hierarchy, complex technical debates appear opaque, and vast profits are to be made. All of these factors would seem to favor management by closed, even conspiratorial oligarchy. That decentralized methods have been widely used in this setting suggests as strongly as in the case of community policing both the power of such methods and their amenability to adoption across a wide range of government institutions.

The history of the design by the Special Projects Office of the United States Navy of the Polaris submarine-launched missile system—the largest and most successful naval project of the early Cold War—illustrates one of the many paths to the new class of institutions.<sup>149</sup> Until 1955, when the project began, naval procurements were managed by collaboration between the Chief of Naval Operations—who, as commander of the fleets, determined weapons requirements—and a group of technical departments—specializing in areas such as aeronautics, ordnance, or ships—which selected a prime or general contractor to produce the material demanded in their respective jurisdictions. The prime contractor, in turn, parceled out specialized tasks to subcontractors and assumed responsibility for integrating the weapons system itself. But missile development—and particularly the development of missiles requiring complex shipboard fire-control mechanisms—straddled the boundaries between

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148. See Jonathan Zeitlin, *Flexibility and Mass Production at War: Aircraft Manufacture in Britain, the United States, and Germany, 1939–1945*, *Tech. & Culture*, Jan. 1995, at 46, 46–49.

149. See generally Harvey M. Sapolsky, *The Polaris System Development: Bureaucratic and Programmatic Success in Government* (1972).

jurisdictions: Ordinance and aeronautics both insisted on control.<sup>150</sup> Moreover, as strategic ballistic missiles were then an innovation for the Navy, commanders and their representative in the Chief of Naval Operations could not use experience as a guide to formulating operational needs. Nor, finally, was there a pool of prime contractors who might have supplied at least part of the coordination that the Navy could not. Previous developments, principally with the Chrysler Corporation, had been with liquid-fuel missiles, whereas for submersed launchings the Navy needed a solid-fuel missile with correspondingly different guidance and fire-control mechanisms.<sup>151</sup> Lockheed's Missile and Space Division, which did have solid-fuel competence, had none in other important aspects of the project.<sup>152</sup>

In response to these difficulties, the Navy created the Special Projects Office as a kind of federation of the key military participants and specialist private-industry contractors. A Steering Task Group composed of senior representatives of these two groups fixed the performance characteristics of the new missile system; a Projects and Programs Branch of the Special Projects Office was assigned the task of supervising realization of the goals.<sup>153</sup>

This federation might have easily degenerated into a cartel of established interests, with each technical bureau defending its own bailiwick and those of its favorite contractors by insisting on particular versions of the subsystem within its competence—thus disregarding the effects of its preferences on the performance of the system as a whole. This danger was all the greater as the Special Projects Office formally had responsibility for submitting a unified budget for the program, but no direct authority over the participating technical bureaus.<sup>154</sup>

To avoid this combination of conflict and collusion, the senior naval officers in the Office adroitly played on the original jurisdictional ambiguities both to create and moderate competition among technical bureaus, among contractors, and between contractors as a group and their supervising bureaus. Almost inadvertently, they created a system for proposing and comparing design variants with many affinities to simultaneous engineering. Thus, bureaus with competence in adjacent areas were encouraged to propose solutions to particular problems so that the relevant panel of the Steering Task Group or section of the Projects and Programs Branch could choose between them. The bureaus, in turn, responded to the pressure to perform by encouraging competition among their specialist contractors, and choosing the superior design. To ensure that neither historic loyalties nor efforts to gain an advantage in the jurisdictional jostling would lead to collusion between bureaus and particular

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150. See *id.* at 61–62.

151. See *id.* at 79.

152. See *id.* at 80.

153. See *id.* at 73.

154. See *id.* at 69.

subcontractors, or more generally to the suppression of local initiative, contractors were entitled to appeal decisions against them to the Office in the early stages of the program, and later allowed to negotiate minor design changes with subunits of the Office located at their own facilities.<sup>155</sup> The overall result, as in simultaneous engineering and its related disciplines, was to create an environment that shifted incentives from information hoarding (to avoid the possibility of threatening comparisons) to information pooling (to increase the likelihood of surviving them).<sup>156</sup>

The design of the Atlas/Titan series of intercontinental ballistic missiles, begun formally in 1954—a year before the start of the Polaris program—was informed by closely kindred principles that came to be called “system engineering.”<sup>157</sup> Here too the novel demands of the project were at odds with military jurisdictions and orientations, as well as with industrial specializations. An Air Force hierarchy dominated by experienced pilots had trouble even imagining the utility of unmanned vehicles operating outside the atmosphere, let alone contemplating the optimal specifications for such a craft.<sup>158</sup> Even innovative airframe manufacturers, at home with the idea of missiles, had trouble conceiving of such missiles as mere platforms for electronic guidance systems and warheads, rather than engines of flight with an integrity of their own.<sup>159</sup> Here too the solution was to create a design team federating specialists and generalists from the military and private sector, together able to challenge and correct one another and the additional specialized subcontractors they would recruit to the project. On the private-sector side, the key figure was the newly formed firm (Ramo-Woolridge Corporation) that was both a specialist in aerospace electronics and a pioneer of the emerging systems approach. The systems approach was understood, according to one of the company’s founders, as an inherently “interdisciplinary” form of engineering whose “function is to integrate the specialized separate pieces of a complex of apparatus and people—the system—into a harmo-

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155. See *id.* at 148–52.

156. For example, in 1958, at least six organizations were concerned with developing the rocket motor for the Polaris:

Each had a viewpoint on rocket motor problems. Each was willing to evaluate the technical judgments and time estimates of its rival. And each had its own access to the program’s top management. [In consequence,] the strategic decisions involved in the design of the missile and its interactions with other subsystems were the subject of a searching analysis.

*Id.* at 154.

157. For the history of Atlas/Titan with emphasis on the development of systems engineering, see Thomas P. Hughes, *Rescuing Prometheus*, ch. 3 (forthcoming 1998) (manuscript on file with the *Columbia Law Review*).

158. See *id.* at 13–14.

159. See *id.* at 31–32, 41–42 (describing the limited experience of the airframe manufacturers with electronics, warhead design, and the use of computers to solve the kinds of complex problems arising in systems integration, as well as the dominance of specialists in aerodynamics as against electrical engineers in such companies).

nious ensemble that optimally achieves the desired end.”<sup>160</sup> The Air Force in turn assembled a team of technically expert officers, each responsible for monitoring progress in one of the subsystems of the overall project.<sup>161</sup>

Design under this structure was, in the jargon of systems engineering that later shaped the vocabulary of simultaneous engineering, concurrent and parallel. Concurrence meant that parts, and even machines to make those parts, were developed simultaneously, in advance of final definition of the whole. Parallel design meant that related but distinct alternative systems were developed side by side so that failures in the parts or subsystems of one could be corrected by substituting the corresponding component of the other. Thus, the launch facilities at Cape Canaveral (now Cape Kennedy) were under construction before there was a missile to launch.

The Titan rocket was produced as an almost accidental byproduct of parallel development. First, the Air Force commissioned construction of a second missile engine “for reasons of competition and the undesirability of entrusting such an important part of the program to one company.”<sup>162</sup> The same logic suggested paralleling the other subsystem; doing this created all the components of the Titan.<sup>163</sup> By the early 1960s, the Air Force’s success with parallel design attracted the attention of economists, who constructed sophisticated models of the savings in money and time that it made possible.<sup>164</sup>

Much more generally, the application of at least the rudiments of simultaneous engineering principles stands out in a recent survey of government sponsored research and development in the United States in the post-War period as a central determinant of success. Consider the experience of sectors such as semiconductors, computer hardware and software, and biotechnology. In these areas, government policy (including strict enforcement of anti-trust provisions and patenting policies favoring new entrants) encouraged early exploration of diverse alternatives and competition among public and/or private entities performing research or developing technology in connection with particular projects. The aggregate outcomes were extraordinary successes. In contrast, when, as in the case of the supersonic transport project or the effort to build a liquid metal fast breeder nuclear reactor, the government made an early and

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160. *Id.* at 1 (quoting Simon Ramo).

161. *See id.* at 46–47.

162. *Id.* at 55 (quoting General Bernard Schriever, head of the Atlas/Titan program) (internal quotation marks omitted).

163. *See id.* at 56.

164. *See generally* Richard R. Nelson, *Uncertainty, Learning, and the Economics of Parallel Research and Development Efforts*, 43 *Rev. Econ. & Stat.* 351 (1961).

sustained commitment to a particular design and a group of firms associated with it, the results were clamorous failures.<sup>165</sup>

There is, to be sure, irony in the observation that the military-industrial complex—symbol to many of government as an instrument of self-dealing, and to others of a suspect connection between official power and violence—may well have been a pioneer in the use of methods that we would associate with a new form of democracy. But it is irony of a familiar and instructive kind. The means of production and the means of destruction mirror and shape one another as breakthroughs in civilian life are passed to the military, and vice versa; and every contrast among civilian forms of organization has its counterpart in differences of military style. Thus, trench warfare solidified hierarchical forms of command, while tank warfare favored flexible and decentralized decisionmaking.<sup>166</sup> (Or, to choose an example with a closer connection to political participation, the armed services were desegregated by Executive Order before the Supreme Court ruled Jim Crow unconstitutional.<sup>167</sup>) From this perspective, the surprising aspect of the successes of simultaneous engineering in recent military projects is not, perhaps, their occurrence, but rather our tardiness in drawing implications about the plasticity and transferability of government from it.

#### D. *Limitations of Piecemeal Efforts*

A few hints to the contrary aside, the foregoing examples suggest that directly deliberative polyarchy, because it does not presume consensus and because the information-pooling devices on which it ultimately depends may begin informally, can spread piecemeal, by a process of bootstrapping akin to the one noted in the diffusion of learning-by-monitoring institutions in firms. However, without national coordinating mechanisms, those interested in innovating will have difficulty finding one another and pooling their efforts to overcome the predictable resistance of vested interests. To see why such mechanisms are necessary, we sketch the possibilities and limits of uncoordinated reform.

The possibilities for bootstrapping reform stem from the urgent need to respond to, and the freedom of maneuver afforded by, breakdowns in current arrangements. Central (state or national) governments, for example, may admit defeat in efforts to solve certain problems by programs under their direct control and then redistribute the funds dedicated to the failed efforts to lower level authorities, perhaps on condition

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165. See David C. Mowery, *US Post-war Technology Policy and the Creation of New Industries*, in *OECD Proceedings: Creativity, Innovation and Job Creation 199* (1997). For more detail, see id. at 202–04 (semiconductors, computer hardware and computer software), 207–08 (biotechnology), 204–07 (supersonic transport and light-water reactor), 200 (statement of the general factors favoring success summarized above).

166. See Edward N. Luttwak, *The Strategy of the Tank*, in *Strategy and Politics* 295, 299–301 (1980).

167. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948).

that these give some public account for the use they make of their new discretion. Local authorities may have the freedom of maneuver under current arrangements to engage in some form of experimentalism, or attribute themselves this freedom, and the central authorities are so preoccupied by other matters (or so sympathetic, surreptitiously, with the initiatives) that they do not protest. Success by any one of these approaches will often be self-reinforcing and will encourage attempts by the others. Thus, a school district relaxes certain rules to permit decentralized experimentation in curriculum development (itself informed by new ideas of learning through participation in problem-solving groups), perhaps in response to certain semiofficial demonstration projects undertaken by teachers with the help of some parents and administrators. So authorized, the school affiliates itself with one or more associations or networks of similar institutions pursuing related forms of decentralization. Through contact with these, the school launches additional pilot projects that, together with the remonstrations of other schools in the same jurisdiction pursuing slightly different projects in association with other networks, result in requests for further rule changes at the district level. Meanwhile, the federal government begins to consolidate separate programs for linguistic minorities, students with learning disabilities, and many others into block grants to be used substantially at the discretion of local school districts. But a condition for the use of the funds is the articulation of a proposal for the reorganization of the old services on new lines—particularly their integration with one another and classroom activities. Efforts at curricular experimentation now have to be coordinated with experimental delivery of supplementary services, occasioning discussion of further rule changes, comparisons with responses in other districts to this kind of integration, and so on. Processes of this kind explain why examples of the new system, however fragmentary, abound.

But to say that directly deliberative polyarchy, because of the forms of accountability and consensus it establishes, can begin to take shape spontaneously in response to current difficulties is not to say that its diffusion is automatic and assured, nor even that the new system of local government as described is self-sufficient and requires no national complement or preconditions. Diffusion is not assured because the change to directly deliberative polyarchy, like the introduction of learning-by-monitoring methods in firms, creates great uncertainty about who will win and lose by the change. This uncertainty produces a vast reserve of potential opponents, easily activated by any event that confirms their fears. Think of public-sector employees and unions menaced by competition from private service providers or from public-sector service providers from other jurisdictions; of central-office administrators menaced by the increasing autonomy of local officials; of vulnerable economic or ethnic groups that prefer the threadbare protection they now enjoy from national programs to the gamble that they will do better with some version of decentralization. Whether such opposition will prevail is indeterminate. Looking at



the forces deployed against change, close students of the capture of regulatory agencies by special interests did not anticipate the deregulatory movements of the 1970s and 1980s that loosened the hold of those interests;<sup>168</sup> nor, for similar reasons, did close students of U.S. corporations anticipate the vast changes in business organization beginning in the late 1980s.<sup>169</sup> In such turbulent circumstances, the only reliable prediction is that opposition can be overcome, if at all, only after a great struggle.

Amidst that predictable fight, directly deliberative polyarchy will only progress if benchmarking and the complex of institutions for its monitoring are established on a large scale and ultimately attain national scope. The need for such institutions was anticipated in the earlier discussion of learning by monitoring in firms: Benchmarking requires a survey of possible comparisons, evaluation of possible metrics for ranking the comparables, and revision, when necessary, of initial choices of both. Furthermore, the effectiveness of such surveys, evaluations, and revisions depends on the willingness of all participants to disclose information in view of the investigations of the others. That is why, we noted, firms often turn to third parties to organize benchmarking, and the organizers secure participation by various combinations of inducements and threats: disclosing, for example, the pooled information only to those who add their own results to the pool, or expelling members who refuse to cooperate in information gathering. Likewise in government, after easily accessible, informal opportunities have been exhausted, most jurisdictions willing to benchmark will nonetheless be unable to organize the activity themselves, and some jurisdictions—or at least their leaders—will be unwilling to exchange information for fear of showing poorly in comparison. A crucial role of the national institutions in an experimentalist regime is to assist the willing and oblige the unwilling to provide the information citizens require for direct deliberation.

There is a straightforward connection between progress in the construction of a national system of comparisons and the outcome of the fights to extend the reach of directly deliberative polyarchy. The more extensive and accurate the national information pooling, the more likely that innovative solutions will be widely known, and the greater weight the novel alliances formed through these solutions will have in local and national debates about adopting experimentalist measures. Put another way, national information pooling reduces the vulnerability of the vulnerable, and, to the extent that this is so, the more effective the system, the more support there will be for augmenting it.

The second, indirect connection between creation of a national framework and the prospects of experimentalism points to the limits of the analogy between constitutional reform and economic reorganization

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168. See Mashaw, *supra* note 2, at 32–37.

169. See, e.g., Chandler, *supra* note 72, at 482–83 (arguing that conceptions of the modern corporation reflect organizational patterns of the U.S. firm circa 1965).

and underscores the distinctive and fundamental importance of higher-order, national institutions to the former. For employees and owners alike, the possibility that successful, day-to-day operation of current arrangements may generate fundamental errors that those arrangements cannot detect is a business risk worth running if current returns are high and the chances of timely improvements in error detection good. Indeed, if a single firm adopts the new methods while its competitors do not, the firm stands to benefit from the comparative advantage conferred. But constitutions *are* constitutions in the sense of foundational principles of a political order only if they consistently establish the institutions of normal political decisionmaking and the institutions that repair breakdowns in such decisionmaking. By establishing these higher-order institutions, constitutions entrench the conceptions of political justice, thereby *constituting* the polity as well as the government. To pursue a strategy of decentralized design and production in anticipation of corresponding governance mechanisms may be prudent or rash. To adopt cognate forms in the polity—subverting what is left of representative democracy without providing some coherent picture of the emergent regime—gambles that crucial part of our identity that derives from citizenship in a democracy in reckless ignorance of the stakes. Hence, it should not be surprising that the little evidence there is suggests that, even in those isolated cases where experimentalist provision of public services has been broadly and successfully introduced under conditions of near emergency, practical success does not long forestall insistent questions regarding the relation between the new forms of participation and the old.<sup>170</sup>

Thus, either from the point of view of calculations of advantage that tip allegiance in struggles over the desirability of new methods or from the vantage point of large ideas that frame, through citizenship, our political and collective being, the project of democratic experimentalism is incomplete and fragile without preliminary indications of the national ends towards which reform should be directed. To be sure, change may proceed by bootstrapping, as local incrementalism leads to complementary reforms at higher levels. However, even if elements of traditional representative democracy long coexist with elements of a new participatory one, it is essential to present at least a tentative account of the envisioned national framework of experimentalism as a whole. To that task we now turn.

## V. THE NATIONAL FRAMEWORK

Under current conditions, the national lawmaking apparatus performs the Penelope labor of undoing with one hand what it does with the other. To assure democratic deliberation for the common good, an elected Congress has authority to make decisions of national importance; but to take account of the legislature's bounded rationality, Congress del-

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170. See Sabel, *supra* note 103, at 6.

egates its power to administrative agencies or shares its power with the states.

In an experimentalist democracy, in contrast, decisionmaking is from the first presumptively decentralized, hence adjusted to local circumstance, and fragmented, for rules originate in the deliberations of distinct local governments. The principal role of the national government in domestic affairs, accordingly, is to encourage and coordinate this decentralized decisionmaking, and to protect citizens against abuses of power—especially, and paradoxically, those abuses that may result from or be exacerbated by the pulverization of central authority itself. The task of the legislature is to authorize these deliberations and finance the ensuing experiments where local resources are insufficient to do so. The task of the administrative agencies is to provide the infrastructure of coordination, again where local resources are insufficient. The courts in this system are charged with the familiar tasks of policing government and safeguarding rights.

As experimentalist government is government by direct deliberation, these judicial activities are now more conspicuously than ever in the service of the common end of increasing citizen participation in political decisions, and especially in making forms of participation that produce effective results in one jurisdiction available to others in which they are applicable. But policing and monitoring are here also more directly connected than under the traditional approach. The judiciary draws on the experimentalist capacities of the system it superintends and itself uses experimentalist methods in interpreting the law. Information furnished by the system of decentralized learning organized by the administrative agencies informs the judiciary's initial findings; it treats these findings as a framework within which local governments and other rule makers elaborate solutions that meet their needs, provided they explain how local variants respect the framing principles and demonstrate by performance benchmarking that the solutions work as they should in principle. Thus, constitutional considerations are instinct in political deliberation, and the judiciary—like the agencies and the legislature—guides deliberative democracy from within.

This Part presents our familiar national institutions as parts of a system that complements and completes local experimentalism. The Parts that follow explore them further from the vantage point of an experimentalist judiciary recasting and solving in novel ways the dilemmas that give rise to the traditional problems of federalism, separation of powers, and judicial protection of individual rights. Our description of the transformations that democratic experimentalism would require of American national institutions does not minimize the scope of change we envision. At the same time, however, the transformation envisioned has deep resonance with the values of American democracy and is partially anticipated by countercurrents within the tradition of American public administration.

### A. Congress

The chief tasks of Congress in the experimentalist framework are to authorize, finance, and, if necessary, withdraw national support for state and local experimentation, as a means of reforming current solutions to entrenched problems or responding to emergent ones. By authorizing experimentation, Congress agrees to provide funds to local governments, or to administrative agencies collaborating with them, to pursue, by any constitutional means they see fit, such general purposes as Congress has determined, provided that all beneficiaries of the authorization agree to declare their goals and subject their activities to corresponding measurement by methods they agree upon.

Congressional authorization of subnational experiments would depend on a double determination. The first—conventional in character—is that the experiment identifies *citizenship goods*: goods that are important to the ability of citizens to act as such, yet that are unlikely to be supplied adequately to them unless the state provides at least some citizens directly or regulates markets to assure provision. Education is a familiar example of such a citizenship good, for it provides the foundations of self-determination upon which citizenship itself is founded, yet, in the simplest case, citizens may lack the means to provide their children an adequate education. The second determination necessary to authorization—reflecting the conditions propitious to experimentalism—is that the citizenship good be complex. In this context, complexity means that the good consists of one or more services whose means and ends are continuously adjusted to account for the diversity and volatility of the needs of citizen users, and also to account for adjustments in services that are complementary to the main services. The difficulties of New Deal institutions suggest that many current programs are complex (their complexity overburdened the institutions); discussion of the contracting for new services points to the same conclusion.

There will be, of course, disagreements as to whether particular goods meet these tests, and how to frame experiments when they do. As in the case of disputes at the local level of governance councils, the freedom of action provided by experimentalism itself will often clear the way to resolve such disagreements. Some jurisdictions may believe, for instance, that because of moral hazards and other perverse incentive effects, provision of goods in the form of social welfare may lead to behavior that subverts their ultimate purpose of securing economic self-sufficiency. A showing that economic self-sufficiency, as measured in publicly agreed ways, was increased more through training in workplace skills or through public employment or (contrary to our own strongly held view) by doing nothing at all than by any form of direct assistance, would count strongly for their views. In an experimentalist regime, these jurisdictions could pursue such alternatives on condition that they meet certain procedural requirements discussed below. Thus, whereas division now paralyzes the national legislature, and the resulting need for com-

promise often so denatures competing proposals that their proponents cannot be held in the slightest accountable for the results, division in an experimentalist Congress would usually trigger authorization to act on the contending programs. Such actions would be faithful enough to the legislative purposes—and sufficiently measurable by standards they outline—to count as evidence of their plausibility.

The freedom of maneuver of an experimentalist Congress is further increased by the possibilities of authorizing experimentation incrementally or allocating resources to jurisdictions that could not, unaided, manage to put forward the kinds of coordinated proposals from which experimentalism begins. When it is unclear what good pragmatist methods will do or there is fear of disruption if they are introduced abruptly, Congress can dedicate a small, perhaps increasing, share of current allocations to a program for its experimentalist redesign. Congress could also finance experimentalism from increments to the program's budget. If the concern is, rather, that just those jurisdictions whose disorganization makes reform most urgent will initially be incapable of mustering the organization needed to meet the minimal, formal requirements of experimentalist concertation, Congress can provide separate funds to local governments and administrative agencies to permit them to build the capacity to do so. As we will see, the other institutions of the national framework can introduce experimentalism from their separate starting points and build the capacity to engage in it incrementally as well.<sup>171</sup>

This freedom of maneuver comes at the price of substantial self-limitation in the direction Congress can impose on local governments participating in experimentalism. When Congress authorizes experimentation, it puts its own disagreements to one side on the grounds that the means to an end are only provisionally known, and the definition of the end itself will change as appropriate means are discovered. Therefore, it cannot simultaneously give preference to some means over others, or, equivalently, define the ends so narrowly that only certain means count as furthering them. In authorizing experimentation, therefore, Congress should state the publicly desired ends in abstraction from the means, and with sufficient generality to accommodate refinement through pursuit of effective solutions. Consider an example developed below: If an experimentalist Congress intends to increase highway safety, it should not prescribe an increase in the drinking age as the means. Rather, local governments should have the discretion whether to choose instead driver education, mandatory use of safety-enhancing devices, or some other combination of means, provided only that the locales give reasons for their choices and expose those reasons to public scrutiny by benchmarking results.

Similarly, if the goal is to improve the possibilities for young people to pass successfully from school to work, experimentalist reform cannot

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171. See *infra* Part V.B.

effectively be limited, for example, to the redesign of existing vocational training programs. This presumes again that the legislature knows more about the contours of a solution than the recourse to experimentalism warrants. For if the current institutions most directly charged with an official task are failing, it may be that the reason is a flaw in their very constitution, and such flaws are likely to remain hidden unless the failing program is contrasted with others constituted differently. Such contrasts, in turn, depend on an unencumbered survey of possibilities. Indeed, just as solutions often lie outside the realm marked out by habit, so the problem-solving institution best suited to solve a particular problem may have originated as a response to another one, and only local knowledge of its operation reveals the potential of applying it to a new task. Such are the investigations that the authorization to experiment must encourage.

The same logic requires restraint in the determination of subnational jurisdictions. The dimensions of effective government will change according to the particulars of the problem of governance; "local" actors, whatever their limitations, know best when "local" is improperly sized. Hence, the experimentalist Congress defers to local government in defining the jurisdictions that will be the protagonists of particular experimentalist programs. In reforming schools or cleaning up environmental hazards, Congress can assign the states responsibility for determining the jurisdiction—local, statewide, regional, or jurisdictions wholly distinct from ordinary political boundaries—to be established to treat the problem. Nor are Congress and state and local governments limited to combinations or subunits of existing governments in designating problem-solving jurisdictions. Congress can authorize the provision of funds to administrative agencies or to local governments to be distributed in turn to groups (of citizen users, local governments, and providers) able to present promising plans for continuing collaboration (including long-term consultation with others).

With much power delegated to subnational bodies, on what basis would the electorate choose national representatives? Campaigns for election to an experimentalist Congress would join debate about national and local strategies in novel ways, tending in time to establish closer connections between them. At the national level, debate would focus on the implications of large alternatives revealed by experimental exploration of current ones, especially in the form of proposals for new areas of experimentalism based, in part, on analogies to experiments in progress. This debate would go hand in hand with a new localism, as candidates and incumbents in democratic experimentalism challenge one another to say what use they would make of the freedom to experiment locally, and especially how they would use the vantage point of national office to encourage the particular experimental activities they favor. Thus, candidates would soon have to demonstrate mastery of current alternatives, express and motivate their preferences among these, and then pledge to advance the preferred alternative by facilitating its local development. In

doing this, they oblige themselves to support the information exchanges upon which success will in large measure depend. Hence, they pledge to cooperate with local officials in experiments within the experiment: efforts to scout out new possibilities, or to help direct participants to do so, before these are recognized by more formal systems of evaluation. All of this helps to break down the traditional distinction between national politics as the realm of questions so large as to be answerable in the end by professions of faith—government, for or against?—and local politics as service to constituents harried by the problems of wealth or poverty. The more localities in an experimentalist democracy act on familiar grand ideas, and the more representatives are accountable for the local consequences of this action, the more the familiar grand ideas come to be defined by their implications in everyday life, and the more everyday life is implicated in the articulation of novel ideas.

Such changes would not, of course, eliminate porkbarrel legislation. Even in periods of fiscal austerity there will be military bases, government laboratories, regional administrative processing centers, or dams that can arguably be located in one jurisdiction rather than in another. These are among the most prized trophies of representative democracy; experimentalism does not automatically lessen their appeal. But pork would be a residual category, not the emblem of the hidden truth of politics behind the incense of high principle.<sup>172</sup>

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172. In this context, consider, as a cynical harbinger of a new form of election fusing local and national debate, the successful use by the Democratic Party in the last presidential election of the strategy of decomposing all large symbolic issues into small and less generally suggestive projects. Since the time of Walter Lippmann, it has been axiomatic that a political party could succeed in American mass democracy only by associating its program with the symbols of the way of life the majority favors, and associating its opponents' program with symbols of what that majority rejects. The new strategy derived from the insight that such symbols come to stand for a manifold of practices with which they are only loosely associated. See Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties* 218–19 (1997). Thus, advocacy of a constitutional amendment permitting school prayer stands very generally for the conviction that moral beliefs are a public matter, but also, more particularly and loosely, for the distinct ideas that our moral responsibilities to each other may legitimately be discussed in public, that the state may foster such discussion, that religious and moral beliefs may be connected, that children, above all, should learn and partake of all this, that schools should therefore address moral concerns, and so on. Politicians who oppose a school prayer amendment on constitutional grounds can avoid the sting from this rejection of the comprehensive symbol by showing that citizens can get from government most of the particular things they associate with that idea even without the actual amendment. In the short run, as the presidential campaign of 1996 demonstrated, this leads politicians to substitute lists of many small, nearly empty promises (school children should wear uniforms to manifest their acceptance of a moral code; schools should teach respect for moral concerns and mutual responsibilities) for a few large, empty promises. But in an experimentalist setting, local government addresses just these "small" concerns in a way that establishes the accountability of those who urge them and those who must act to realize them. Under these conditions, the shift from the race to associate the opponent with a big, unpopular idea from which prior positions block all escape (the hunt for

## B. *Administrative Agencies*

The chief purposes of administrative agencies in democratic experimentalism are to assist state and local governments in benchmarking, and experimentalism generally, especially in connection with activities carried out under congressional authorizations; to set—again by a variation of benchmarking—regulatory standards for market actors; and to undertake such changes in their own activities and organization as cumulative self-scrutiny indicates will further these purposes. In addition, certain experimentalist agencies provide citizenship goods themselves, such as the administration of public lands, as opposed to assisting local governments in providing the goods. Such agencies will have to organize and coordinate local benchmarking evaluation of the citizenship goods that they provide.

The agencies are thus the continuing organized link between the national and the local, helping to create through national action the local conditions for experimentation, and changing national arrangements accordingly. Experimentalist agencies dedicated to comparative evaluation of public and private actors must contend with the evasions and deceptions of those unwilling to submit to assessments whose outcome they do not control, and determined, therefore, to prevent the participation of actors interested in open examination of their situation. Conversely, experimentalist agencies must also contend with obstruction by those who may use participation itself to frustrate their efforts: inveterate opponents of government administration or regulation in any form, or activist citizens determined to paralyze administration, preventing approval of actions they disapprove. We focus here on benchmarking comparisons and regulation through benchmarking as the prototypical activities of the experimentalist agency. We then suggest why experimentalist administration can likely succeed at these tasks despite the inevitability of obstruction. Last, we indicate the distinctive organizational features of this novel form of administration that allow it rapidly to identify and generalize good practices as they emerge in relevant areas of activity, and to reorganize itself to better its ability to do this.

1. *Benchmarking.* — In furnishing assistance in benchmarking, administrative agencies are almost literally creating the infrastructure of decentralized learning. Governments that want to learn from comparing what they do to the activities of others like themselves must first find each other, clarify the similarities of their activities, and define measures to rate outcomes. Assuming that superficial resemblance is not always or even often a good indication of deeper comparability of circumstance, they must—by self-defeating circularity—start with deep mutual knowledge to become useful acquaintances. Because of their ability to survey many jurisdictions from many points of view, administrative agencies can

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“wedge” issues), to the race to decompose the old rallying calls, can be the beginning of a new form of electoral politics.



break this circle. With regard to programs in, for instance, education, training, or child-protective services, the appropriate agency convenes the local actors: to formulate suggestions for subgroupings of comparable jurisdictions (very crudely: urban and rural with further subtypes within each); to begin characterizing both individual programs (what services are actually provided and how?) and the architecture of decisionmaking (who participates and how?); as well as to devise performance measures by which to evaluate these. Participants in these meetings arrive with proposals elaborated by the relevant groupings of officials from governance councils, service providers, and citizen users, and they return to these to discuss the results of each round and prepare for the next.

The agencies must be able to take account of local diversity and resulting differences in the direction of local innovation in order to provide effective measures of performance in core programs—those which in some form all jurisdictions are obligated to provide. As a consequence, the agencies' measures must themselves be diverse and composite. Such basic institutions of government such as schools or prisons, and many others besides, serve distinct and potentially conflicting ends. Prisons exact a penalty for wrongdoing against society, incapacitate the wrongdoer during his imprisonment, provide specific and general deterrence, and rehabilitate the wrongdoer for participation in social life.<sup>173</sup> Schools that enable young persons to flourish in a democracy teach respect for self and others, as well as the more or less specialized capacities needed for economic and political independence. Different jurisdictions will naturally differ in their emphasis on these purposes and accordingly prefer measures that record progress on the dimensions they prefer.

Nonetheless, common systems of measurement will be possible and widely valued because jurisdictions are unlikely to disavow the institutional purposes they do not favor. Therefore, they will be concerned with maximizing achievement of their preferred purposes while minimizing the sacrifice of other legitimate aims. Thus, those who view prisons primarily as places of rehabilitation are unlikely to think that rehabilitation is furthered if inmates literally or figuratively run riot in prison.<sup>174</sup> Conversely, those who see the purpose of penal institutions as inflicting deserved and dissuasive punishment are unlikely to prefer forms of discipline that encourage recidivism as against those that reduce it.<sup>175</sup> In the

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173. See George P. Fletcher, *Rethinking Criminal Law* 415 (1978); Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* 27–29 (2d ed. 1986).

174. See Patrick R. Kane, *Rehabilitation—The Prison System: "Warehouse Rehabilitation"* Federal Bureau of Prisons, 34 *How. L.J.* 496, 499 (1991) (arguing for rehabilitation programs for most prisoners, while recognizing that "[f]irst, we must have security in these facilities").

175. Consider in this context a suggestion in Justice Thurgood Marshall's dissent in *Dothard v. Rawlinson*, in which the majority upheld an Alabama prison regulation that barred women from employment as prison guards in "'contact positions,' that is, positions requiring continual close physical proximity to inmates." 433 U.S. 321, 325 & n.6 (1977). Justice Marshall challenged the majority's assumptions about the nature and function of

school setting, those who emphasize the importance of the pupils' esteem for self and others will frequently consider this a precondition for acquiring the skills that afford self-sufficiency; those who emphasize the latter will often treat it, conversely, as a precondition for the former.<sup>176</sup> In short, localities will be under pressure to measure their effectiveness at achieving a range of goals, not merely those they choose to emphasize.

Hence, despite the differences in emphasis from one jurisdiction to another, there is a common interest in learning more about the relation between various ends. In the foregoing examples, mutually comprehensible measurements reveal the trade-offs or surprising complementarities between forms of discipline and rehabilitation, or between pride of identity and generally certified accomplishments. Jurisdiction X will not be able to say to its disgruntled citizens who favor policy goal P, "We cannot have P because we seek Q," if comparable jurisdiction Y pursues P as effectively as Y does, without sacrificing Q. The utility of mutually comprehensible measures creates incentives to agree to common, composite measures by which each jurisdiction monitors performance indicators that reflect not just its preferences, but the preferences of other jurisdictions as well. Beyond these composite, core measures will be ones devised by institutions and jurisdictions in distinct settings: rural schools, or schools for the deaf, or the unruly, and so on. Discussion and agreement on measures of these various sorts harness diversity of purpose to a common enterprise without imposing false uniformity.

Despite their manifestly demanding goals, these benchmarking proceedings can be effective even if their results are modest when judged by the exigent ambitions; the utility of modest results will encourage agreement that, in turn, allows the parties to learn enough to do modestly better the next time. Recall that the aim in benchmarking is simply to reveal sufficiently large differences in performance and approach to provoke local debate about the possibilities of improvement, and, subsequently, about the improvement of the groupings, characterizations, and measures themselves. Agreement on groupings, characterizations, and measures should be feasible because categorizations are understood as provisional—in the case of novel programs, explicitly experimental—and perfectible, not definitive. Recall, too, that benchmarking and the ensemble of learning-by-monitoring institutions of which it is a part, do *not*

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the job of prison guard. Initially, he invoked a benchmark from other jurisdictions: Where was Alabama's evidence that women are categorically unqualified for the position, given the "highly successful experiences of other States" described in an amicus brief of California and Washington? *Id.* at 341 (Marshall, J., dissenting). In addition to criticizing the majority for too readily accepting a correlation between gender and control, Justice Marshall noted that most prisoners will eventually be released, and they will be less likely to commit further acts of violence if, during their imprisonment, they have learned "to relate to women guards in a socially acceptable manner." *Id.* at 346 (Marshall, J., dissenting).

176. See, e.g., James E. Abbott, *Educating Students for the Community of Work: Connecting with the Fourth Essence*, 115 *Educ.* 407 (1995) (linking self-esteem with performance and using the new private sector forms as a model).

aim to produce an exhaustive, fully replicable characterization of the products or processes to which they are directed.<sup>177</sup>

Benchmarking does not produce laboratory protocols by which successful experiments can be reproduced elsewhere. Rather, it reveals or leads to the discovery of unsuspected goals and indicates the guiding principles and related kinds of means for obtaining them. Error-detection systems (which can themselves be benchmarked, and which can be combined with random-assignment experiments and other familiar methods of evaluation) are then used to determine how to adapt the indicated means to the local setting to achieve the goal. Put another way, the benchmarking comparisons need only produce a usefully informative disequilibrium between current practices and prospects for improvement. Thus, even the early characterizations of programs and outcomes can produce enough learning to allow adjustment of the results of initial rounds according to the exchanges of local experience they help organize.

2. *Obstruction.* — But the very feasibility of agency coordination of benchmarking will be an urgent reason to obstruct it for those who risk a bad showing in comparison. Their obstruction can take many forms. Jurisdictions that do little in an area can group themselves with others who do only that much or less and claim that their modest efforts and results are the most circumstances will allow. There are performance measures that notoriously conceal more than they reveal.<sup>178</sup> Insiders often find it easy to exclude outsiders, because part of being an insider is knowing which bits of the indigestibly large mass of information introduced into debate really matter for decisions.

Yet, this obstruction will succeed in the long run only on the highly unlikely condition that almost none of the local governments participating in the benchmarking and almost none of their constituents actually intend to learn anything from it. Assume, to the contrary, that there is a small group of governmental actors that does. The members of that group can find one another in the general meetings and establish the classification necessary to begin information exchange; the agency then publicizes their measurement scheme and their substantive results. If there are among the constituents of the obstructionists any who are discontent with the results their local governments provide, they can use the public information to suggest unfavorable comparisons between their home situation and that of the better performers. Thus, reversing the burden of proof, they can pressure their own government to prove—by cooperative participation in benchmarking—that the comparison is unwarranted. And to defend itself by cooperating, the local government

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177. See *supra* text accompanying notes 82–90.

178. Consider, for example, the question of how to measure the return on the public investment in technical assistance to firms. The firms prefer to measure this return by their own estimates of *potential* savings since such a measure only provides information to those familiar with the options the firm really faces, that is, to those inside the firm.

begins to provide information for assessments that are valid even if the initial, invidious one proves not to be.

Truculence would be sanctioned initially by the administrative agency, which would treat obstruction of benchmarking as a violation of the obligation to exchange information accepted as a condition for obtaining national funds for experimental purposes. In addition, authorizing legislation would confer on aggrieved citizen users a statutory right to participation. In judging the validity of administrative sanctions and citizen claims, courts would look for evidence that local governments and agencies had actually engaged in directly deliberative problem solving with regard to benchmarking and related activities.<sup>179</sup>

Within any jurisdiction, the discipline of those who use participation to frustrate the purposes of administration depends less on the shadow of the law and more on the pressures of competition for influence and place. Again, the crucial assumption is that there are some jurisdictions in which participants do want to cooperate in problem solving. So long as there are, and cooperation does produce results, aggressive participation as a means of obstruction will be open to criticism from within those groups in whose name it is being exercised. Industrialists or managers who quibble endlessly about providing any information or environmentalists who insist on having all that can be imagined will soon be confronted by compatriots who can cite examples where settling for less is the way to get much more. Indeed, there are some first signs that advocacy groups are in fact realizing that they have more to gain by participating in decentralized problem solving than by using strong-arm techniques to set limits on centralized decisions.<sup>180</sup>

Experimentalist agencies would not merely coordinate the experimentalist methods of subnational jurisdictions; agencies themselves would adopt the new disciplines. Thus, in the new framework, agency regulatory standard setting similarly depends on benchmarking and error detection for the initial formulation and continuous adjustment of rules, and on a similar combination of incentives and legal sanctions for its enforcement. Subject to some important exceptions, until recently, standards in areas such as occupational health and safety, environmental protection, the transportation of hazardous materials, and the like have been implicitly premised on the fixity of the mass-production world. They specify, in effect once and for all, means and ends simultaneously, and by reference to each other. A safe construction method for workers at risk of dangerous falls is one that provided them with safety lanyards or tethers, and other specified equipment to be worn under risky conditions; "acceptable" emissions of certain effluents are defined as those not exceeding certain concentration levels in the environment at any one mo-

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179. See *infra* Part V.D.

180. For examples of problem-solving public advocacy in the areas of health care and low-wage labor markets, see Videotape: *So Goes A Nation: Lawyers and Communities (Site Effects 1997)* (on file with the *Fordham Urban Law Journal*).

ment, or accumulating to more than specified amounts in any period. The actual standards are often the result of a typical compromise: The responsible administrative agencies and the advocates of those exposed to, for example, environmental and occupational hazards urge rules that would eliminate the risks. Producers countered that a regime that eliminated risk entirely makes production impossible: Workers completely secured against falls are so tightly tethered that they cannot construct anything and the only way to eliminate certain effluents entirely is to cease production of the good of which they are a coproduct. The obvious compromise is to define a list of obligatory protection measures or schedule of fines that reduce (or create financial incentives to reduce) risk without eliminating it, yet are economically acceptable. Because it is laboriously achieved, this compromise is seldom revisited, with the result that standard means and ends usually outlive the circumstances to which they were applied.<sup>181</sup>

Experimentalist regulation, in contrast, would connect rulemaking with the learning-by-monitoring institutions of firms. The fundamental link is that most hazards are joint products of conditions that produce waste or inefficiencies in general.<sup>182</sup> Identifying and eliminating the sources of the hazards both raises efficiency and creates the preconditions for subsequent efficiency gains. For example, a production system that leaks recurrently is discarding its own output while burdening the environment; it is, moreover, an unpredictable system. Efforts to improve it could be wasteful themselves because, so long as the system is out of control, there is no conclusive way to determine their effects. Similarly, many of the worst construction hazards result from flaws in the design of the building under construction (in the case of steel-girder erection, poor design may produce torsion at the joints which can then spring apart with catastrophic effects for workers in the vicinity and the structure as a whole), or from poor training in construction methods (which endangers workers and reduces the value of the finished building). Thus, in experimentalist administration, the search for efficiency is incidentally a search for regulatory improvements and vice versa.

The administrative agency can, in turn, use this connection between regulatory goals and efficiency to promulgate regulations in the form of *rolling best-practice rules*. Such rules require regulated entities to use processes that are at least as effective in achieving the regulatory objective as the best practice identified by the agency at any given time. In one variant, the current production method that creates the lowest level of

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181. The construction examples draw on proposed safety rules discussed at a meeting of the Steel Erection Negotiated Rulemaking Advisory Committee (SENRA) and reported in Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 49-55 (1997).

182. The condition might be thought not to hold for processes designed to separate a useful resource from a useless or inherently hazardous one, but, of course, the concepts of useful and useless themselves include potentially challengeable assumptions.

risk is the standard all producers must meet (within a certain grace period), either by adopting those methods or devising equivalents. In another, polluters are pushed from the bottom of the heap rather than pulled toward the top: The level of risk defined by the most hazardous operators defines a regulatory purgatory from which polluters must ascend (again within an agreed period); the acceptable minimum rises as the worst performers improve. In both cases, benchmarking establishes and periodically updates the standard to incorporate improvements, raising the ceiling in the one case and the floor in the other. Firms that achieved significant improvements as part of the first, rising ceiling type of programs of increasing efficiency, would gain a further advantage in establishing them as public standards. Competitors would have to incur the costs of adopting some version of the new methods sooner than market competition alone would have required, reducing risks without an offsetting gain in efficiency, or paying a fine. In the meantime, the innovator could be innovating again. Specialist producers of equipment—pumps, valves, many kinds of machine tools, for example—that reduce risks by increasing the reliability on which efficiency improvements ultimately depend, would, under such regulations, have an additional motive to do what they often do in any case: Make their current products obsolete by building more capable models.

Notice that this method eliminates the problem of information hoarding associated with many of the market-based alternatives to traditional rulemaking. In the standard market-based alternative, firms are assigned tradable rights to emit certain quantities of pollutants in a given period.<sup>183</sup> Those who reduce emissions below the level of their entitle-

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183. For arguments in support of such schemes, see J.H. Dales, *Pollution, Property & Prices: An Essay in Policymaking and Economics* 93–108 (1968); Thomas H. Tietenberg, *Emissions Trading* 188–215 (1985); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 *Stan. L. Rev.* 1333, 1341–51 (1985). Although we disagree with the specific form of market-based alternative to regulation, we agree with Richard Stewart's more general observation:

The most promising solution to Madison's Nightmare is not indiscriminate devolution and deregulation. Neither is it a constitutional counterrevolution by the courts, nor stiffer judicial controls on administrators through administrative law. The best solution is to adopt new strategies for achieving national goals in lieu of the centralizing command and control techniques relied upon so heavily in recent decades.

Richard B. Stewart, *Madison's Nightmare*, 57 *U. Chi. L. Rev.* 335, 352 (1990). Notice, finally, that in explaining the limited diffusion of market-based regulation thus far, some authors note that a central barrier to its widespread use has been the organizational limitation of—in our language—mass-production firms. Thus, a shift to the form of economic organization sketched above may encourage certain forms of regulation with affinities to market-based schemes, but not directly for the reasons normally offered by the proposals of these latter. See Robert N. Stavins & Bradley W. Whitehead, *Market-Based Environmental Policies*, in *Thinking Ecologically: The Next Generation of Environmental Policy* 105, 111 (Marion R. Chertow & Daniel C. Esty eds., 1997). For an earlier draft of this piece that discusses the issue at greater length, see Robert N. Stavins & Bradley W. Whitehead, *The Next Generation of Market-Based Environmental Policies* 17 (Aug. 15,

ments can sell the rights to emit the difference to those firms who emit more, and the prospect of doing so is the incentive to cut emissions.<sup>184</sup> The difficulty with this system (other than the vexing problem of determining and constantly adjusting the price for the entitlements) is that it encourages firms to hoard the know-how they acquire in pollution reduction. The greater the gap between their knowledge and their competitors', the greater the prospective proceeds from the sale of rights. But if this secrecy is rational for the individual firm, it is plainly irrational for the society as a whole to pay the costs of multiple, independent reinvention of waste-reduction methods.

Rolling best-practice rulemaking and the incentives it creates are not limited to circumstances in which the search for incremental efficiency gains leads directly to reductions in known hazards. The method can be used *prospectively* to create incentives for attractively safe products that do not currently exist. In some production methods, hazardous materials or circumstances do not coincide with inefficiency; instead, in these methods, the hazardous materials or circumstances are a necessary and irreducible byproduct or component of an efficient process or product. In these cases, by definition, efficiency gains pursued along the current trajectory of technological development will not substantially reduce the hazard. The use of fluorohydrocarbons in current refrigeration systems or as a propellant, or of gasoline in current automobiles are examples. The only way to eliminate the hazard is to find a substitute for the product or process of which it is a part. It is here that prospective rolling best-practice rules play their most significant role. The traditional method of encouraging such substitution of safer products or processes is by technology-forcing legislation that imposes fines on producers that fail to reduce hazards to a level achievable only by some (unknown) alternate technology by a distant date.<sup>185</sup> These rules touch off a game of chicken: Recalcitrant producers do nothing and encourage others to do the same

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1996) (unpublished manuscript, on file with the *Columbia Law Review*). For a discussion of non-market based alternatives, see Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 *J. Econ. Literature* 132, 158-59 (1995).

184. The Clean Air Act codifies a traditional pollution credit allowance system. See 42 U.S.C. § 7503(c) (1994). For a moderately favorable assessment of this program, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 117-20 (1995).

185. For example, in *Industrial Union Department v. American Petroleum Institute*, the Supreme Court invalidated a decision by the Occupational Safety and Health Administration (OSHA) to replace a ten-part-per-million benzene exposure limit with a one-part-per-million exposure limit because, in the Court's view, OSHA lacked an evidentiary basis for concluding that this level of safety was reasonably necessary. 448 U.S. 607, 630-38 (1980). Although the Court did not directly address the question of whether the technological (in)feasibility of meeting a particular standard should be a basis for adjusting an otherwise appropriate standard, that concern no doubt played a significant role in the Court's reluctance to approve what it deemed an arbitrarily chosen limit. See *id.* at 639-40.

in the hope that their inaction can eventually be used to persuade courts or administrative agencies that the original goals were infeasible. Collusion against the legislative or administrative goal is easy because it is tacit, and because potential innovators will be deterred from developing alternatives for fear that the results will fall short of the requirement. Under a prospective rolling best-practice rule, in contrast, the best alternative solution available by a distant date would (re)set the standard from that time on. Innovators are rewarded for outdoing the competition, and hence encouraged to outdo one another. Only explicit (and therefore detectably illegal) collusion could bind all from developmental activities that would spur the rivalry of the others.

Likewise, rolling best-practice rules can be used *potentially*, to reduce sources of risk in novel or experimental products, even before the precise nature of those sources can be identified. Potential rolling best-practice rules are useful where product life cycles are short with respect to the time needed fully to test and improve the safety of a product under real-world conditions (computers, much software, and complex financial products) or where initial real-world failures would be catastrophic (pharmaceuticals, foodstuffs, and products bound for space or the battlefield). The way to reduce risks under these circumstances is to characterize more and more precisely the sources from which hazards may derive and to reduce and monitor each precisely characterized source more and more effectively. Contaminants are much more likely to be introduced into batches of foodstuffs at some points in processing than at others: when harvested, during transport, when fermenting, etc. Precise accounts of potential hazards and countermeasures—including error-detection systems for maintaining and improving the countermeasures themselves—can then be developed to lower the possibilities of dangerous damage to products of various types.<sup>186</sup> In the production of foodstuffs, these are called HACCPs, for hazard analysis of critical control points;<sup>187</sup> the Federal Drug Administration maintains an analogous set of standard operating procedures with regard to the production of pharmaceuticals.<sup>188</sup> The potential rolling best-practice rule benchmarks these prophylactic measures and establishes them as the initial production standards in the relevant industries. As these standards help producers increase the reliability of both products and processes, efficiency considerations again encourage compliance. Indeed, to the extent that risk reduction is a condition for creating markets in potentially hazardous products as diverse as sophisticated financial derivatives and foodstuffs,

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186. For an insider's ringing endorsement of many elements of the experimentalist regulatory methods in the approval of new drugs, see David A. Kessler, Remarks by the Commissioner of Food and Drugs, 51 Food & Drug L.J. 207, 209–15 (1996) (describing the success of the FDA in self-monitoring and comparative assessments with counterpart agencies worldwide).

187. See 9 C.F.R. pt. 417 (1997).

188. See Kessler, *supra* note 186, at 207.



regulation of this sort amounts to a form of codevelopment between producers, users, and regulators. The decomposition of as-yet undeveloped products and processes enables producers and regulators alike to learn from real-world experience in circumstances in which no experience with the completed product or process yet exists.

3. *Novel Forms of Organization.* — Finally, to update and propagate benchmarks, and the background understanding they suppose, while assessing compliance with them, experimentalist administration introduces novel forms of organization. Experimentalist regulatory agencies recall the design and problem-solving teams of learning-by-monitoring institutions in the way they pool various kinds of expertise in the evaluation of different situations. Recall that in learning by monitoring, collaboration among teams within a firm and between the firm and its suppliers breaks down the distinction between the individual actors' roles.<sup>189</sup> Similarly, from the point of view of the composition of their personnel and their personnel's career paths, the operations of experimentalist agencies blur the distinction between regulatory agency and regulated entity—without obstructing public scrutiny of administrative activity. We call the ensemble of these forms *peer*, *team*, or *participatory* administration to emphasize two points. First, in their organization, agencies will come to utilize work teams in much the same manner that the new firms do, and thus the agencies will be structured as participatory units. Second, and more important, peer, team, or participatory administration refers to the close working relationship between regulator and regulated entity that will facilitate the agency's role as conduit of information. To an important degree, peer administration provides a mechanism by which agencies set rolling best-practice rules. Agency staff, observing (or more properly, participating in the activity of) the regulated entities first-hand, develop a strong sense of emerging processes, and by pooling knowledge of these processes with staff at other locations, agencies can identify emerging *best practices*.

The New Deal pattern of organization—or, rather, the characteristic dilemma of that organization—is useful as a point of contrast. On the one hand, New Deal agencies were meant to remain distinct from the social or economic worlds they regulated or administered; distance and detachment were thought to be requirements if the agency was to exercise its (delegated) lawmaking authority to establish general, enduring, and impartial rules.<sup>190</sup> Hence, agencies needed an extensive, professional, and independent staff, competent to gather information for rulemaking and adjudication. But the same agencies, on the other hand, had to deal directly and continuously with the interests they regulated. Otherwise, no matter how well staffed, they lacked the fine-grained information about emergent possibilities or potential evasions required to ex-

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189. See *supra* text accompanying notes 82–90.

190. See Landis, *supra* note 26, at 9–14.

ercise their (delegated) lawmaking authority in the interest of the particular segment of the public within their jurisdiction. Hence, agencies needed to supplement or even supplant staff work with complex alliances with various interests, aiming to expose what normal research alone could not uncover. The results were continuing struggles of the agencies to be in the worlds they regulated, but not of them, and the concomitant oscillations of their leading officials between magisterial lawgiving and factional politicking. Thus, as an architect of the administrative state and founder of the Securities and Exchange Commission (SEC), James Landis, for example, likened the role of the administrative agency to that of a board of directors for an industry, able to use its fact-finding powers and panoramic perch to reach judgments more balanced and farsighted than those accessible to more partial parties.<sup>191</sup> But as the senior operating official of the SEC, he was always playing off the independent accountants against the corporate treasurers to determine what types of corporate financial information could reasonably be disclosed for purposes of evaluating publicly traded securities.<sup>192</sup>

Experimentalism links benchmarking, rulemaking, and revision so closely with operating experience that rulemakers and operating-world actors work literally side by side—but, to repeat, in plain view of the public—and thus, largely overcome the distinction between the detached staff of honest but imperfectly informed experts and the knowledgeable but devious insiders they regulate. Inspection by peer administrators is a characteristic institution for establishing these connections. Assume that initial regulatory benchmarks have already been fixed with regard to, say, forest-fire prevention or the safety-related operations of nuclear power plants (to pick two examples to which we will return in detail in a moment) by some procedure of extensive consultation. Then the task of the peer inspectors is to determine whether particular operating units are in compliance with the benchmarks, and to grasp the general lessons, if any, regarding obstacles to compliance in cases where they are not, or regarding the need to set more demanding standards, when they are. Such evaluative learning is in effect a kind of higher-order error detection: It aims to discover why the error-detection institutions of a particular unit were either unable to detect and correct the disturbances that obstructed compliance or were so effective that they raised performance above currently established levels.

But of course the initial benchmarks and, more generally, standards for purposes of environmental or consumer protection, occupational health and safety, or the coordination of complexly interconnected products with aspects of public infrastructure (as in telecommunications) can all be set by similar means. Thus, whereas practitioners may currently testify at hearings or serve on ad hoc committees devoted to writing defin-

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191. See *id.* at 10–13.

192. See Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* 153–209 (1984).

itive rules, in peer administration they would serve on the standing bodies that create the framework for rules that can be periodically updated as practice warrants, and help establish the forms of *participatory* review suited to keeping the rules up to date in various settings. Peer participation on the problem-solving model could also be used occasionally to identify areas where the administration might change its own structures to facilitate experimentation: for example, by creating a service to help jurisdictions that lack the experience to formulate plans for experimental projects to do so or to aid others threatened by deadlock to advance. Again, these services would draw on the experiences of respected practitioners. Selection would favor those who had learned to break deadlocks not in some arbiters' way of splitting differences (which entrenches fundamental assumptions and thus, in time, obstructs wide-reaching change), but rather by showing the parties how, in pursuing new projects that sidestep or clarify their differences, they might come to a new understanding of those projects. Selection would also favor those who became adept at bootstrapping planning, in which each project increases the jurisdiction's capacity to formulate a comprehensive and better directed successor. By such means, peer administration could become at once the frame of national experimentalism and, together with a new style of electoral politics, an instrument for connecting that frame to the local activity it regulates.

### C. *Antecedents and Lessons*

Just as the institutions of learning by monitoring in the private sector have advantages which lead to their diffusion, so principles of democratic experimentalism in administration are often sufficiently attractive to both public and private actors to be adopted piecemeal in the public sector. That agencies designed on conventional principles have begun to reorganize themselves along the lines described above in recent years<sup>193</sup> argues for the robustness of peer administration as a general response to problems of regulation under conditions of volatility and diversity. There are, in addition, suggestive historical cases where measures of peer administration were adopted *avant la lettre* by American agencies operating in environments which were anomalous for their day,<sup>194</sup> but which approximated the situation administration now faces.

We begin with negative lessons by considering a classic failure, which upon closer inspection, reveals itself to have been a near success. This anticipatory history helps specify key preconditions for experimentalism to thrive—most critically, some mechanism for forestalling litigation until after an experimental regulatory regime has had the opportunity to demonstrate its worthiness or lack thereof. We draw these lessons chiefly from the furor over regulatory attempts to require air bags on

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193. See *supra* Part IV.

194. See *infra* Parts V.C.1-4.

automobiles during the last quarter century. We then reach back to a still earlier antecedent in the Forest Service and forward to contemporary success stories concerning nuclear power plant safety and environmental regulation to show how different regulatory regimes, beginning from nearly contrary starting points, are converging on the same experimentalist methods.

1. *National Highway Traffic Safety Administration*. — The National Highway Traffic Safety Administration (NHTSA, or the Agency) provides both an illustration of administrative experimentalism that might have been, and a cautionary tale about the capacity of current practice and doctrine to stifle regulatory innovation in its infancy. NHTSA was created in 1966 explicitly to bring science and technology to bear on the problem of reducing highway slaughter.<sup>195</sup> But in the course of fifteen years, NHTSA's decisionmaking became so unwieldy that in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, it was chastised by the Supreme Court for failing to give due consideration to manifestly promising safety devices.<sup>196</sup> The authoritative study of NHTSA by Mashaw and Harfst, *The Struggle for Auto Safety*, recounts the Agency's decline from putative avant-garde to laggard.<sup>197</sup> From this history, Mashaw and Harfst draw a large conclusion. As they understand it, American legal culture is preoccupied with individual rights and permanent contests for authority between the President and Congress on the one side and the federal and State governments on the other.<sup>198</sup> Contrasting the Agency's promise with its performance, their study presents the history of NHTSA as an object lesson in the constraining influence of that legal culture on *all* forms of regulation.<sup>199</sup>

Yet beneath, or, rather, entwined with, the story of an agency that belied its own efforts to seek practical truth, the authoritative account also contains a counternarrative of an agency that might have adopted certain experimentalist methods but for the accidents of political happenstance; of an agency, moreover, that arguably *did* adopt an oblique form of experimentalism in response to the *State Farm* decision; and, indeed, of an agency, and of a whole legal regime more generally, that could by modest reform encourage experimentalism quite directly. Juxtaposing the actual outcome with the counterfactual alternative thus suggests how easily we might have stumbled upon a variant of administrative experimentalism without intending to and how we might achieve one if we did.

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195. See National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 103-272, § 7(b), 108 Stat. 1379, 1379-1401 (codified as amended at 15 U.S.C. § 1381 (1994)).

196. 463 U.S. 29, 46-57 (1983). Below we address the implications of *State Farm* and related cases for the role of courts in a system of democratic experimentalism. See *infra* Parts V.D.1-2.

197. Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety* (1990).

198. See *id.* at 22-24, 111-13.

199. See *id.* at 20-24 (defining legal culture); *id.* at 224-31 (discussing implications of cultural constraints on agency performance).

First the balance of failure. NHTSA was the first of the agencies such as the Occupational Health and Safety Administration, the Environmental Protection Agency, and the Consumer Product Safety Commission, formed at the high noon of confidence in centralized government, to complete and perfect New Deal institutions by fusing democracy with science in a new way.<sup>200</sup> Operating under vague and general statutes, and formulating rules incrementally, by adjudicating individual cases through collegial decisionmaking independent of executive direction, the previously established agencies had often seemed impervious to the very interests they were meant to protect and all too susceptible to those they were meant to domesticate.<sup>201</sup> With more specific mandates, decisionmaking processes aimed not at adjudication but rather at making general rules under conditions open to the participation of potential beneficiaries, and directed by more powerful, hence more acceptable administrators, the new agencies were intended to reverse this relation.<sup>202</sup>

This general reorientation went hand in hand with the reconceptualization of automobile accidents from an epidemiological standpoint.<sup>203</sup> In the traditional view, accidents and injuries were coincident: Drivers and passengers were injured or killed when cars collided with each other or with fixed objects. For the epidemiologist, the human host is only harmed upon contact with the agent of rapid energy transference in the environment of the collapsing car.<sup>204</sup> Hence, anything that altered the environment to prevent the agent from contacting the host prevented the accidental harm. This, in turn, suggested that to improve highway safety the agency should focus less on preventing car crashes—which required laborious and unreliable efforts to change driver behavior—and more on reducing the hazards of the automotive environment by using regulation to encourage use of passive safety devices (self-securing seat belts or air bags) or active ones (manually secured seat belts) to protect car occupants from the effects of the “second,” internal collision.<sup>205</sup> As seat belts were widely used in the late 1960s, and air bags, under development since

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200. See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 2(b)(3), 84 Stat. 1590, 1590 (codified at 29 U.S.C. § 651(b)(3) (1994)) (“authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce”). From 1970 to 1990, the Clean Air Act directed the Environmental Protection Agency to regulate statutorily specified pollutants on a pollutant-by-pollutant basis. See 42 U.S.C. § 7412(b)(1)(A)–(B) (1988), amended by 42 U.S.C. § 7412(b)–(f) (1994). For the authorization and purpose of the Consumer Product Safety Commission, see Pub. L. No. 92-173, § 2, 86 Stat. 1207, 1207 (1972) (codified at 15 U.S.C. § 2051 (1994)).

201. For early recognition of the problem of agency capture, see Marver H. Bernstein, *Regulating Business by Independent Commission* 74–95, 169–71 (1955); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *Yale L.J.* 467, 481–505 (1952) (documenting railroad capture of the ICC).

202. See Mashaw & Harfst, *supra* note 197, at 4–5.

203. See *id.* at 3.

204. See *id.*

205. See *id.* at 2–4, 65–67.

the early 1950s, were on the verge of broad deployment,<sup>206</sup> there was nothing technologically extravagant about the approach. Nor was there anything rash in the agency's decision to promote these changes wherever possible by moving gradually from design standards based on equipment in current use to performance standards that would eventually specify the characteristics of whole automotive subsystems.<sup>207</sup>

Two closely related problems thwarted the agency's projects and turned many of its efforts down the path of self-parody. First, absent any evidence as to whether firms could comply with agency standards if they made reasonable efforts to do so, courts simply did not know how to evaluate the claims of those manufacturers who asserted that the standards as written were unreasonably burdensome. The resulting ambiguities were judicial accidents waiting to happen, and several did. To take only the best known example, in *Chrysler Corp. v. Department of Transportation*, the United States Court of Appeals for the Sixth Circuit acknowledged that NHTSA was authorized by statute to induce firms to introduce new technology, but found that Standard 208, establishing the performance criteria for passive restraints eventually to be required on new automobiles, was defective because of three ambiguities in the specifications of the dummy with which the safety device was to be tested.<sup>208</sup> The court found that these ambiguities violated the statutory requirement that agency standards be "objective," in that manufacturers using different but equally compliant test dummies might market passive safety devices with different performance characteristics.<sup>209</sup> Eventually some might be unjustly penalized for these differences.<sup>210</sup> In fact, the specifications for the dummy had been elaborated by a committee composed of industry engineers; more important, as the agency observed, no manufacturer would be penalized for choosing one interpretation of the specification over another.<sup>211</sup> But since the court believed otherwise, and since it erroneously believed that manufacturers develop equipment only after they have perfected the corresponding test devices, it ordered that implementation of Standard 208 be delayed until the ambiguities were resolved and manufacturers could adjust to corrected specifications.<sup>212</sup> This and similar decisions that overturned standards just because they were rigorous enough to allow precise identification of ambiguities<sup>213</sup> devastated

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206. See *id.* at 85.

207. See *id.* at 74-77.

208. See 472 F.2d 659, 671-73 (6th Cir. 1972).

209. See *id.* at 675-78.

210. See *id.*

211. See Mashaw & Harfst, *supra* note 197, at 90.

212. See *id.* at 91.

213. See, e.g., *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 644-45 (9th Cir. 1978) (invalidating index of road slickness because court found unsatisfactory an agency proposal for compensatory adjustments in test procedures to account for variations over time of given road surfaces); see also Mashaw & Harfst, *supra* note 197, at 100-01 (discussing the *Paccar* case).

NHTSA's ability to promulgate performance standards of any kind, emboldening reluctant manufacturers to try intransigence under all possible legal pretexts before compliance, while intimidating the rulemakers through the prospect of endless challenges.<sup>214</sup>

The second problem that thwarted NHTSA's efforts was that it found no way to assess reliably whether the driving public would welcome its regulatory interventions as an advance in public safety, disregard them as inconsequential nuisances, or rebel against them as violations of an elemental freedom of movement.<sup>215</sup> Public reaction was for the agency as unpredictable as judicial reaction, and this second unpredictability, symbolized in the disastrous episode of the interlock rule, was as intimidating as the first.<sup>216</sup> In response to complex technicalities related to the *Chrysler* decision, and in revision of its own earlier determinations, NHTSA in effect required that 1974 model-year cars be equipped with an interlock device that disabled the ignition unless the seatbelts of occupied seats were engaged.<sup>217</sup> The public revolted. There were terrifying stories of women unable to flee rapists and amusing ones of parking attendants driven mad by incessant buckling.<sup>218</sup> Senators rose on the floor to tell of constituents strapping turkeys and dachshunds snugly into the front passenger seat.<sup>219</sup> Congress then added injury to insult by amending the Agency's enabling statute in 1974.<sup>220</sup> Instead of insulating NHTSA from judicial review, it subjected any future passive-restraint standard to a legislative veto, and prohibited the Agency outright from requiring any interlock device.<sup>221</sup>

Given these obstacles, the Agency sought politically and judicially acceptable alternatives to rulemaking as a way of demonstrating vitality if not efficacy, and temporized issuing those standards—208 above all—that it could not abandon without publicly disavowing its original hopes.<sup>222</sup> The search for alternatives led quickly to a massive program for forcing manufacturers to recall and repair cars found to have dangerously defective parts.<sup>223</sup> Politically, the campaign was welcome because as car prices rose during the inflation of the 1970s, consumers became less and less tolerant of defects, and let their representatives know it;<sup>224</sup> judicially, it proved unexpectedly acceptable because courts treated the Agency in this regard with the leniency accorded consumer plaintiffs in

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214. See Mashaw & Harfst, *supra* note 197, at 92–103.

215. See *id.* at 38, 52, 215–16.

216. See *id.* at 134–35.

217. See *id.* at 131–33.

218. See *id.* at 139.

219. See *id.* at 139–40.

220. See Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1470, 1482–84 (repealed 1994).

221. See Mashaw & Harfst, *supra* note 197, at 109.

222. See *id.* at 185.

223. See *id.* at 189.

224. See *id.* at 113–15.

product liability cases rather than the stringency applied to it as a defendant in administrative law matters.<sup>225</sup> Taking account of the response rate to recall programs, the costs of accidents occasioned by the trip to or from the local recall center, and the risks of introducing new defects while repairing the known one, it is likely that the diversion produced on balance more harm than good; but there is no doubt that it was successful, for a time, in diverting attention from the near breakdown in rulemaking.<sup>226</sup>

Consistent with this retreat from rulemaking, NHTSA eventually concluded that detachable automatic seat belts would not result in a significant reduction in highway deaths or injuries, and accordingly rescinded Standard 208 in October 1981.<sup>227</sup> The decision to abandon the standard was in part a reflex response to the advent of the Reagan Presidency and the era of deregulation it promised, but, perhaps in equal measure, also the product of NHTSA's despair at finding a solution that was both innocuous and minimally effective.<sup>228</sup> Given the constraints, the logic behind the rescission order had a compelling aspect: If the public, out of concern for freedom of movement and fear of entrapment, would at most accept passive devices that could be detached by a release button in the manner of the quintessentially active device, the manual seat belt, why require passive restraints in the first place?

But the Supreme Court reasoned differently. In *State Farm*, the Court found NHTSA's rescission of Standard 208 arbitrary and capricious because the Agency had failed to give adequate consideration to requiring air bags or nondetachable automatic seat belts as an alternative. As willing to punish the Agency for the ambiguities of inaction as the lower courts had been to penalize the ambiguities of rulemaking activity, the Supreme Court criticized the decision for assuming, on no evidence, that the driving public would defeat passive devices just because it was technically possible to do so, and wondered why air bags, which were unintrusive to the point of invisibility, had suddenly disappeared from the menu of possible regulatory solutions.<sup>229</sup> The controversy was eventually mooted when, responding to consumer demand, automobile manufacturers equipped new vehicles with air bags as standard equipment. Only then, in an ironic if not pathetic gesture, Congress responded by including a provision in the Intermodal Surface Transportation Efficiency Act of 1991 directing NHTSA to amend Standard 208 to require air bags on

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225. See *id.* at 151–56.

226. See *id.* at 167–71.

227. See Federal Motor Vehicles Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 53,419 (1981) (codified at 49 C.F.R. pt. 571.208); Mashaw & Harfst, *supra* note 197, at 209.

228. See Mashaw & Harfst, *supra* note 197, at 209.

229. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983).



all new vehicles.<sup>230</sup> The new requirement became fully effective for passenger vehicles on September 1, 1997—just after NHTSA promulgated a final rule authorizing the depowering of air bags to prevent injuries to children and small-statured adults.<sup>231</sup>

Now consider an alternative, experimentalist outcome that is much closer, it turns out, to actuality than this account of nearly insurmountable obstacles would make it appear. The regulatory result would very likely have been different had just one car manufacturer been willing to build a fleet of vehicles equipped with air bags and had NHTSA been willing to defer establishing standards until the fleet was tested on the road. For the experience of building and using this fleet would have put to rest questions about the acceptability of the device to the driving public while addressing judicial concerns about ambiguity. If consumers were willing to drive the cars it was unlikely that they would rise in protest against regulations making air bags standard equipment; if manufacturers sincerely feared that they would be penalized for misinterpreting ambiguous performance standards, they could adopt the solution of the pioneer.

In fact, this experiment was almost run. The then-Secretary of Transportation, William Coleman, proposed the idea of a cooperative demonstration project in 1975, and General Motors, long a proponent of air bags, was willing to participate.<sup>232</sup> Indeed, General Motors had already begun in the preceding years to use its problem-solving capacities to provide working solutions to regulatory problems. As the only car company ready to produce cars equipped with air bags at the time of the *Chrysler* decision, it helped the Agency develop dummy standards nine months after the Court demanded clarification.<sup>233</sup> In the end, only the accidents of national politics prevented construction of the demonstration fleet. Coleman left office when President Ford lost the election of 1976 to President Carter; under its new Secretary Brock Adams, the Department of Transportation simply saw no need for experimentation, arguing with almost cynical consistency both that consumers would surely take no notice of seat belts,<sup>234</sup> and that demonstration projects were a “weak” regulatory strategy.<sup>235</sup>

But had this test been conducted it seems likely that the Court in *State Farm* would not have felt obligated to imagine all the ways, however improbable, that the development of a novel technology might prove infeasible or unjust, and the apparent limits of American legal culture

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230. See Pub. L. No. 102-240, § 2508(a)(2), 105 Stat. 1914, 2085 (1991) (codified at 49 U.S.C. § 30127(c)(1) (1994)).

231. See Federal Motor Vehicle Safety Standards, 62 Fed. Reg. 12,960 (1997) (to be codified at 49 C.F.R. pt. 571).

232. See Mashaw & Harfst, *supra* note 197, at 206, 250–51.

233. See *id.* at 92.

234. See *id.* at 206.

235. See *id.* at 251.

would have been extended without having been traversed. Mashaw and Harfst say as much: Besides advancing Standard 208, they write, “[a] similar demonstration approach might well have saved Standard 121, the truck antilock braking standard, and yet another might have enlisted the support of the tire industry for tire performance standards.”<sup>236</sup>

Observe as well how easy it would have been to pass from a series of demonstration projects that almost were, to explicit modification of the legal regime along the lines suggested above. Generalizing the experience acquired through demonstrations, all organized by utterly conventional agreement under current law, NHTSA could have developed rolling best-practice standards in tandem with pilot projects, encouraging competitors to pool standard-relevant knowledge (as General Motors did in the case of the dummy specifications) along the way. The Agency, and others following its example, would have thus created a *de facto* regime in which pre-enforcement challenges to the feasibility of rules and standards would be pointless because rules and standards would not exist, let alone give rise to enforcement actions, until their feasibility was established. Should further clarification prove necessary, it would be a short step from this regime to a statute making forbearance from pre-enforcement litigation the rule in experimentalist litigation, thus insuring that courts decide administrative law cases against a detailed backdrop of fact.

In one regard such a shift would restore, ironically enough, the state of affairs that had obtained in administrative law in the period before *Chrysler* and related decisions—when agencies imposed order by applying rules case by case, and courts, when invoked, reviewed the agency decisions in light of the facts.<sup>237</sup> The difference is that in the experimentalist regime, courts would be reviewing decisions and factual scenarios produced by the articulation of performance standards, potential and prospective, inconceivable in the epoch before *Chrysler*. If this is the path we take, the confusions of the last decades will come to seem more a detour than a necessity; and doctrinalists of the future will wonder how, for a time, courts could have inverted the very idea of thought experiment from a technique of imagining a new possibility from an imaginary vantage point to a method of finding legal obstacles—some restricting agency action, some obligating it—by imagining all manner of possibilities. As Paul Verkuil argued in the mid-1970s, and as Mashaw continues to argue persuasively today, elimination of pre-enforcement litigation would go a long way towards reducing the arbitrariness of judicial review.<sup>238</sup> Moreover, as Mashaw presents no deeply entrenched obstacles in American legal culture to doing so, it is hard to see why that culture is, as argued in *The Struggle for Auto Safety*, itself an obstacle to significant

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236. *Id.*

237. See *id.* at 162.

238. See Mashaw, *supra* note 2, at 164–80; Paul Verkuil, *Judicial Review of Informal Rulemaking*, 60 *Va. L. Rev.* 185, 205 (1974).

reform.<sup>239</sup> In short, the counternarrative may, in the long run, prove more important than the farce that obscures it. Before turning to those reforms of the courts, we consider three more examples of past and present experimentalist administration.

2. *Antecedents in the Forest Service.* — The Forest Service of the United States Department of Agriculture (the Service) attracted public and scholarly attention in the late 1950s for its ability to adjust complex policy goals to extraordinarily diverse local settings, largely through controlling, and learning from, the exercise of discretion by its lowest level operating agents, the forest rangers. As this was the period in which the view of bounded-rationality institutions<sup>240</sup> was formulated, academic efforts to grasp the success of the Service were at pains to portray its organization as a centrally directed hierarchy of this type. Indeed, the leading study of the subject, Herbert Kaufman's *The Forest Ranger*, draws heavily on the work of Herbert Simon, a progenitor of the bounded-rationality idea.<sup>241</sup> Here, using mainly the evidence reported in Kaufman's study, we show that this success, and especially the reciprocal reshaping of general rules and local practice that made it possible, rested instead on methods that foreshadow peer administration introduced into the Service at its founding. Thus, this brief example does double duty. It buttresses the claim that experimentalism is a general system of problem solving under conditions of diversity and complexity by showing that where problems are addressed with notable success under such circumstances, the solution is by this and not other means. It also points to the possibility that American public administration contains an organizational tradition, rooted in a variant of Progressivism, that might serve as one operational precedent for an extensive system of experimentalist administration. We conclude our discussion of the Forest Service by briefly recounting the problems that the Service has encountered in the decades since Kaufman completed his account.

The modern Forest Service was established in 1905, when responsibility for protecting and managing the country's national forests was transferred from the Department of the Interior to the Department of Agriculture, which until then had been limited to gathering historical, statistical, and technical information concerning forestry and forest products.<sup>242</sup> The Service was charged from its inception with pursuing various, often conflicting goals in disparate settings, and the complexity of the tasks and diversity of the settings increased rapidly in the following years.<sup>243</sup> By the late 1950s, the Service had jurisdiction over 151 million acres scattered through forty-two states and Puerto Rico, including re-

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239. See generally Mashaw & Harfst, *supra* note 197.

240. See *supra* Part II.

241. See Herbert Kaufman, *The Forest Ranger: A Study in Administrative Behavior*, at xiv (1960).

242. See *id.* at 26–27.

243. See *id.* at 29–33.

mote regions of the Rockies, relatively developed lands on the East Coast, the coastal mountains of Alaska, and the tropical jungles of Puerto Rico.<sup>244</sup> Today, national forest lands total 192 million acres in all regions of the country (although concentrated in the Western States and Alaska), or nearly nine percent of the United States landmass.<sup>245</sup> Within these areas, the Service manages timber logging and sales, reforestation, fire control, grazing, the use of watersheds and natural habitats, and recreational activities.<sup>246</sup> The balance of these activities varies widely from region to region, and even where it is approximately the same, differences in soil composition, vegetation, climate, and accessibility require that similar goals be pursued by different means.<sup>247</sup> Once arrived at, local and national policies must be frequently revised to take account of, among many other things, changes in product markets that make, say, lumbering more attractive than grazing, or developments in labor markets that change the attractiveness of a career in the Forest Service itself to potential recruits with differing levels of education and professional ambition.<sup>248</sup>

From the beginning, day-to-day management of local activities was delegated to Forest or District Rangers, each responsible for a single district within a national forest, and reporting to a forest supervisor (who in turn reported to a regional forester with jurisdiction for several national forests).<sup>249</sup> Prior experience under the Department of the Interior had shown that efforts to control the use of public lands directly from Washington resulted in interminable delays in granting permits and other decisions, and obstructed conservation.<sup>250</sup> The result was a founding and enduring principle of delegation subject to review that was clearly announced in a letter from the Secretary of Agriculture to the Chief of the Forest Service in 1905: "In the management of each reserve [now national forest] local questions will be decided upon local grounds . . . . General principles . . . can be successfully applied only when the administration of each reserve is left largely in the hands of local officers, under the eye of thoroughly trained and competent supervisors."<sup>251</sup>

From the vantage point of the organizational understanding of the 1950s, the puzzle was how the necessary exercise of local discretion could be sufficiently controlled to ensure conformity to the central direction. The answer, as provided in Kaufman's account, was comprehensive written regulation, policed and updated by a system of inspections and clear-

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244. See *id.* at 38.

245. See U.S. GAO, GAO/RCED-97-71, Report to Congressional Requesters, Forest Service Decision-Making: A Framework for Improving Performance 4 (1997) [hereinafter Forest Service Decision-Making].

246. See *id.* at 20-23.

247. See *id.* at 25.

248. See Kaufman, *supra* note 241, at 208.

249. See *id.* at 45-47.

250. See Gifford Pinchot, *Breaking New Ground* 161-70 (Island Press 1987) (1947).

251. Kaufman, *supra* note 241, at 84.

ances, and complemented by personnel policies that encouraged compliance by building *esprit de corps*.<sup>252</sup> In the late 1950s, the regulations were contained in a seven-volume *Forest Service Manual*, four volumes of which were issued to District Rangers.<sup>253</sup> Continually revised, and supplemented by insertions at the regional and national-forest levels, as well as by technical manuals prepared by the Service staff in Washington, these volumes established procedures and standard responses for each class of problem the Ranger might encounter.<sup>254</sup> In addition to uniform, Service-wide guidelines, specific local plans for implementing policies for fire prevention and timber management were required of all districts. On their own initiative, other districts could implement plans for recreation, grazing, and other major Service objectives.<sup>255</sup> Such plans included quantitative performance goals which set target levels for numerous areas, including timber sales, fire control, wildlife preservation, and the number of visitors to the forest, among others.<sup>256</sup>

Conformity with the rules and plans was secured, to begin with, by the requirement that all decisions involving the redistribution of anything more than trivial amounts of resources be cleared in advance by superiors (and in turn their superiors).<sup>257</sup> Deviations were detected after the fact by regular and extensive inspections by superiors of the work done by their subordinates.<sup>258</sup> For purposes of the functional inspections looking into all aspects of forest management, District Rangers were required to maintain diaries recording their activities by thirty-minute intervals, as well as detailed records of all expenditures and income, so that results could be compared to the efforts and resources that produced them.<sup>259</sup> Homogeneity of interpretation was underpinned by a homogeneity of outlook secured by filling entry-level professional positions with persons sharing a common background in forestry studies, rotating recent entrants through various regions (to build loyalty to the Service rather than particular locales), and filling supervisory jobs through internal promotion.<sup>260</sup> That, at any rate, is Kaufman's account, seen through the lens of hierarchical organizational principles.

But the statements of officials and District Rangers interviewed by Kaufman, together with administrative rules and practices under which they operated, suggest an interpretation of much of this directive machinery as an instrument of peer administration. "Again and again," Kaufman writes, "the researcher is told by officers in the field that they do the bulk

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252. See *id.* at 91-107, 194-95.

253. See *id.* at 95.

254. See *id.* at 95-102.

255. See *id.* at 99. Note, however, that only fire and timber plans were required of each district. Some districts had plans for other policies mentioned.

256. See *id.* at 99-101, 203-04.

257. See *id.* at 102-03.

258. See *id.* at 137-41.

259. See *id.* at 130-34, 140.

260. See *id.* at 155-58, 161-200.

of the work even though others sign the papers, and their superiors freely acknowledge this dependency."<sup>261</sup> It was the District Rangers who, for example, recommended the issuance or denial of permits, established the feasibility of land transactions, and furnished the plans on which production quotas and targets were based.<sup>262</sup> Headquarters relied so openly on the judgment of local officials that new procedures and equipment were only introduced after field testing in pilot ranger districts, and in consultation with those who participated in the experiments.<sup>263</sup> In sum, "leadership decisions about what the Forest Service can and should do rest in the last analysis on what the field men tell the leaders."<sup>264</sup>

This dependence on local information in turn calls attention to a lesser role for the *Manual* than it plays in Kaufman's account and transforms the role of inspections and diaries. Thus, because field officers objected to its unwieldiness, the *Manual* remained incomplete. Indeed, plans to add three additional volumes were abandoned in the late 1950s in favor of a project to reduce and simplify the existing ones.<sup>265</sup> Inspections, accordingly, appear to have been less occasions for verifying compliance with a master plan than a method of pooling and evaluating experience from the whole Service. Because of the policy of internal promotion, most inspectors had been District Rangers,<sup>266</sup> and this experience, combined with the activity of inspection itself, put them in a good position to identify and propagate good practices and criticize deficient ones; and as a rule the emphasis was more on the former than the latter. "[T]he stress in inspections is on training," Kaufman writes, "and the inspectors may be said to constitute an itinerant school . . ."<sup>267</sup> The highest officials of the Service, moreover, were quite explicit in distinguishing investigation, defined as the search for "something that's dishonest or otherwise wrong," from inspection, whose purpose was "to see how together we can do a better job."<sup>268</sup> Given this distinction, it is unsurprising that field officials, "rather than fearing inspection, tend[ed] to welcome the opportunities it afford[ed] them to keep abreast of developments in

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261. Id. at 192.

262. See id.

263. See id. at 189.

264. Id. at 192.

It would be an exaggeration to say that the Rangers are consulted about *every* decision affecting the management of their districts, but there can be no question that consultation on many matters of concern to them is common enough to lend credibility to the impression that the Rangers participate actively in the formation of administrative policy for national forest administration.

Id. at 189.

265. See id. at 95.

266. See id. at 144-45.

267. Id. at 216.

268. Id. at 142-43 n.7 (quoting Letter from the Chief of the Service to the Regional Forester of Region 2 (Feb. 21, 1955)). A regional regulation defined the purposes of inspection as 90% training, 5% fact-finding, and 5% reporting and recording. See id.

the organization . . . and to give their own ideas to their superiors at first hand."<sup>269</sup>

In a setting where inspection was a rudimentary form of information pooling, activity diaries documented *de facto* organizational routines and allowed comparative evaluation of their effectiveness in the context of local circumstance.<sup>270</sup> In other words, defects in reporting often revealed defects in operation. Thus, the sharpest criticism was reserved for District Rangers whose confused or incomplete procedures, as reported in their own logs, made risky situations more dangerous still, whatever the actual outcome,<sup>271</sup> and conversely, commendations were directed to those who planned what they did and did what they planned.<sup>272</sup>

Such benchmarking was further facilitated by the Forest Service policy of transferring Rangers from one district to another every few years.<sup>273</sup> This policy facilitated error detection as the new Ranger might see mistakes that the previous Ranger, entrenched in habit, had failed to notice. This practice also allowed the Service to benchmark the performance of each Ranger against the Ranger previously responsible for that district. Furthermore, the exposure of each Ranger to a variety of local conditions built a base of diverse experiences which could be called upon when responding to new or fluctuating conditions.

In sum, despite Kaufman's disposition to understand the Forest Service according to the paradigm of a large-scale hierarchical organization, the facts he discloses tell a different story. The Service discovered that it could best coordinate national policies with local circumstances by a decentralized experimentalist system of error detection through information pooling and benchmarking.

Yet, if the early experience of the Forest Service is an antecedent of experimentalist public administration, its more recent experience could be read to suggest limits of experimentalism, in so far as experimentalism is inspired by the Progressive experience. Since its inception, the Service has been charged with managing its land "for six renewable surface uses—outdoor recreation, rangeland, timber, watersheds and water flows, wilderness, and wildlife and fish."<sup>274</sup> The potential for conflict among these uses is obvious, and that conflict has been realized in recent decades: Timber production on Forest Service land has increased dramati-

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269. *Id.* at 145.

270. See *id.* at 130–34.

271. "It is . . . difficult," one General Integrating Inspector admonished a District Ranger, "to tell from diaries and other records who is Fire Boss on individual fires. I wonder if the same difficulty is present among your men actually on fires?" *Id.* at 145.

272. See, e.g., *id.* at 148 ("W— is very interested in work planning and has done a good job of making this style of planning into a useful tool to help him administer the district. The monthly plans were followed reasonably well and accomplishments are satisfactory.").

273. See *id.* at 176–83.

274. Forest Service Decision-Making, *supra* note 245, at 4.

cally.<sup>275</sup> Meanwhile, other developments have stressed competing uses. Most notably, the enactment of environmental protection statutes such as the National Environmental Policy Act,<sup>276</sup> the Endangered Species Act,<sup>277</sup> the Clean Air Act,<sup>278</sup> the Clean Water Act,<sup>279</sup> and the Wilderness Act,<sup>280</sup> placed higher priorities on the nontimber uses of Forest Service land. Recreational use has also increased dramatically in just the last decade (although timber production has experienced a sharp decline in that same period, partly due to court orders based on environmental protection statutes).<sup>281</sup> In principle, the Forest Service's historical commitment to decentralized decisionmaking should have positioned it well to respond to the new conflicts—for its own and other agencies' experience demonstrate that local flexibility plays a key role in accommodating conflicting demands by uncovering new possibilities. But in practice the new priorities were less amenable to such solutions for a number of reasons.

First, Congress's continued insistence on emphasizing timber production often crowds out other uses.<sup>282</sup> Second, the underlying concerns of environmental protection legislation are generally best managed by focusing on ecosystems as the relevant geographic unit.<sup>283</sup> Yet, national forests under Forest Service management typically constitute fragments of larger ecosystems that are divided among private landowners and other federal agencies<sup>284</sup>—typically the National Park Service, the Bureau of Land Management, and the Fish and Wildlife Service.<sup>285</sup> The Forest Service has experienced severe difficulties coordinating its activities with other agencies, partly because of failure to consult from the outset of projects,<sup>286</sup> and partly because the various agencies collect data in non-compatible formats and have not yet developed the means for meaningful pooling of information. Finally, the sheer procedural burden of complying with (or in some cases failing to comply with) Congress's often

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275. See Paul Roberts, *The Federal Chain-Saw Massacre: Clinton's Forest Service and Clear-Cut Corruption*, Harper's, June 1997, at 37, 41.

276. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1994)).

277. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended in scattered sections of 16 U.S.C.).

278. Pub. L. No. 84-159, ch. 360, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)).

279. Pub. L. No. 80-845, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

280. Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-1136 (1994)).

281. See Letter from Mike Dombeck, Forest Service Chief, to General Accounting Office (Apr. 21, 1997), in *Forest Service Decision-Making*, supra note 245, at 130.

282. See *Forest Service Decision-Making*, supra note 245, at 64.

283. See Bradley Karkkainen, *Biodiversity and Land*, 83 *Cornell L. Rev.* 1, 43 & n.235, 76 (1997).

284. See *Forest Service Decision-Making*, supra note 245, at 75-76.

285. See *id.* at 23.

286. See *id.* at 84-87.



contradictory mandates exacts a heavy toll on the Forest Service: “[C]onducting environmental analyses and preparing environmental documents consumes about 18 percent of the funds available to manage the national forests and approximately 30 percent of the agency’s field resources.”<sup>287</sup> The net effect of all this confusion has been to dissipate the efficiency and creativity gains that decentralization promises. Although the Forest Service remains highly decentralized,<sup>288</sup> it has, of late, exhibited signs of paralysis more typically associated with rigid centralized bureaucracies. A recent General Accounting Office study concludes “that the Forest Service’s decision-making process is clearly broken and in need of repair.”<sup>289</sup> More ominously, a cover story in the June 1997 *Harper’s* portrays the Forest Service as the corrupt servant of a timber industry that lobbies Congress to provide large subsidies for logging in Forest Service lands, with expedients such as fire-salvage and disease-control used to justify clearcutting in forests that would otherwise be protected by environmental laws.<sup>290</sup>

These developments might be read as an inevitable consequence of Progressivism’s faith that scientific management will produce a single, best solution, when in fact conflicting goals will be pursued by conflicting interest groups.<sup>291</sup> Whatever the merits of this critique as a general matter, however, it hardly applies to the particular case. In his administration of national lands, Pinchot pursued an approach nearly the opposite of this portrayal of Progressivism. Recognizing that conflicting goals and changing knowledge would render once-and-for-all rules ineffective, he sought a corrigible system: Pinchot favored public ownership of lands, short-term leases rather than long-term leases or outright sales of resource-rich property, an obligation by leaseholders to exploit resources immediately as a means of preventing speculative occupation, periodically adjustable fees, and a ban on forms of use, such as overgrazing, that would lead to irreparable harm to the environment.<sup>292</sup> Moreover, anticipating the dangers of overlapping administrative authority, Pinchot advocated integration of all public land questions under the supervision of a single federal department.<sup>293</sup> Thus, the current crisis in public land management seems more nearly a consequence of disregard for Pinchot’s

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287. *Id.* at 28.

288. *See id.* at 20.

289. *Id.* at 12.

290. *See Roberts, supra note 275, at 38.* The G.A.O. confirms the emphasis on timber use. *See Forest Service Decision-Making, supra note 245, at 53–56, 64.*

291. *See James A. Morone, The Democratic Wish: Popular Participation and the Limits of American Government 115–23 (rev. ed. 1998).*

292. *See Samuel P. Hays, Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890–1920, at 66–90 (1959).*

293. *See id.* at 72.

principles of corrigibility<sup>294</sup> than an indictment of other-worldly technocratic optimism.

3. *Nuclear Power Plant Safety*. — We turn now to a more recent and more nearly complete example of experimentalist administration. Recently, there has emerged a new system of benchmarking regulation of the nuclear power industry housed in the Institute of Nuclear Power Operations (INPO, or the Institute), founded and financed by the utilities themselves in 1979—nine months after the Three Mile Island disaster—to reduce the potential for catastrophic accidents in the industry.<sup>295</sup> A memorandum signed in October 1988 between INPO and the Nuclear Regulatory Commission (NRC) creates the framework for a “continuing and cooperative relationship” between the two “in the exchange of experience, information, and data related to the safety of nuclear power plants.”<sup>296</sup> Under this agreement, the NRC, in effect, retains the formal authority to promulgate regulations, but either adopts the standards in training, maintenance, and other matters elaborated by INPO, or simply acknowledges best practices defined by the Institute without further formalizing them.<sup>297</sup> There are no civil or criminal penalties for noncompliance with INPO standards,<sup>298</sup> but INPO can suspend the membership of uncooperative utilities and has found means, as we will see, to ensure that the operating goals it sets are carefully respected.<sup>299</sup>

In practice, INPO’s chief activities consist of pooling the industry’s operating experience, establishing benchmarks that distill the lessons it contains, and then evaluating individual power plants according to their ability to meet the relevant benchmarks.<sup>300</sup> Operating information is gathered initially through the Significant Event Evaluation-Information Network, or SEE-IN.<sup>301</sup> This is “an industry-wide effort to systematically collect, analyze, and share the industry’s experience with safety-related problems.”<sup>302</sup> INPO officials sift SEE-IN reports to distinguish harmless disruptions of operations from dangerous ones.<sup>303</sup> Thorough analyses of the causes of the dangerous disruptions, and ways of preventing them, are then circulated as Significant Operating Experience Reports, or SOERs.<sup>304</sup> Industry Operating Experience Reviews are then conducted periodically to assess the ability of particular plants to make effective use

294. Pinchot himself was forced from office by President Taft. See George E. Mowry, *The Era of Theodore Roosevelt* 254 (1958).

295. See Joseph V. Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island 1* (1994).

296. *Id.* at 195 n.39.

297. See *id.* at 38–40, 195 n.39.

298. See *id.* at 91.

299. See *id.* at 107–09.

300. See *id.* at 75–87.

301. See *id.* at 126–27.

302. *Id.* at 126–27.

303. See *id.* at 127–28.

304. See *id.* at 128–29.

of the information provided by SOERs and other means to improve their own affairs.<sup>305</sup> For purposes of this review, a team of specialists in a variety of areas evaluates the plant's troubles since the last INPO inspection, paying particular attention to the plant's own reports on how it has responded to SOERs.<sup>306</sup> As many as six of the inspectors operate as experts on loan from their companies.<sup>307</sup> The team spends a week preparing at INPO headquarters in Atlanta, and then spends two weeks of twelve-hour days doing "nothing but watch[ing] what is going on at the plant."<sup>308</sup> In particular, as in the case of error detection in firms, the inspectors are "always asking the 'Why?' question."<sup>309</sup>

The results of the report are made available to the CEO of the utility operating the power plant and to that utility's board of directors to ensure that criticism is not blunted as it passes up the managerial hierarchy.<sup>310</sup> The rankings naturally expose managers to intense peer pressure. In addition, INPO ranks all plants with respect to a number of summary measures of operating safety, and reports these rankings annually to a meeting of the utility CEOs.<sup>311</sup> These reviews, finally, are supplemented by continuing analysis of accident data and development of standards.<sup>312</sup> Participants in these activities are drawn from utilities, as are some fraction of INPO's full-time staff.<sup>313</sup> In addition to providing information to the plants, results of INPO evaluations are communicated to the NRC, the federal agency responsible for monitoring reactor safety.<sup>314</sup>

As measured by two broad substantive indicators, INPO is an unqualified success story. The two measures are the number of "scrams," or rapid reactor shutdowns, and the number of safety system actuations. Both represent a gauge of the frequency of emergencies and are therefore inversely correlated with overall reactor safety. Between 1980 and 1990, the number of scrams per unit decreased by eighty percent, and the number of safety system actuations decreased by sixty percent between 1985 (the first year such measures were taken) and 1990.<sup>315</sup>

Still, one persistent criticism of INPO remains. Because it is not itself a government entity, INPO's activities are not subject to all of the usual responsibilities associated with such entities; most importantly, its reports

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305. See *id.* at 137-38.

306. See *id.* at 141.

307. See *id.* at 54.

308. *Id.* at 141 (quoting INPO inspector).

309. *Id.* at 144, 147.

310. See *id.* at 98-99.

311. See *id.* at 104-06.

312. See *id.* at 128.

313. In 1991, for instance, one in seven staff members were on loan (for up to two years) from nuclear power facilities. See *id.* at 57.

314. See *id.* at 195 n.39.

315. See *id.* at 183.

are not directly available to the public.<sup>316</sup> Thus, critics note that the public reports produced by the NRC present sanitized versions of INPO's data, thereby shielding the plants from public scrutiny.<sup>317</sup> On the other side of the question is the view that some degree of confidentiality facilitates full, open self-criticism by the plants. In addition, given the public's likely reaction to even extremely small increases in the risk of the very large harm that a nuclear power plant accident would occasion, general release of INPO assessments might be misunderstood and misused by the public. This in turn would divert plant staff from safety improvements and other operations, causing them to pay excessive attention to public relations.

It is difficult to judge the merits of this debate at its most abstract. Surely there are contexts in which confidentiality breeds correctives. Public overreaction to potentially catastrophic harm, no matter how unlikely, has arguably distorted public policy in the past.<sup>318</sup> But it is a staple of democracy that in most contexts publicity encourages change for the better. Into which category particular aspects of nuclear power plant safety inspection fall strikes us as just the kind of question that can only be answered by experience and experiment.

But as regards the operation of INPO, now it seems that the criticism of secrecy is misleadingly narrow, while the Institute's secretive handling of information unjustifiably disparages the citizens' ability to deliberate about matters that concern them viscerally. The criticism is misleading because it slights the fact that INPO's reports do reach important watchdog groups, including not only the NRC, but also utilities (often themselves publicly accountable) and public service commissions.<sup>319</sup> Fears of potential conspiracy thus come down to the much more limited claim that citizens living near reactors have a need for direct access to all information. To provide anything less is not to flaunt unaccountability. But INPO's reticence seems disproportionate as well, for, as we will see next, public disclosure of environmental hazards comparable to those posed by nuclear power stations has often proved an effective instrument of regulation.<sup>320</sup>

4. *Innovative Environmental Regulation.* — Many of the cases of precocious or emergent experimentalism discussed so far were set in settings

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316. See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc) (holding that commercial character of information voluntarily submitted to government exempts INPO reports from requirements of Freedom of Information Act, 5 U.S.C. § 552(b)(4)(1994)).

317. See Matthew Freedman & Jim Riccio, *What the Nuclear Regulatory Commission Won't Tell You: Aging Reactors. Poorly Trained Workers*, Pub. Citizen, Jan.-Feb. 1994, at 10, 10-11 (also available at <<http://www.citizen.org/CMEP/nuclearsafety/INPOarticle.html>>).

318. See Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 19-20 (1993).

319. See *id.*

320. See *infra* text accompanying notes 328-333.

that combined bureaucracy and disorganization in ways inhospitable, even inimical, to innovation. If experimentalism has prospects of succeeding in such settings, we argued, it is likely to prosper almost everywhere else as well. The circumstances of environmental regulation, by contrast, combine aspects of locality and generality that invite experimentalist information pooling.<sup>321</sup> On the locality side, it is necessary to take full account of local topography, wind conditions, and economic activity to determine the exposure of a particular population to various environmental risks. Effective reduction of such risks requires full attention to the local complexities of industrial production, sewage disposal, power generation, or traffic patterns from which they arise. On the generality side, the epidemiological determination, say, that a substance is toxic or otherwise hazardous, and in what concentrations, requires the pooling of evidence from many different and dispersed sources. The same sort of information pooling is necessary for estimating feasible reductions in particular environmental harms and for ascertaining the most effective methods of achieving such reductions.

The incentives for mutual learning and monitoring are particularly strong in environmental matters, moreover, given the poorly confined or even unconfined nature of hazards such as air or water pollution. For example, coal-burning plants in the Midwest produce acid rain in the Northeast and Canada. In the worst case, one locale's indifference to its environment puts all the others at terrible risk. The existing regulatory regime does more to obstruct than to further such learning. It typically sets fixed emissions standards for particular processes, and divides responsibility for controlling pollution in the air, water, and other media to different regulatory authorities. Obtaining permits for the processes in use at any production site therefore requires a laborious round of agencies, and abatement of pollution at the prompting of authorities in monitoring one medium can easily lead to additional problems in areas where there is less vigilance.<sup>322</sup> If public and private actors were not drawn to forms of democratic experimentalism to reconcile the needs of local and global learning under these conditions, they would be unlikely to give them much consideration anywhere else.

We conclude this subsection, therefore, by noting the recent spread of forms of self-, state, and federal environmental regulation whose experimentalist features may be cohering into a system of learning by monitoring by a peer inspectorate along the lines we saw in our discussion of INPO. The prospect of such an outcome is especially striking because it arises in part from systematic public disclosure of alarming, potentially catastrophic hazards: the same kind of information, we just saw, some-

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321. See Daniel C. Esty & Marian R. Chertow, Introduction to Thinking Ecologically, *supra* note 183, at 1, 4.

322. See *id.* at 9 ("We 'fix' our air pollution problems with scrubbers that create a sludge that becomes a land disposal issue which, if improperly handled, may run off into streams, becoming water pollution.").

times said to obstruct reform by private actors when revealed to the public. We begin with a review of the innovative, if barebones, national system of benchmarking self-reported releases of toxic substances—the Toxic Release Inventory (TRI)—and the efforts at self-regulation it has provoked on the part of the chemical manufacturers. Then we consider the Massachusetts Toxics Use Reduction Act of 1989<sup>323</sup> (TURA), which, as the most developed of several similar state regimes, requires not only that firms report their use of certain toxic substances, but also that they formulate and periodically revise plans to reduce that use in consultation with a peer inspectorate created for this purpose.

Finally, we examine the Program for Regulatory Excellence (XL) and the Common Sense Initiative (CSI) of the federal Environmental Protection Agency (EPA). XL is a pilot project that waives many current permitting requirements. It allows firms greater flexibility in defining the precise means and ends of their regulatory performance in exchange for commitments to improve on that performance and commitments to provide sufficient information to facilitate monitoring their actual behavior. CSI invites proposals for regulatory reform of this general kind—some eventually requiring waivers, others not—from teams of stakeholders in six industrial sectors. But the limits of XL's authority to authorize experimentation are vague, as are the conditions under which proposals for reform formulated under CSI can actually be tested in practice. Neither project makes provision for benchmarking or any other form of information pooling by which the EPA, together with the affected actors, might devise standards for judging the suitability of revisions of current rules. These deficiencies explain why, so far, XL counts many more failed negotiations than successful ones, while CSI promises reforms without realizing them. Together TRI, TURA, and the federal programs suggest additional, complementary lessons about the possibilities and limits of the incremental introduction of experimentalism in our federalist polity.

a. *TRI*. — TRI was created under the Emergency Planning and Community Right-to-Know Act of 1986.<sup>324</sup> The Act and TRI were, like the creation of INPO after Three Mile Island, a response to catastrophe: in this case, the explosion in 1984 of a Union Carbide facility in Bhopal, India that killed many thousands of persons, mostly through release of toxic methyl isocyanate gas.<sup>325</sup> Unlike the familiar regulatory regimes defined by the Clean Air Act<sup>326</sup> or the Clean Water Act,<sup>327</sup> the Right-to-Know legislation neither fixes targets for the reduction of aggregate levels of pollution, nor requires specific pollution-abatement efforts by particu-

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323. Mass. Ann. Laws ch. xx (Law. Co-op. 1996).

324. 42 U.S.C. §§ 11001–11050 (1994).

325. See Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 *Wm. & Mary L. Rev.* 251, 264 n.58 (1993).

326. 42 U.S.C. §§ 7401–7671 (1994).

327. 33 U.S.C. §§ 1251–1376 (1994).

lar classes of polluters. Rather, in establishing TRI, the Act requires only that private and government-run facilities meeting statutory size requirements report estimates (calculated by EPA methods) of the amounts of some 650 chemicals they transfer off-site, or routinely or accidentally release.<sup>328</sup> Since passage of the Pollution Prevention Act of 1990, facilities must also report transfers within the plant and efforts at pollution reduction and recycling.<sup>329</sup> These reports are then made publicly available in both raw form and as tables comparing amounts released by substance, facility, industry, and location.<sup>330</sup> In addition, since 1989, the EPA has published an annual summary of emissions, with a comparison to previous years. Failure to file a report as required by the Act may result in penalties, but inaccuracies in reporting do not. In fact, the EPA does little to verify the accuracy of emissions reports, and has no inspection or other enforcement authority directly related to TRI.<sup>331</sup> Citizens, however, may sue firms for failure to comply with TRI's disclosure provisions,<sup>332</sup> and the data obtained can then be used to establish violations of other, substantive statutory obligations, or as a lever by which to apply public pressure for improvements. TRI is thus environmental "regulation" in the minimal sense of formally requiring disclosure of a body of comparative information from which environmental rules and standards, fixed or rolling, might eventually be fashioned or enforced.<sup>333</sup> Its operation therefore constitutes a rough test, under admittedly favorable circumstances, of whether benchmarking in general—and benchmarking of "alarming" information in particular—can play the central role that we

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328. See 42 U.S.C. § 11023(c) (1994) (referring to chemicals on the list in Senate Comm. on Environment and Public Works, 99th Cong. 2d Sess., Toxic Chemicals Subject to Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986, (Comm. Print No. 99-169, 1986), as well as subsequently listed chemicals).

329. 42 U.S.C. § 13106 (1994).

330. The latest available complete compilation contains a useful overview of TRI. See U.S. EPA, EPA 745-R-97-005, 1995 Toxics Release Inventory Data Release (1997) (also available at <<http://www.epa.gov/opptintr/tri/pdr95/drhome.htm>>) [hereinafter 1995 TRI Release].

331. See Janice Mazurek et al., *Shifting to Prevention: The Limits of Current Policy, in Reducing Toxics: A New Approach to Policy and Industrial Decisionmaking* 58, 80–85 (Robert Gottlieb ed., 1995).

332. The citizen suit provision is found at 42 U.S.C. § 11046 (1994). In *Steel Co. v. Citizens for a Better Environment*, No. 96–643, 1998 WL 88044 (U.S. Mar. 4, 1998), the Supreme Court held that the respondent lacked standing to sue a defendant firm for past violations of its disclosure obligations because the relief sought would not redress the harm alleged, but there is no question that the statute validly confers standing for suits against firms that persist in their noncompliance.

333. For an intriguing proposal to make TRI the basis of a rolling-rule regulatory system in which the bottom-quartile performers would have to achieve median performance within a set period, with the regulatory authorities devoting a maximum of attention to these minimum performers, see Archon Fung & Dara O'Rourke, *Reinventing Environmental Regulation from the Grassroots Up: Explaining and Expanding the Success of the Toxic Release Inventory 14* (Dec. 10, 1997) (unpublished manuscript, on file with the *Columbia Law Review*).

have attributed to it in guiding and synchronizing performance-improving efforts and rules to encourage these efforts.

Three results suggest that it can. First, the collection and publication of TRI data immediately discipline polluting private actors: Public comparisons of polluters compiled by journalists or community activists from TRI data lead to significant declines in the share value of publicly traded firms that show poorly.<sup>334</sup> Some of this decline might simply reflect investors' fears that bad publicity, however unfounded, always means costly trouble. But it is at least as likely to reflect a cold-eyed calculation that facilities listed among the worst polluters of their locale or type are not well controlled by managers, and may therefore suffer from problems not directly connected to pollution as well. Once it is clear that a poor pollution ranking leads to costly penalties in financial markets, and from there to clean-up expenses, managers have strong incentives to avoid the costs either by reducing environmental burdens in advance of the disclosure or (given negligible penalties for inaccurate reporting) shading their estimates of toxic releases to obscure their true situation. Investors might reasonably conclude that management that did neither was simply unaware of the extent of the problem in comparison with other facilities. This conclusion might just as reasonably prompt the more general concern that management might be ignoring problems unrelated to pollution as well. In any event, details of the connection between finance-market discipline and TRI data aside, commentators agree that "public release of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of government regulation."<sup>335</sup>

Beyond this immediate discipline, Bhopal and TRI have had second-order effects on the behavior of the actors by inducing changes in industry associations and the information they pass among firms. Where Three Mile Island led to INPO, Bhopal and TRI have led to the creation, within the Chemical Manufacturers Association (CMA) of a "Responsible Care" program, launched, as the head of the Association confessed, because "the industry had no choice."<sup>336</sup> This program encourages firms: 1) to link pollution-prevention efforts to the core disciplines of error-detection and elimination which they apply to managing their production processes; 2) to involve suppliers and distributors in these expanded efforts at continuous improvement; 3) to set target dates for installing

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334. See generally James T. Hamilton, *Pollution as News: Media and Stock Market Reactions to the Toxics Release Inventory Data*, 28 *J. Envtl. Econ. & Mgmt.* 98 (1995).

335. Pildes & Sunstein, *supra* note 184, at 106. The year-to-year comparisons show substantial decreases in most categories. See 1995 TRI Release, *supra* note 330, ch. 5.

336. After Bhopal, the public ranked the chemical industry just behind the tobacco industry in terms of threat to the public health and the environment, according to the Association's own surveys. See Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 *J. Land Use & Envtl. L.* 217, 309 (1996).



these new disciplines; 4) to monitor progress towards their goals; and 5) to document and disseminate best practices.<sup>337</sup>

In theory, then, Responsible Care could in time become the armature of monitored self-monitoring with a family resemblance to the INPO system. Assessment of the gap between this theoretical possibility and current practice is, however, impossible based on currently available evidence. On the one hand, certain associations, such as the Society of Organic Chemical Manufacturers, make compliance with Responsible Care disciplines within fixed time limits a condition of membership,<sup>338</sup> and at least some companies—Union Carbide, to take a chastened and chastening example<sup>339</sup>—publicly report progress towards the Responsible Care standards as well as performance by TRI measures. On the other hand, the trade associations do not seem to be organizing the kinds of practices on which INPO depends: systematic inspections of facilities, comprehensive reporting on hazardous disturbances, and analysis of countermeasures taken by the facilities. Instead, the CMA, for example, has thus far emphasized self-monitoring by firms and minimized the need for any systematic review of these results, except by such amorphous entities as company-appointed Citizen Advisory Panels drawn from the communities in which participating members operate. Environmentalists plausibly suspect that these panels may be denied relevant information and dominated by company interests.<sup>340</sup> Peer pressure, public opinion, or the discovery of further benefits to pollution-control measures could of course lead to more rigorous benchmarking of problems and countermeasures, but this outcome is no more automatic than was the adoption of the Responsible Care program in the first place.

Third and concurrently, as the EPA itself has noted, in making possible comparisons across regions and facilities, the release of TRI information has allowed federal, state, and local governments to cooperate with the public and industry to “evaluate existing environmental programs, establish regulatory priorities, and track pollution control and waste reduction progress.”<sup>341</sup> At the state level above all, the boldest of this collaborative redirection of regulatory activity has gone to the creation of just the kinds of review and information-pooling services which even the

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337. The elements of the Responsible Care program can be found at the CMA website. See Chemical Mfrs. Ass'n, *Responsible Care: A Public Commitment* (visited Jan. 23, 1998) <[http://www.cmahq.com/cmaprograms/programs\\_index.html](http://www.cmahq.com/cmaprograms/programs_index.html)> (on file with the *Columbia Law Review*).

338. See Synthetic Organic Chem. Mfrs. Ass'n, *Responsible Care: A Guide to SOCMA's Membership Requirements* (visited Mar. 1, 1998) <<http://www.socma.com/respnble.html>> (on file with the *Columbia Law Review*).

339. See Union Carbide, *Union Carbide Responsible Care Information* (visited Jan. 23, 1998) <<http://www.unioncarbide.com/respcare/1996/uccres.html>> (on file with the *Columbia Law Review*).

340. See Robert Gottlieb et al., *Greening or Greenwashing?: The Evolution of Industry Decisionmaking*, in *Reducing Toxics*, supra note 331, at 170, 196–97.

341. 1995 TRI Release, supra note 330, ch. 2.

largest trade associations have not (yet) undertaken to provide, and which may always be beyond the reach of industry associations in sectors, such as injection molding or metal plating, characterized by small, dispersed facilities. Partly by complementing, partly by competing with (and thus forcing emulation by) industry associations in the provision of services, programs in states such as Massachusetts, Oregon, New Jersey, Washington, and Minnesota are likely to shape the emergent regime of environmental regulation and accentuate its experimentalist features.<sup>342</sup>

b. *TURA*. — One of the most established, comprehensive, and influential of such programs was created by the Massachusetts TURA of 1989.<sup>343</sup> Because of the scope and integrity of this founding Act, the relation among the parts of the Massachusetts regulatory system and their connection to federal benchmarking are particularly clear. We turn briefly to TURA and its operation, therefore, for a first impression of one variant of a more developed experimentalist regime of environmental regulation.

As an initial matter, TURA broadens and extends TRI. It broadens TRI by requiring firms to report not only toxic releases, but also use or generation of toxics in any stage of production.<sup>344</sup> TURA further requires that the reports on use of toxics be connected to plans for usage reduction.<sup>345</sup> Thus, under the Act, firms meeting statutory requirements regarding size and line of business must annually file a Toxic or Hazardous Substance Report listing the amounts (in excess of certain minima) of designated toxics used as inputs to processes, generated as byproducts, or shipped as end products. In addition, the Report must estimate changes in the amount of toxic byproduct and emissions generated per unit of product as compared with the preceding year, and specify whether the changes were due, for example, to altered inputs, new production processes, improved operations, reformulation of the product, recycling or other extension of the usefulness of toxic substances, or other modifications of the manufacturing setup.<sup>346</sup> These reports then form the starting points for biannual Toxics Use Reduction Plans centered on “a comprehensive economic and technical evaluation of appropriate technologies, procedures and training programs for potentially achieving toxics use reduction for each covered toxic or hazardous sub-

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342. For the general features of these laws as well as a sketch of their differences, see Robert Gottlieb et al., *New Approaches to Toxics: Production Design, Right-to-Know, and Definition Debates*, in *Reducing Toxics*, supra note 331, at 124, 143–48. “By the 1990s,” they note, “states and local communities had become actors in their own right in the toxics policy arena.” *Id.* at 144.

343. See *id.* at 146 (stating that TURA “became more a harbinger of changes at the state level than an isolated case of innovative legislation passed by a state known for its strong environmental and public interest groups”).

344. See Mass. Gen. Laws Ann. ch. 21I, § 10 (Law. Co-op. 1996).

345. See *id.* § 11.

346. See *id.* § 10a, b.

stance."<sup>347</sup> On the basis of this benchmarking survey of possibilities, firms specify in the Plan particular measures to be adopted, the schedule for implementing them, and two- and five-year targets for toxic use reduction.<sup>348</sup> Although TURA establishes the general goal of reducing use of toxics in Massachusetts by fifty percent by 1997,<sup>349</sup> and penalizes "willful" violations of the requirements to report toxics use and plan for reduction,<sup>350</sup> the Act sets no more specific performance standards nor does it penalize failure to act on reduction plans. Thus, rather than fix objectives, and compel their attainment, TURA furthers the TRI strategy of using the obligation for self-monitoring to induce firms and citizens to acquire information that reveals problems and possibilities for their solution. TURA provides an additional possibility for citizen involvement by providing a right of citizens to sue to have firms comply with the Act's largely procedural requirements.<sup>351</sup>

At the same time, TURA extends and helps formalize industry efforts at improved environmental performance both by creating a peer inspectorate to review the usage reduction plans, and by enabling provision of ancillary technical consulting services to aid firms in their formulation.<sup>352</sup> The peer inspectorate is created by requiring that the accuracy of Plans be certified by a toxics use reduction planner, then by making completion of various training programs a condition for initial or renewed certification as a planner. Two possibilities are anticipated. The first is that the prospective planner complete satisfactorily a comprehensive program in toxics use reduction planning organized by the Commonwealth. In that case, the planner may certify the reduction plan of any firm submitting one. The second option is for the planner to demonstrate, for purposes of initial certification, two years of practical experience in toxics use reduction in a particular firm. In that case, the planner can only certify plans of his or her employer. The training requirement of the two paths, and the experiences of the two types of planners, converge, however, as participation in continuing-education classes in the subject is a condition for re-certification after two years in both cases.<sup>353</sup> The Act accordingly

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347. *Id.* § 11(3)a.

348. *See id.* § 11.

349. *See id.* § 13. Note that the target is precatory, chosen, evidently, more to establish the need and starting point for self-evaluation than because a fifty percent reduction is the "right" amount. A fifty percent reduction is just the halfway point between the trivial and the unattainable: a decrease large enough to command attention and underscore the problem at hand, yet not so large as to demand the impossible.

350. *See id.* § 21b.

351. *See id.* § 18. In case private actors systematically refuse to act on the information provided, the Act does reserve to the Commonwealth the right to set pollution-reduction standards in particular lines of business if a majority of firms in those activities fail to reduce toxics use at rates documented regionally or nationally, or in related activities in Massachusetts, *see id.* § 15, but thus far no use has been made of this power.

352. *See id.* §§ 12, 6, 7.

353. *See id.* § 12.

establishes a Toxics Use Reduction Institute (TURI) at the University of Massachusetts at Lowell to develop the curricula and provide the courses required for certification or re-certification as a planner, or generally to inform industry or the public of developments in this area, and to conduct research necessary to these activities.<sup>354</sup> It also establishes an Office of Technical Assistance (OTA) to assist firms (particularly small, first-time filers) in meeting their TURA obligations, and to help coordinate the provision of relevant services by the public and private sectors. Confidential information obtained by the OTA in the course of consultations with a firm is not reported to the Commonwealth Department of Environmental Protection unless the firm agrees, or unless the information concerns an imminent threat to public health.<sup>355</sup> The training of planners, submission of plans, and provision of technical services, furthermore, is coordinated with existing reporting and inspection regimes to minimize the burden of regulatory compliance.<sup>356</sup> Taken together, plans, planners, TURI, and OTA create an inspection regime in which current conditions in individual firms or industrial segments can be compared with each other and with academic understanding of best practices, even as that understanding is corrected by scrutiny of innovation in firms.

Finally, applying the pragmatist principles of adjustment of means and ends to the institutions created by the Act itself, TURA provides a high-level governance structure that periodically suggests modifications of the new state services and reporting requirements in the light of its evaluation of progress towards the Act's original reduction target.<sup>357</sup> An Administrative Council, consisting of state government officials with responsibilities in the environmental area, presents an annual review of progress towards the overall goal and suggests possibilities for improvements in, and better coordination<sup>358</sup> of, the programs concerned with toxics use reduction.<sup>359</sup> An Advisory Board composed of two officials and thirteen representatives of environmental, business, and other interested groups, creates a forum for users of the program to comment directly on its operation and to create, if necessary, ad hoc committees to recommend changes.<sup>360</sup> The Act is self-financing in the sense that the costs of training inspectors and providing other services are to be paid by the proceeds of a "toxics use fee" on the large toxics users subject to it,<sup>361</sup> and the governance bodies can easily monitor the relation between costs and revenues.

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354. See *id.* § 6.

355. See *id.* § 7.

356. See *id.* § 8.

357. See *id.* § 12.

358. See *id.* § 3(C).

359. See *id.* § 4.

360. See *id.* § 5.

361. See *id.* § 19.

Substantial evidence in the aggregate and at the firm level suggests that this apparatus works. From 1990 to 1995—the period for which TURA data exist—the use of toxic chemicals fell by twenty percent in Massachusetts, and the generation of toxic byproducts by thirty percent, after adjustments to take account of changes in the levels of production.<sup>362</sup> Beyond this overall result, it is clear that the requirement to plan reduction of toxics use has enabled firms to discover significant net benefits to doing so and to value the public institutions that facilitate the planning.<sup>363</sup> The peer inspectorate and related programs were crucial to the positive outcomes. Of all the services provided to facilitate planning, the responding firms were most enthusiastic about toxics use planner training, followed by site visits from the OTA, while firms were least enthusiastic about the provision of toxics use reduction information by their own trade associations.<sup>364</sup> Nor were these benefits offset for the firms by the costs to them of meeting the new reporting and planning requirements.<sup>365</sup> A summary measure of the favorable balance of costs and benefits of toxics use reduction planning to the firms is that eighty-six percent of all respondents said they would continue to plan even if there were no longer a requirement that they do so.<sup>366</sup>

c. *Project XL and the Common Sense Initiative.* — In the wake of this and related experience, the EPA has launched, by its own, plainly incomplete count, thirty-nine programs to fashion an experimentalist regime at the federal level.<sup>367</sup> Two of the most prominent and widely noted pro-

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362. See Monica Becker & Ken Geiser, *Massachusetts Toxics Use Reduction Program, Evaluating Progress: A Report on the Findings of the Massachusetts Toxics Use Reduction Program Evaluation* at 21–22 (Mar. 1997). Ambiguities in the 1987 baseline data make it impossible so far to give a precise estimate towards the overall goal of a 50% reduction of toxics use. See *id.* at 24–25.

363. Thus, a phone survey of 434 representative 1993 TURA filers found that 70% of the respondents identified toxics reduction opportunities as a result of the planning activities. See *id.* at 6. Eighty percent of this group then implemented some part of their TURA plan. 67% of the implementers reported cost savings in areas such as materials use and waste disposal, 66% noted improvements in worker health and safety, see *id.* at 26, and 43% registered benefits in the form of reduced costs of regulatory compliance, see *id.* at 27.

364. See *id.* at 35.

365. For example, an in-depth study of 21 representative firms included in the general survey found that even the most onerous single regulatory obligation, filing the toxics use report itself, could be completed at a cost of about \$500 per report and was not “significantly” burdensome for a majority of respondents. See *In-Depth Investigation of Toxics Use Reduction in Massachusetts Industry* iv, 17 (Massachusetts Toxics Use Reduction Inst., *Methods and Policy Report No. 16*, 1997). One of the three firms that did experience a significant burden in compliance produced unusually varied and complex products, which made tracking of toxics correspondingly harder; because of peculiarities in the overlap between federal and state listings of toxics, the other two were required to file in Massachusetts a federal EPA form not required of them by the EPA itself. See *id.*

366. See Becker & Geiser, *supra* note 362, at 32.

367. U.S. GAO, GAO/RCED-97-155, *Report to Congressional Requesters, Environmental Protection: Challenges Facing EPA's Efforts to Reinvent Environmental Regulation 5* (July 1997) [hereinafter *Environmental Protection*]. The EPA's estimate

grams, Project XL and the Common Sense Initiative (CSI), encourage firms, singly or in sectoral groups, to propose and eventually to test experimentalist reforms. Other programs encourage similar initiatives by consortia of states collaborating in various ways with regional and national offices of the EPA.<sup>368</sup> Still others focus on the reorganization of the EPA's own regional offices to respond to and foster state-level experimentalism.<sup>369</sup> This flotilla of programs is evidence of the compelling attraction of the experimentalist alternative. But its wavering course and halting progress call attention to the difficulties of proceeding from piecemeal demonstration of the feasibility of this kind of reform to its generalization. We focus on XL and CSI because, as the most advanced and publicly visible of the programs, their record sheds the most direct light on these difficulties and hence the federal prospects for experimentalism.

Project XL is a pilot program for encouraging and supervising pilot programs.<sup>370</sup> It allows the federal government to authorize state regulatory bodies to permit the entities that they regulate to adopt environmental performance strategies which deviate from traditional requirements, on the condition that "superior" environmental benefits result and detailed records of environmental performance are made public.<sup>371</sup> Project XL substantially extends TRI and TURA in offering private actors, by means of waivers, a more comprehensive version of the core experimentalist bargain of greater autonomy in the determination of precise ends and means of environmental regulation, in return for increased monitorability. But it differs crucially from these programs in providing for neither benchmarking, nor a peer inspectorate, nor any other systematic form of deriving rolling rules of fair and effective behavior from emerging practice.

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counts "high-priority" as well as "other significant actions," but not "less centralized" projects that the agency is conducting through its program and regional offices. *Id.* The uncountable proliferation of programs is itself an indicator of disorder. See *id.* at 6, 7, 33.

368. For summaries of the National Environmental Performance Partnership System formed in 1995 between the EPA and the states, see *id.* at 26. For more information on the Performance Partnership Grants, which allow eligible states and tribes to combine funds that would be due them under separate environmental laws into a single fund for purposes of experimenting with more flexible, combined regulation of the relevant areas, see *id.*

369. See *id.* at 27, 29-30.

370. There is no direct legislative authorization for the project. The EPA announced Project XL in May 1995 to implement President Clinton's plan, announced in a March 16, 1995 document, *Reinventing Environmental Regulation*, to create innovative alternatives to command-and-control environmental regulation. See *Regulatory Reinvention (XL) Pilot Projects*, 60 Fed. Reg. 27,282-283 (1995).

371. See *id.* at 27,287. The legal authority for the EPA's ability to waive statutory and regulatory requirements is dubious. Indeed, the EPA proposes to grant waivers principally by failing to bring enforcement actions and by seeking special regulations and even legislation where needed. See *id.* (stating, euphemistically, the "EPA will use enforcement mechanisms to facilitate the projects").

In the absence of any standards of comparison, discussions between a private actor and the state, and then between both of these and federal authorities, become an extended negotiation to agree on a distinct, quasi-private regulatory regime. Government waivers are piled atop waivers and private undertakings atop other undertakings. Such negotiations are by their nature arduous and costly. They require exchanges so intimate, particular, and extended between the state, the private actor, and other concerned parties, as almost inevitably to suggest to some of the participants that others are colluding against them, even when they are not. No wonder that Project XL has so far been of interest chiefly to very large, capable corporations whose constant product and process innovation make regulatory permitting under fixed rules a potentially paralyzing burden. No wonder, too, that relatively few such corporations have been able to negotiate successfully waivers and reporting regimes that meet their own requirements and those of both levels of government and the other parties. While the EPA set an initial goal of fifty projects,<sup>372</sup> as of the end of 1997, only seven XL projects had been finally approved; three were listed by the EPA as "facilitated" but not yet final; nine had reached the intermediate "development" stage; and thirty XL proposals had been rejected or withdrawn for a variety of reasons.<sup>373</sup>

A brief look at a typical failed negotiation involving the Minnesota Mining and Manufacturing Co. (3M) facility in Hutchinson, Minnesota, shows why, stripped of a pooled, background understanding of what results can be achieved and what risks are worth taking, bargaining in isolation is likely to fail.<sup>374</sup> At Hutchinson, the company proposed to keep combined or multimedia emissions to a level below existing regulatory limits in return for waivers from the standard permitting procedures. Negotiations failed, for one thing, because the EPA could not provide 3M with satisfactory assurances that compliance with XL would immunize the

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<sup>372</sup>. See *id.* at 27,283.

<sup>373</sup>. See Information on Specific XL Projects (visited Jan. 22, 1998) <[http://199.223.29.233/ProjectXL/xl\\_home.nsf/all/xl\\_info](http://199.223.29.233/ProjectXL/xl_home.nsf/all/xl_info)> (on file with the *Columbia Law Review*).

<sup>374</sup>. By way of contrast, an even briefer look at one of Project XL's showcase successes, Intel's \$1.3 billion, 720-acre Octillo semiconductor facility in Chandler, Arizona, shows that given great resources and needs, it is, just barely, possible to strike experimentalist regulatory bargains in isolation, creating a novel, multilevel regulatory regime almost from scratch. A copy of the Intel Final Project Agreement can be found at Project XL: Final Project Agreement (visited Jan. 22, 1998) <[http://199.223.29.233/ProjectXL/xl\\_home.nsf/all/intel\\_fpa\\_final.html](http://199.223.29.233/ProjectXL/xl_home.nsf/all/intel_fpa_final.html)> (on file with the *Columbia Law Review*). Critics of the Intel XL agreement focused, even in this nearly exemplary case of collaborative rulemaking, on what proved to be the weak points with the program as a whole: concern both with the level of environmental performance to which the agreement holds the company and with the enforceability of the XL agreement as a whole. See Cindy Skrzycki, *The Regulators: The Perils of Reinventing, Critics See a Playground for Polluters in EPA's XL Plan*, Wash. Post, Jan. 24, 1997, at D1.

company from civil liability for technical violations of existing statutes.<sup>375</sup> For another, there was disagreement as to the level of "superior" performance expected as a condition of the waiver.<sup>376</sup> 3M claimed to be outperforming current standards, but refused to guarantee that it would increase or even maintain this level of "superiority" under the new arrangements. This uncertainty was compounded by disputes among the regulatory entities over the allocation of authority among the Minnesota Pollution Control Agency and the Washington and regional offices of the EPA.<sup>377</sup> Both sources of confusion were in turn the fruit of the initial decision by the federal level of the EPA to declare itself open to experimental reform without providing any but ad hoc means for establishing mutual accountability and coordinating its own decisions with those of its field offices, let alone other government entities or private actors.<sup>378</sup>

The CSI, established in 1994, has had, if anything, more difficulty than Project XL in moving from experimental idea to actual experiment. Much of the reason is manifest in a complex, ambiguous hierarchical structure, apparently intended to encourage a form of information pooling, that in fact discourages it. At the top is a thirty-two-person council composed of representatives of industry, small business, labor, federal, state, and local government, environmental justice groups, and community-based and national environmental organizations.<sup>379</sup> Under the aegis of this council are six sectoral subcommittees grouping stakeholders from automobile manufacturing, iron and steel, metal finishing, computers and electronics, printing, and petroleum refining. Each sectoral subcommittee in turn organizes project groups and teams that elaborate detailed reform proposals and may undertake pilot programs to test them. Reform recommendations based on the studies and experience of the project groups, passed through the sectoral subcommittees, must be ap-

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375. See Jeffrey P. Cohn, *Clearing the Air*, Gov't Executive, Sept. 1, 1997, available at 1997 WL 9254804.

376. See Janet Pelley, *Project XL Founders in Minnesota; Critics Call for National Legislation*, 30 *Envl. Sci. & Techn.*, 428A, 428A-429A (1996) (observing the inherent ambiguity in XL's requirement of "superior" performance).

377. See generally EPA Regulatory Reinvention Efforts: Testimony Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce, 105th Cong. (Nov. 4, 1997) (statement of Peder A. Larson), available at 1997 WL 14152790 (offering state perspective).

378. For an analysis of the Hutchinson failure, see Environmental Protection, *supra* note 367, at 36. An interim report of a continuing and incisive research project explains how, inter alia, 3M was the victim of its own experimentalist success. See Alfred A. Marcus et al., *Advising, Monitoring, and Evaluating a Minnesota Pollution Control Agency Pilot Project for Flexible, Multi-media Permitting* 7-8 (1998) (unpublished manuscript, on file with the *Columbia Law Review*).

379. For an overview of the structure, see U.S. EPA, *The Common Sense Initiative* (visited Jan. 22, 1998) <<http://www.epa.gov/commonsense/bckgrd.htm>> (on file with the *Columbia Law Review*). For a description of the CSI Council, see U.S. EPA, *Common Sense Initiative Council* (visited Jan. 22, 1998) <<http://www.epa.gov/commonsense/council/index.htm>> (on file with the *Columbia Law Review*).



proved by the council as a whole before being forwarded to the EPA as Common Sense Initiatives.<sup>380</sup> Hence, in addition to all of the difficulties of achieving consensus regarding concrete measures, there is the imponderable difficulty of anticipating which projects, and what forms of presentation, will be acceptable to the superintending council, not to mention the EPA itself. The predictable result is concentration of the activity, such as it is, in the project groups—often, as in the case of metal finishing, in programs of self-monitoring, reporting, and standard setting with clear affinities to TURA<sup>381</sup>—and indecision at the top.<sup>382</sup> Worse still, it may be that project groups and especially pilot projects keep some or much of their results to themselves, guarding against the possibility of higher-level interference, but also fragmenting and occluding information instead of pooling it.

The difficulties of XL and CSI point to what could prove to be a characteristic political dilemma in the diffusion and generalization of experimentalist methods. After the failures of standard programs have opened the way to alternatives, and these have progressed far enough to promise large-scale feasibility, public and private actors will often divide on what comes next. Those most inconvenienced by the current regime, or ideologically opposed to any form of government regulation, will urge abolition of the rump of traditional rules as a precondition for further and conclusive reform. One of their chief arguments will be that the experimentalist success would become self-reinforcing if only the obstacle of current law (whose costly disutility it dramatizes) were abrogated. On the other side will be those who see themselves as beneficiaries of the current rules, or of regulatory protection against market forces in general. They will argue that the early successes could come undone if the old rules are discarded before new ones—demonstrably ensuring that the

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380. The structure and the reporting relation among the levels is summarized in Environmental Protection, *supra* note 367, at 25.

381. For the metal finishing activities of CSI, see U.S. EPA, Common Sense Initiative Metal Finishing Sector (visited Jan. 22, 1998) <[http://www.epa.gov/commonsense/metals/index.htm#anchor\\_projects](http://www.epa.gov/commonsense/metals/index.htm#anchor_projects)> (on file with the *Columbia Law Review*). Underlying many of the projects is a picture of the "tier structure" of the industry in which first tier firms are "consistently in compliance with regulatory requirements and are proactive in making environmental improvements to move beyond compliance." U.S. EPA, Performance Tiers as a Tool for Action (visited Jan. 22, 1998) <<http://www.epa.gov/oppe/isd/tier.htm>> (on file with the *Columbia Law Review*). Fourth tier firms "are 'renegade' shops that are out of compliance, make no attempt to improve, and often escape enforcement attention." *Id.* Many projects aim at moving firms between these extremes to learn from higher ranked ones, and to force the lowest ranked to improve or exit the industry. See *id.* at para. 6. The model is thus related to the maxi-min strategy derived from the toxic release inventory data described above. See 1995 TRI Release, *supra* note 330, at 355.

382. See Environmental Protection, *supra* note 367, at 37 & n.8 (reporting the result of an outside evaluation of CSI commissioned by the EPA that "concluded that EPA should provide more guidance on the types of recommendations and projects that the agency would find most useful for CSI" and noting the EPA's own general concurrence based on its "ongoing review").

new regime is, indeed, self-reinforcing—are in place. Caught in this to and fro, politicians and administrative officials will temporize, waiving the rules on all manner of conditions to placate those who want to try new things, but keeping the rules on the books to appease those who fear wholesale deregulation. Meanwhile, the authorities will hope that amidst the waiving there emerges just the experimentalist solution that conciliates both camps. The result will be the profusion of experimentalist activism in the small, and institutional immobilism in the large, that we observe in the EPA programs.

The experimentalist program we are advancing suggests a response to this dilemma. At almost any point in shifting from traditional to experimentalist regulation, it is possible to advance still further by extending the benchmarking apparatus, thus providing the instruments and the impetus for the actors themselves to demonstrate new possibilities for solving problems within current rules or devising alternatives to those rules. This is the lesson of TRI and TURA. Imagine, then, for example, that Congress amended the legislation governing the TRI to include the planning, peer-inspectorate, and inter-agency coordination features of TURA. In that case, actors nationwide would, as in Massachusetts, rapidly learn which kinds of public and private services and reporting regimes favor comprehensive environmental improvements, and the best of these could then be used to create a framework for an experimentalist framework for changing the traditional rump. Yet, whatever the advantages of such a system, the notion that it culminates in a *framework for a framework* suggests why, in the end, even augmented information pooling can only be a palliative, not a definitive solution. Eventually, the traditional rump stands in the way of further experiments. What then?

Here is where the basal ideas of experimentalism matter. Within representative democracy, “experiments” conducted within the confines of existing law, but with a view to changing existing law, are likely to turn into lobbying efforts rather than directly deliberative experiments. Those who entertain truly innovative plans that might put themselves and their ideas at risk will hold back for fear of overstepping legal boundaries. That is certainly part of the lesson of XL.<sup>383</sup> Many of those who participate in these confined “experiments” will do so in order to advance ideas they firmly hold, not to test them. That such participation leads to more maneuvering than forward motion is surely part of the lesson of CSI. Put another way, the effort to advance experimentalism by sparing it political conflict over the rump of rules leads to a paralyzing politicization of the experiments.

The alternative is to apply experimentalist principles of accountability as much to projects that challenge the rump of rules as to those that

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383. Recall that the EPA has cobbled together its waiver authority from a combination of its inherent prosecutorial discretion and its offer to seek changes in the law. See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282, 27,287 (1995).

do not. Imagine that the EPA asked Congress for explicit authority for itself and associated state entities to give temporary waivers from certain statutory permitting requirements for firms that meet generally applicable, rolling rules regarding environmental performance and reporting. This would create an open competition to devise a rolling alternative to current practice, acceptable to a wide range of public and private actors. Congress would, in the end, decide if the winner was an improvement sufficient to warrant a definitive switch. Experimentalism would be a new form of lawmaking, not a new method for influencing the lawmakers. If experimentalism, as we are projecting it, has a future, then environmental regulation is one of the first areas where, beyond the morass of waivers and pilot programs for pilot programs, we should see this kind of change taking place.

#### D. *The Role of Courts in the National Experimentalist System*

Even more than the other branches, the courts<sup>384</sup> are the institutions in which existing conceptions of constitutional democracy appear to flow seamlessly into experimentalism. "Experimentalist courts" are thus nothing more than traditional Article III courts transformed by the new methods of organization in the political branches of government and society around them. Experimentalist courts, like the traditional courts of constitutional democracy, function by a form of direct deliberation.<sup>385</sup> Citizens, as individuals or groups, speaking with the authority of their own experience, can demand that the government give reasons for its actions. In constitutional and administrative law litigation, such claims will ultimately be grounded in both traditional and experimentalist courts in norms of due process, freedom of expression, and equal protection, broadly understood as necessary elements of democracy, as well as the more concrete doctrines applying these and other textual guarantees.<sup>386</sup> But whatever the nominal source of the citizens' right to reasoned decisionmaking, the courts, experimentalist and conventional, are the place where individuals can insist that the polity, and the government that works in its name, justify again, by reference to its deepest values and its best understanding of relevant experience, the justifications given so

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384. For ease of exposition, we concentrate on federal courts, although a shift to experimentalist institutions at all levels of government would necessarily have an impact on state courts as well.

385. See, e.g., Christopher J. Peters, *Adjudication As Representation*, 97 *Colum. L. Rev.* 312 (1997) (arguing that even traditional courts should be seen as democratic institutions).

386. In most cases challenging agency action, the textual source of the entitlement within the current system is the Administrative Procedure Act's authorization for judicial review of agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, . . . contrary to constitutional right, power, privilege, or immunity, . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, . . . or without observance of procedure required by law." 5 U.S.C. § 706 (1994).

far for particular actions. It is in the courts, therefore, that experimentalism manifests its continuity with constitutional democracy, and constitutional democracy manifests its most directly deliberative and experimentalist aspect.<sup>387</sup>

The novel features of experimentalist courts result from their relations to the other experimentalist organs of government: Congress, state and local governments, and administrative agencies. As these entities adopt experimental methods, they come to elaborate new understandings of fundamental principles in the course of seeking solutions to concrete problems. The ebb and flow of reason giving is the political process of directly deliberative polyarchy. In effect, it obliges the actors to elaborate fundamental principles while assessing the practical consequences of different rules of order. This process substantiates the sovereign intent, the means associated with it, and the authorities' fidelity to the constraints imposed by both. Accordingly, a two-fold transformation in judicial decisionmaking serves as both a precondition and consequence of this enlarged role for social self-explication.

First, the courts must develop an explicit understanding of fundamental legal norms deeply entrenched yet always provisional in the sense that the means by which core values are both protected and ultimately defined are deliberately exposed to experimentalist understanding. By insisting that actors respect the central experimentalist condition of declaring goals and measuring results, the courts can declare and defend inchoate rights without pretending to anticipate the manifold consequences of the finding.

Second, experimentalist courts defer to the political actors' exploration of means and ends only on the condition that the actors have in fact created the kind of record that makes possible an assessment of their linking of principle and practice. The system that experimentalist judicial review enables thus introduces constitutional values into the political decisions of everyday life while bringing the lessons of everyday life into the discourse of constitutional value. Put another way, experimentalist courts can serve democracy better not only because they presume to provide fewer definitive answers to legal, social, and ultimately political questions, but also because they can inquire into more of the political actors' own deliberative capacities.

Judicial review by experimentalist courts accordingly becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of whether the protagonists have themselves

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387. It is true, of course, that members of Congress devote considerable resources to constituent services, but these services do not include redress of most asserted legal wrongs. Indeed, under traditional separation-of-powers principles, it would be inappropriate for Congress to attend to individual grievances. See *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment) (deriving a generality requirement from the prohibition on Bills of Attainder in Article I, Section 9).

been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them. *Constitutional* review in particular becomes a jurisprudence of impermissible arguments and obligatory considerations—the former forbidding the actors to pursue ends found to be unconstitutional; the latter enjoining them to give particular attention to their choice of means when constitutional values appear to be at risk.

This Section focuses on the current problems courts face in construing ambiguous statutory and constitutional text, and the way the redistribution of reason giving in experimentalist courts provides a partial solution. Succeeding Parts rely on nascent constitutional doctrine to illustrate how experimentalist methods can reveal the boundaries of the legitimate zone of constitutional experimentation in federalism, separation of powers, and most important, a reinterpretation of the idea of individual rights that accompanies the new jurisprudence.<sup>388</sup>

1. *The Dilemma of Judicial Review as the Muddle of Means and Ends.* — Under current conditions, the indeterminate relation of legislative means to ends bedevils judicial review of administrative action and the constitutionality of legislation. Absent well-articulated connections between means and ends that the political actors have themselves elaborated, the courts must speculate about their relation. This speculation typically takes the form of balancing policy objectives against prima facie affronts to the legal order. Yet, because open balancing embroils the court in political decisions, it balances surreptitiously through the use of complex rules that determine the degree of judicial scrutiny to which an individual case will be subjected. But because the application of these tests in turn involves a suspiciously political calculus, the court must then defend the tests and categories in a form of second-order balancing.

Consider the paradigmatic difficulty of determining the relation between the means and ends of a particular law, starting with ends. A straightforward way to know whether a law's ends are constitutional is to determine the legislature's intent in enacting it. But there is no simple way to make this determination: The majority that voted for a bill is composed of legislators who cast their vote for various reasons,<sup>389</sup> among which may be the desire to occlude the true reason for the vote. The alternative to looking to declared or subjective intent is to infer the so-called "objective" intent from the statute itself. This is, of course, a judicial construction: Given the means chosen by the legislature, the courts

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388. See *infra* Part VI (federalism), Part VII (separation of powers), Part VIII (individual rights).

389. See *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) (“[t]he number of possible motivations . . . is not binary, or indeed even finite”); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 702–03 (1981) (Rehnquist, J., dissenting) (ridiculing the notion of a law's *actual* purpose); see also Ronald Dworkin, *Law's Empire* 317–24 (1986) (arguing against a “speaker's meaning” approach to statutory interpretation).

infer the statute's purposes or ends. But this maneuver of inferring the ends from the means yields a determinate result only if it is possible to assess the significance of the means without referring back, in circular fashion, to the indeterminate ends.<sup>390</sup>

Yet scrutiny of means does retrace the circle. A court bent on sustaining legislative power can simply define the statute's objective as the accomplishment of whatever it is the statute happens to accomplish.<sup>391</sup> Conversely, if a court first divines a legislative goal, then whatever means the legislature chooses, the court can devise other, less menacing ones, depending on its view of the legitimacy and urgency of the goal to be achieved. Suppose, for example, that the Supreme Court decides that preferential hiring of minority contractors is allowable as a means, *provided* that it is essential to achieving the allowable end of reduction of racial discrimination in the contracting industry in a particular city.<sup>392</sup> Or suppose, to return to the *State Farm* case, the Court finds that a particular, passive automobile safety restraint is an acceptable means to the end of increasing highway safety, *provided* that there is no better one.<sup>393</sup> Given a court's limited fact-finding capability—its limited ability to explore alternatives—how can it know that means are not sufficiently closely tied to ends?

Under current practice in both the administrative and constitutional law contexts, the Court speculates about what are essentially empirical matters, asking questions about the advantages and disadvantages of alternatives that the protagonists might well have asked but did not: Was official discrimination in fact severe enough in the city in question to justify the inevitable social and individual costs of affirmative action?<sup>394</sup> Were passive restraints such as airbags feasible and therefore preferable to rescission of Standard 208?<sup>395</sup> Thus, in scrutinizing means by, for example, inquiring whether a statute is "narrowly tailored" to further a constitutional end, the Court in effect balances its estimates of the constitutional harm entailed by the legislative solution against its estimates of the greater costs (or benefits) to society that result from pursuing a constitutionally preferable (or equivalent) one.<sup>396</sup> The balance will often appear

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390. But see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (describing the least restrictive means test as a means of "smok[ing] out" impermissible motives).

391. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (upholding as rational exemptions from a ban on pushcart vending for two identifiable vendors on the ground that the city could rationally conclude that these vendors "had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre").

392. See *Croson*, 488 U.S. at 498–506.

393. See *supra* text accompanying note 229.

394. In *Croson*, the Court decided no. See 488 U.S. at 498–506.

395. Recall from our earlier discussion that the *State Farm* Court said yes. See *supra* text accompanying note 229; see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983).

396. See Ely, *supra* note 2, at 105–06.

capricious or partial because the standards for measuring costs and benefits of means can easily appear to have been derived from evaluations of the worthiness of ends. Thus, if the Court sets an extraordinarily high value on a particular vision of racial justice, almost any affirmative action program can be judged to produce benefits on balance greater than costs. In finding otherwise, by this logic, the Court subordinates racial justice to other values (including a competing vision of racial justice itself), even though it purports to answer the empirical question whether the challenged program could have achieved its worthy goals by other means. However, there is no satisfactory reason why the Court, rather than the legislature, is the appropriate institution to raise and answer such empirical questions and then make and compare the estimates of benefit and harm to which the answers lead. For these reasons, such scrutiny evokes the menace of the countermajoritarian difficulty. No wonder the Court is at pains to disguise the extent to which its formal constitutional tests rely on balancing techniques.<sup>397</sup>

The Court's efforts to reduce the need to engage in this suspect balancing by reducing its cause—its own uncomfortable position as clarifier of ambiguous authoritative meaning—lead to unpalatable results in representative democracy. One strategy is to require the legislature to articulate its purposes upon enacting legislation, and therefore disallow (re)interpretation of those purposes before a court responding to a subsequent constitutional challenge. This suggestion has been current for a quarter century;<sup>398</sup> the Supreme Court has followed it in some cases subjecting legislation to heightened scrutiny of constitutionality.<sup>399</sup> But a determined legislature could circumvent such a prohibition simply by declaring a purpose that immunized its legislation from later judicial challenge. Hence, the Court has not embraced a general exclusion of

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397. For example, Justice Scalia sometimes voices strong objections to balancing, see *Whren v. United States*, 116 S. Ct. 1769, 1776 (1996) (rejecting an explicit balancing approach to determine reasonableness under the Fourth Amendment); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897–98 (1988) (Scalia, J., concurring) (ridiculing the process of balancing incommensurate qualities), even if he recognizes, in unguarded moments, that strict scrutiny itself is a form of balancing, see *Employment Div. v. Smith*, 494 U.S. 872, 882–88 (1990).

398. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 28, 44–46 (1972). Similarly, Cass Sunstein has argued that “[m]any constitutional provisions require government to identify a public value that can be used to support government action.” Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. Chi. L. Rev.* 1129, 1133 (1986). His more recent work, however embraces the claim that requiring agreement as to purposes among judges will often frustrate the goal of agreement as to the bottom line. See Sunstein, *supra* note 50, at 20–21.

399. See Laurence H. Tribe, *American Constitutional Law* § 16-32, at 1606–09 (2d ed. 1988).

justification of legislation by afterthought, for fear that the obligation to give binding reasons could be reduced to a formality of drafting.<sup>400</sup>

Courts recur to a second, closely related but equally unfeasible, strategy in developing canons of restrictive statutory interpretation said to serve the constitutional value of clear authoritative meaning, even if these canons are not directly required by the Constitution.<sup>401</sup> Thus, judges attempt to constrain legislatures to purge their enactments of ambiguity by disallowing references to legislative history or by imposing plain statement requirements.<sup>402</sup> But these techniques attribute to the Court a fictive capacity to determine which meanings are plain; more troubling still, they attribute to the vacillating and divided legislature we know a superherculean capacity not only to solve problems without recourse to ambiguity, but also to anticipate which solutions the Court will accept as unambiguous. It takes great confidence indeed in the authority and interpretive constancy of the judiciary (and a peculiar mixture of little and much faith in the judiciousness and integrity of elected representatives) to assume that, by itself, the intimidating prospect of a Court sworn to extirpate legislative ambiguity will produce effective and unequivocal legislation.

Given the persistence of these fundamental dilemmas of interpretability, the Court in practice faces a familiar Hobson's choice. It can defer to political decisions however arrived at, knowing that deference invites caprice and manipulation by the lawmaker. Or it can scrutinize the decision in the light of its balancing techniques. But this scrutiny threatens to paralyze or disqualify democracy.

The Court's response is yet another balancing act: In effect, acknowledging that, case by case, it must be either too deferential or too intrusive, the Court aims to strike an acceptable balance between these excesses in the aggregate of its decisions. It does so by categorizing cases either as calling for deference to political decisions or as calling for close supervision. Upon determining that deference is called for, the Court insists only that it be able to discern a "rational basis" for legislation (in constitutional law)<sup>403</sup> or evidence of "reasonable" agency decisionmaking

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400. See Ely, *supra* note 2, at 125.

401. In the federalism context, the Court has imposed a rule that, absent a plain statement, Congress will be presumed not to have exercised the power to regulate in areas traditionally regulated by the states. See *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (invoking this rule to hold that the Age Discrimination in Employment Act does not apply to state judges).

402. For a catalogue and critique of conventional textualist theories, as well as a defense of a somewhat unconventional theory, see generally John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 *Colum. L. Rev.* 673 (1997); see also *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law.").

403. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (rational basis review in equal protection); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (rational basis review of economic legislation).



(in administrative law).<sup>404</sup> The standards applied in the case of such deference are very deferential indeed. In the constitutional area, the Court will simply assume that the legislature has chosen to pursue a permissible end, and then hypothesize a route from chosen means to that end. Thus, to take an infamous example, if the optometrist and ophthalmologist lobby manages to obtain legislation that favors their interests over those of opticians, the Court strains to imagine a world in which the law is public regarding rather than a private deal.<sup>405</sup> Or, to choose an equally notorious example from the realm of administrative law, if manufacturing interests persuade a new administration to reinterpret an environmental statute in a manner that permits more pollution, the Court will characterize the shift as a policy decision within the broad scope of the statute, thus avoiding the need to interpret the statute definitively itself.<sup>406</sup> In both constitutional and administrative law, such deference is the rule. Only in cases raising matters of exceptional urgency does the Court apply its techniques of weighing means and ends under the more demanding and forbiddingly named tests of strict scrutiny (in constitutional law) and hard look review (in administrative law).<sup>407</sup>

But the categorization of particular cases as calling for either deference or close scrutiny is, at best, a political makeshift. It demonstrates to the polity that the Court is aware of its place in the constitutional order, even if by a sad paradox each decision taken by itself seems to suggest that it is not, and even if, by a more perilous paradox, the balancing act underscores just how much that order depends on the Court's ability to maintain its poise. Indeed, on rare occasions we actually see the Court teetering. It worries that the application of a standard in a particular case will undermine the integrity of the standard in others.<sup>408</sup> The Court's

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404. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

405. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487 (1955).

406. See *Chevron*, 467 U.S. at 857-58, 866.

407. Strict scrutiny applies to laws infringing or unequally burdening fundamental rights and those employing suspect classifications such as race. See Tribe, *supra* note 399, § 16-6, at 1451. *State Farm* exemplifies hard look review, see Peter L. Strauss, *Considering Political Alternatives to "Hard Look" Review*, 1989 Duke L.J. 538, 539, in which the reviewing court asks the nominally procedural question whether the agency gave adequate consideration to the issues raised by its decision. See Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 Tex. L. Rev. 483, 491 (1997). The Court has not announced formal criteria that determine when it will engage in hard look review as opposed to deferring per *Chevron*.

408. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), is an almost comical example. The Court first declines to find that mental retardation is a suspect classification calling for strict scrutiny, expressing the fear that such a finding would open the floodgates to other suspect classifications, and thus lead to unwarranted judicial interference with political decisionmaking. See *id.* at 445-46. But the Court goes on to find that the particular classification at issue fails even the minimal test of rational basis scrutiny, see *id.* at 447-48, in effect subjecting the ordinance "to precisely the sort of probing inquiry associated with heightened scrutiny," *id.* at 458 (Marshall, J., concurring

falterings reveal its fundamental dilemma. For if the Court abandons deference too often for the alternatives of heightened scrutiny or hard look review, and in the bargain recognizes openly that it is engaged in balancing incommensurate public and private goods,<sup>409</sup> it interferes with the political process and risks its own legitimacy. But if the Court chooses deference instead, it risks protecting itself at the cost of the fundamental values it is meant to safeguard.

2. *Experimentalism and the Giving of Reasons.* — The foregoing difficulties are not of the Supreme Court's own making; rather, they result from the nature of the processes the Court must review, and which by doctrinal assertion alone it cannot reform. We contend that as the polity adopts experimentalism, courts can avoid the worst features of oscillation between deference and intrusion. For democratic experimentalism can clarify the relation of means and ends in a way that judicial exhortation and intimidation cannot. Experimentalism provides the polity with the institutional means to ask the questions that courts otherwise need to, but cannot ask, in hard cases, and to ask them in the way most relevant—connecting means to ends—to practical decisions and judicial review.

Experimentalism clarifies authoritative meaning so as to reduce recourse to, and the capriciousness of, statutory interpretation and the balancing tests with which it is associated, because it does away with the spurious precision of once-and-for-all solutions to problems of administrative and constitutional order. As a result, many issues that daunt judicial review in its current form often do not even arise under experimentalism; and when they do arise, they call forth a judicial response that casts the courts in a new, less precarious role.

Consider the case of the environmental statute used to illustrate deferential administrative review.<sup>410</sup> The statute provided for stringent emissions licensing requirements to be applied to what the statute called a "stationary source."<sup>411</sup> The controversy surrounded the definition of this term. Prior to the Reagan administration, the agency treated each pollut-

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in the judgment in part and dissenting in part); see also *Burson v. Freeman*, 504 U.S. 191, 225–26 (1992) (Stevens, J., dissenting) (expressing concern that the Court's upholding of limitation on speech would dilute strict scrutiny).

Nor is this phenomenon limited to constitutional law. In the administrative law context, the Court sometimes strains mightily to avoid classifying a case as calling for deference. For example, in *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994), the Court analyzes the contents of old and new dictionaries to conclude that the word "modify" encompasses minor but not major change. See *id.* at 225–29. This maneuver enables the Court to refuse to defer to the agency's interpretation of "modify," on the ground that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id.* at 229 (citing *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988), and *Chevron*, 467 U.S. at 842–43).

409. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("It is more like judging whether a particular line is longer than a particular rock is heavy.")

410. See *Chevron*, 467 U.S. at 843–44.

411. See *id.* at 840.

ing device as a single stationary source for a variety of purposes. The new administration wished to employ a "bubble concept," in which the entire plant was treated as one stationary source.<sup>412</sup> This redefinition of the statutory term allowed firms to meet licensing requirements more easily by using low-level emissions-producing devices to offset the effects of dirtier ones.<sup>413</sup> Given the ambiguity of the regulation, it seemed that the Court had little choice but to defer.

Under democratic experimentalism, in contrast, this sort of problem typically would not arise because Congress and the agencies would play quite different roles. The very idea of statutory authorization for the agency to license plants based upon their compliance with agency-set emissions standards would be replaced by a statute authorizing the agency to coordinate industry, state, and local efforts to establish a rolling best-practice requirement. Some jurisdictions might initially define emission sources as points or discrete pieces of equipment, while others might define them as areas or bubbles. The differences could persist until it were demonstrated that one regime or the other produced the superior (rolling) standard. The search routines and comparisons that set such requirements would supplant agency-set limits; and, should Congress nonetheless choose to trigger certain (other, rolling best-practice) requirements with a term like "stationary source," the same search routines and comparisons would inform the agency and the court as to whether a standard more stringent than the bubble concept were possible.<sup>414</sup> If one jurisdiction could regulate pursuant to a single-source interpretation of stationary source, then regulated entities in other jurisdictions would have little cause to complain.

Under current practice, when an agency's regulatory approach is challenged as illegal, it typically defends itself by arguing that the practice falls within the band permitted by the standard-setting statute even if other practices also fall within that band.<sup>415</sup> The courts must then determine the meaning of the statutory or regulatory command—a task that is problematic in the ways we just saw.<sup>416</sup> By contrast, under a statute authorizing experimentalist administration, the courts do not themselves

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412. See *id.* at 840 (defining bubble concept), 857–89 (describing shift under new administration).

413. See *id.* at 853–59.

414. It might be thought that the choice between regulation per the bubble concept and regulation per point sources poses a simple policy choice between more or less pollution. But this is not obviously so; state and local experimentation might reveal that, under some circumstances, a bubble concept in fact produces incentives that result in less total emissions than the alternative point source regulation. See Donald Kennedy, *Valuing Nature*, 16 *Stan. Envtl. L.J.* at xi, xii (1997) (grouping the bubble concept with other market-based approaches that create incentives for firms to reduce pollution). But cf. Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 *Envtl. L.* 1549, 1624 (1991) (contrasting bubble concept with "a market approach").

415. See, e.g., *Chevron*, 467 U.S. at 842–45.

416. See *supra* Part V.D.1.

supply authoritative meaning; the agencies and other actors jointly provide the baseline through rolling best-practice standards.

Noncomplying entities then would have the burden of showing that the standard selected by the agency is not in fact superior to their own, or of showing that local circumstances render solutions that were adopted elsewhere infeasible for them. Courts would be required to exercise some judgment, but that judgment would be considerably less speculative than under existing practice. The courts would not be charged with determining whether the practice designated by the agency is in fact best—how could a court know better than an agency? Instead, the court's task is to inquire whether the agency in fact undertook the kind of information organizing and coordinating effort necessary to generate rolling best-practice standards. And in the case of entities or jurisdictions that claim that their local circumstances make the standard practice inapplicable, the burden would be on these entities and jurisdictions to show why this is so, by showing that they undertook the sort of searching comparisons conducted by firms engaged in learning by monitoring.

The system of judicial review is thus procedural in the sense that it asks what the entities, jurisdictions, and agencies did to look for solutions, rather than whether the solutions were the right ones. However, because the preferred procedures of democratic experimentalism so closely tie means to ends, procedural review resists transformation into an empty formalism. Practical exploration of alternatives by the primary actors obviates much interpretive balancing of means and ends by the judiciary, and does so in a way that allays fears of a pro forma manipulation of the record.

Judicial review of experimentalist administration avoids the extremes of deference and intrusion. We have just considered a case that would, under the present regime, be treated under a rule of deference; under experimentalism, the same approach applies in cases that would, under the present regime, be treated as calling for hard look review. Seen through the lens of democratic experimentalism, the flaw in the agency process in a case such as *State Farm*<sup>417</sup> (the paradigmatic hard look case) is not so much the failure to consider a particular alternative regulation as it is the decision to structure the regulatory process as a search for a definitive standard. If NHTSA had established a rolling best-practice standard, automobile manufacturers would have had a financial incentive to find optimal solutions, and judicial review would have proceeded along the general lines described above.

Recall that cases like *State Farm* present the question whether an agency regulation ought to be invalidated for the agency's failure to consider some particular alternative.<sup>418</sup> An experimentalist court hearing

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417. See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

418. See *supra* text accompanying notes 226–231.

such a claim typically would not need to speculate about such matters, because an experimentalist agency will itself generate the information that bears on the court's assessment of the consideration of alternatives—not because the agency labors under the watchful eye of the courts, but because that information is crucial to regulation itself. The consideration of alternatives is not a mere appendage to the regulatory agenda; benchmarking and error detection by comparison are the very stuff of experimentalist regulation. Judicial review would then look to see whether the agency used procedures that enlisted the regulated entities and the intended beneficiaries as partners in the search for solutions. A claimant would not state a case justifying relief merely by alleging that the agency failed to consider some particular alternative to the regulation ultimately adopted and deemed suitable by the reviewing court; instead, the reviewing court would look to see whether the process was structured in such a way as to produce alternatives and comparisons. When agencies function according to experimentalist principles, judicial review of agency action is thus unlikely to disrupt agency proceedings.

3. *A Partial Reconceptualization of Judicial Review and Rights.* — As the foregoing analysis makes clear, experimentalist legislation and administration will not eliminate the need for judicial action, but the new forms do partially transform judicial action. An experimentalist court seeks to give effect to important legal norms, without presuming to know their full implications for particular circumstances. The experimentalist court enlists the actors' particular projects in its elaboration of general norms. To do so, the court first identifies circumstances that threaten constitutional and other important legal values; it then commands the actors to meet this menace by means of their choosing (with due consideration to the choices of others in like circumstances) and subject to the court's review. In Part VIII, we detail how the Court has already authorized such an exploration of countermeasures to potential constitutional wrongs under the name of "prophylactic rules," and show that the justification for this approach can sensibly be extended to the mass of constitutional values. For now, however, we focus on those aspects of experimentalist judicial review that illustrate the new division of deliberative labor between the judiciary and other actors. As our examples in the previous section were drawn largely from administrative law, here we focus on constitutional cases.

By way of illustration, consider a stylized version of one of the most vexing constitutional questions of our time: To what extent may government classify persons by race as a means of combating present racism and the present effects of past racism? The question calls for an interpretation of the Fourteenth Amendment's guarantee of equal protection and raises profound philosophical and political issues. Yet, it also raises important practical questions, and an experimentalist judiciary would enlist society at large in connecting the practical to the philosophical. Thus, in the case of an urban affirmative action program, an experimentalist court

would oblige the city to canvass current and potential affirmative action programs for city employees and contractors, as well as race-neutral means for achieving the same objectives. In choosing one or some amalgam of several programs, the city would have to give reasons for its choice, rooted in the particulars of local experience and reflecting the diversity of local views. In justifying its choice, moreover, the city would have to explain—again by reference to alternatives practiced elsewhere—why the forms of participation used to assess local conditions and potential local remedies are in fact suited to those conditions. In correcting the operation of the affirmative action program, the city would furthermore present a review of all these matters from the point of view of participants, pleased and not, and a record of the response to that review.<sup>419</sup>

Abstracting from this example to the process of judicial review more generally, we see that the actors use the record of their evolving purposes as the guide and measure of their action. As a consequence, a reviewing court has relatively little need to fear that it is being duped by empty declarations of harmless intent, or that it will have to fill a vast interpretative void by hypothesizing as to legislative purposes. If the gap between actions and the record is large, then the actors have failed to meet their obligation of self-explication, and their after-the-fact justifications—always suspect—are more suspicious still. If the gap is acceptably small, then the record reveals the intent as it was interpreted in action; and, being itself an exegesis of the facts, it neither requires nor admits an after-the-fact supplement.

Stripped of the confounding complexity of means-ends scrutiny in its familiar forms, an experimentalist review moves in the direction of an express jurisprudence of excluded or impermissible reasons.<sup>420</sup> At any moment, such a jurisprudence gives substance to the constitutional obli-

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419. The post-*Croson* literature suggests the kinds of information that city policymakers ought to compile. See, e.g., George R. La Noue, Standards for the Second Generation of *Croson*-Inspired Disparity Studies, 26 Urb. Law. 485, 533–35 (1994) (discussing the various problems of disparity studies and suggesting solutions for policymakers); Daron S. Fitch, Note, The Aftermath of *Croson*: A Blueprint for a Constitutionally Permissible Minority Set-Aside Program, 53 Ohio St. L.J. 555, 576–84 (1992) (discussing use of statistical and anecdotal evidence in proving past discrimination).

420. Several commentators have recently noted that the Supreme Court has itself been moving in this direction precisely because of the circularity problems identified here. See Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297, 338 (1997); Richard H. Pildes, Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law, 45 Hastings L.J. 711, 712–13 (1994). Stephen Gottlieb has called attention to this point as a general matter, see Stephen E. Gottlieb, Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication, 68 B.U. L. Rev. 917, 919–20 (1988); Stephen E. Gottlieb, The Paradox of Balancing Significant Interests, 45 Hastings L.J. 825, 860–66 (1994), and of course, there are areas of constitutional law, such as the First Amendment's protection of free speech, that have been long understood to be concerned primarily with illicit government purposes, see generally Tribe, *supra* note 399, §§ 12-2 to 12-4, at 789–804.

gation that citizens be treated as free and equal by saying what motives violate that requirement.<sup>421</sup>

In determining, next, whether permissible reasons have been accorded the respect due them, a court need no more reconstruct the whole history of decisionmaking in a matter under consideration than an agency does in determining compliance with the obligation to benchmark and the rolling standards that result. Where judicial review of agency action is at issue, the process takes place at a metalevel: The court reviews the agency's decisions about how to regulate, given the choices faced directly by regulated entities. The court looks to the record of the agency's successive organizations of information pooling, and especially its (changing) responses to challenges and proposed alternatives. This form of judicial review resembles the new method of regulating nuclear utilities. It judges the safety and reliability of the responses by analyzing how they respond to potential hazards and actual threats, given an extensive record of both, *and* a record not only of reactions to them but of efforts to improve those reactions.<sup>422</sup> Where there is no agency interposed between the actors and the court—as in the urban affirmative action example—the court monitors the pooling of information as though it were an agency, but applies, of course, the less detailed criteria found in broad constitutional guarantees, as against relatively concrete (experimentalist) statutes. In determining, for instance, whether the city adopting affirmative action measures has chosen means appropriate to the allowable end of reducing discrimination, the court, like a hypothetical regulatory entity, looks to the pool of experience upon which the city itself has been drawing: the affirmative action plans of like cities and their justifications, the exact form of benchmarking, the participatory methods, and the corrections to these.

Thus, the court judges the parties' abilities to gather, summarize, and use information by their ability to learn from their mistakes while drawing on the efforts of others in their situation to do likewise. Plaintiffs will strive to enlarge the circle of comparisons to include cases with out-

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421. A substantive jurisprudence of this stark kind is foreshadowed in the Court's recent decision in *Romer v. Evans*, 517 U.S. 620 (1996), invalidating Colorado's state constitutional amendment denying cities and other subdivisions of the state the authority to prohibit discrimination against gays and lesbians. Justice Kennedy's opinion for the Court self-consciously avoids the customary preoccupation with the appropriate level of scrutiny, finding instead that the Colorado amendment is best seen as a fulfillment of the goal of harming gays and lesbians for the simple purpose of harming them. See *id.* at 1628. Whatever else one might say about discrimination on the basis of sexual orientation, the Court says that the purpose of harming an identifiable group is a constitutionally illegitimate one. See *id.* Of course, the *Romer* opinion does not entirely escape the dilemma of modern judicial review, because Justice Kennedy must infer the amendment's purpose in part from the means it uses, and he predictably encounters a different characterization by the dissent. See *id.* at 1629 (Scalia, J., dissenting) (arguing that Colorado amendment was not motivated by "desire to harm," but instead by desire to "preserve traditional sexual mores against the efforts of a politically powerful minority").

422. See *supra* Part V.C.3.

comes that favor their cause. To be convincing, they will have to show that at least some other jurisdictions have found the comparisons they contemplate compelling enough to consider acting on them. Defendants will present reasons based in their own experience for disallowing those comparisons. To be convincing they will have to show that these reasons are consistent not only with the other reasons they give for their actions, but also with those actions (and responses to the reactions they provoke) themselves. In this to and fro, it is the primary actors that define the range of alternatives to be considered in an evaluation of the appropriateness of ends to means, further publicizing the variety of possibilities in the process; and in deciding whether due consideration has been given to these alternatives, the court refers to standards of care and attentiveness—the ability to learn and learn to learn—that emerge from the practice of the relevant parties themselves.

The resulting convergence of judicial and practical reason giving appears most dramatically in the formulation of concrete plans of action. Even traditional courts often directly involve the parties in the formulation of remedial decrees. This is most often true in institutional reform litigation: Upon finding that a city deliberately operates a racially segregated school system in violation of the Equal Protection Clause or that a state operates an overcrowded prison in violation of the Cruel and Unusual Punishments Clause, courts routinely solicit remedial plans from the plaintiffs and (respectively) the school board or prison officials.<sup>423</sup> Experimentalism generalizes and radicalizes this procedure. It asks courts to involve the parties in exploring the realm of possibilities at the earlier stage of determining whether there is a legal violation.

For trial courts, experimentalism can transform the role of the judge from the traditional Anglo-American model of passive referee<sup>424</sup> into an active problem solver, acting in cooperation with lawyers and the network of social problems and services in which legal problems are embedded. For example, in the last decade, over 150 drug courts have been created, and an equal number are planned.<sup>425</sup> These courts treat nonviolent crimes committed by drug addicts as symptoms of the addiction, rather than merely as violations of the criminal code. Social workers, medical personnel, and a sophisticated computer database give the judge the kind of information necessary to decide whether and how treatment may be more appropriate than prison; frequent follow-ups by the court ensures

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423. See, e.g., *Hart v. Community Sch. Bd.*, 383 F. Supp. 769, 774 (E.D.N.Y. 1974) (Weinstein, J.) (ordering implementation of school district's proposed remedial plan upon receiving detailed report of special master and after extensive consultation with parties), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

424. See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1042–43 (1975) (arguing that a judge in the American adversarial system is ill equipped to play an active role in development of the case).

425. See Jennifer Gonnerman, *Justice for Junkies: Brooklyn's Drug Court Marks a Year of Sending Addicts to Rehab, Not Prison*, *Village Voice* (New York), June 3, 1997, at 50.



that addicts continue their prescribed treatment, and that treatment facilities serve their assigned functions, rather than simply acting as alternate warehouses to prison.<sup>426</sup> In this setting, the judge acts as coordinator of information, as stern parental figure to addicts who repeatedly fail to follow through on treatment, and as cheerleader for those who succeed.<sup>427</sup> The one thing the judge does only rarely, however, is, in a word, *judge*—in the sense that the judge rarely purports to make a legal or factual determination based on competing presentations.<sup>428</sup> But, unlike other contexts in which the judicial system skips the adjudication phase, such as plea bargaining, in a drug court the judge plays an extremely active role in implementing and overseeing resolutions.<sup>429</sup>

In those circumstances in which the court is not a part of the social arrangements it superintends, experimentalist judging will often consist of instructing the primary social actors to devise solutions. As a striking example of the convergence of approaches, consider the decision of the European Court of Justice in *Union Royale Belge des Sociétés de Football Association (ASBL) v. Bosman*.<sup>430</sup> The court faced a challenge to, inter alia, regulations promulgated by national and international soccer organizations requiring the payment of large transfer fees (up to eight times a player's annual gross salary) when, upon the expiration of a professional player's contract, he wished to play for a new club.<sup>431</sup> The court interpreted Article 48 of the European Community as including a prohibition on "rules applied without discrimination which hinder freedom of movement,"<sup>432</sup> and accordingly held the transfer rules invalid in the case of a Belgian soccer player who found himself unable to play for a French club because of the prohibitive cost of the transfer rules.<sup>433</sup> However, the court recognized that the soccer organizations were legitimately concerned that without some form of regulation, the teams playing in the richest markets would win the bidding war for the best players and thereby reduce the overall quality and competitiveness of play.<sup>434</sup> Finding that the transfer rules were not the only feasible means of preventing this occurrence,<sup>435</sup> the court ruled them invalid.<sup>436</sup> The court did not, however, order the organizations to adopt any particular remedy. In-

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426. See Christopher S. Wren, *New Court Lets Drug Addicts Choose Treatment Program Rather Than Jail*, N.Y. Times, May 27, 1997, at B3.

427. See Gonnerman, *supra* note 425, at 50.

428. Both of the authors had this reaction after observing a session of the Brooklyn Treatment Court.

429. Interview with Judge JoAnn Ferdinand, Criminal Court of the City of New York, in her Brooklyn Treatment Court Chambers (Dec. 1, 1997).

430. Case C-415/93, 1995 E.C.R. I-4921, [1996] 1 C.M.L.R. 645.

431. See *id.* ¶¶ 9-10, at I-4934-35.

432. *Id.* ¶ 165, at I-4991.

433. See *id.* ¶ 248, at I-5025.

434. See *id.* ¶ 218, at I-5014.

435. See *id.* ¶¶ 219-27, at I-5014-18.

436. See *id.* ¶ 248, at I-5025.

stead, it noted that the objective of competitiveness could be achieved by revenue sharing, as that method in fact was in use "in specific areas by the associations and clubs concerned."<sup>437</sup> Having set this benchmark, the court made clear that it would not presume to devise solutions for the actors:

Which system the associations and clubs put in the place of the . . . transfer rules with their system of transfer fees is in any event a matter for them themselves. The only condition imposed by Community law in that respect is that the right of players to freedom of movement, protected by Article 48 of the EC Treaty, must remain guaranteed.<sup>438</sup>

As we explain in greater detail in Part VIII, American constitutional doctrine anticipates a similar form of experimental elaboration of legal norms in its concept of prophylactic rules.<sup>439</sup> The basic notion, elaborated in *Miranda v. Arizona*<sup>440</sup> and other cases involving the rights of criminal suspects, has several components. First, prophylactic decision-making allows that some circumstances pose special risks to constitutional rights and values even if the Court cannot identify a clear violation. Second, this allowance obligates the government to meet minimum protective standards established by the Court. Third, the Court's chosen standards are understood to be mere minima; the Court encourages different jurisdictions to experiment with other means of protecting the vulnerable rights and values. It should be immediately apparent that this approach may be used whenever the Court is uncertain about the application of general norms to particulars—and that this circumstance describes nearly all adjudication.

Thus, as a matter of substance, experimentalist judging focuses on the permissibility of reasons, and responses to threats to fundamental legal norms. As a matter of procedure, experimentalist judging focuses on participation; but where traditional procedural jurisprudence seeks the eternal requisites of fair process,<sup>441</sup> experimentalist courts ask whether the parties whose actions are challenged have satisfied their obligation to grant those rights of participation revealed to be most effective by comparison with rolling best practices elsewhere.

But no matter the constraints supplied by the self-exploration and explication of the parties in democratic experimentalism, and its approximation of judicial and practical logistics notwithstanding, in the end, of course, judging the validity of reasons and the respect accorded them in particular cases will require judgment; and as judges reflect on the rea-

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437. *Id.*

438. *Id.*

439. See *infra* Part VIII.B.

440. 384 U.S. 436 (1966); see also *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980) (using the "prophylactic" label).

441. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266–71 (1970) (setting out the elements that the Due Process Clause requires in a hearing prior to termination of welfare benefits).

sons given for preceding decisions, judgment will be informed by doctrine. Often that doctrine will be shaped by the need to clarify the responsibilities of actors and institutions within the architecture of an experimentalist regime. As anticipating such doctrine is itself a way of clarifying the experimentalist design, we present experimentalist variants of federalism doctrine concerning the relation between national and sub-national governments, and of separation-of-powers doctrine concerning the relation between branches of government. The most controversial doctrinal developments, in experimentalism as under current arrangements, will typically concern the definition of the rights that define the freedom and equality of citizens, or, put another way, set limits to the reasons permitted in directly democratic deliberation. Because it identifies and publicizes novel forms of participation, democratic experimentalism provides a mechanism by which the social actors can press the courts for clarification of the citizens' rights of participation broadly understood. Because it allows local actors to pursue broad ends by the means they think best, experimentalism allows judges to acknowledge the justice of actors' demands for clarification of their participatory rights without the courts' having to discern by themselves how this acknowledgment can be woven into the skein of practical affairs. Anticipating this mutual redefinition of participation and rights will help clarify how experimentalism gives meaning to democracy. Before turning to these questions of doctrine and rights, however, we address several broad criticisms of democratic experimentalism that are likely to have been crystallized by the exposition so far.

### *E. Criticisms and Big Worries*

Any incrementalist design for polyarchy is reasonably subject to two broad kinds of criticism. The first kind of criticism is that incrementalism, by decentralizing authority and subdividing large decisions into small ones, directly surrenders the weak to the power of the strong. It is often the local oligarchs, after all, who truly love their little platoon. Behind the screen of community and long familiarity, they can have their way, excluding the little people from political participation by quiet intimidation, perhaps softening intimidation into anxious loyalty with the small gifts of clientelism. Or it may be that decomposition of large questions into debates about small improvements disadvantages the weak because the causes of their vulnerability are so deeply and systematically rooted that only large changes will produce improvements worth the name. In obstructing the consideration of sweeping alternatives, incrementalism substitutes tinkering for resolute reform.

The second kind of criticism is agnostic as to the advantages and disadvantages of incrementalism for the weak and the strong. Its concern is efficiency, and the dangers of detour and paralysis. Going step by step we climb, for too long, the hillock rising before us, only to discover at the top the mountains and valleys towards which we ought to have been striv-

ing. Thus, incrementalism invites us to celebrate timidity and inertia as prudence and determination. The more determined we are, moreover, to ensure that each step meets the procedural requirements of directly deliberative democracy, the greater the chances that prudence ends in a morass of proceduralism.

We have been mindful of these criticisms from the outset and sought to construct democratic experimentalism to respond to them. To take stock of the argument so far, to make explicit assumptions left in the background, and to suggest further necessary elaboration, we respond to them directly and briefly here.

Consider first the possible menaces to the vulnerable: exclusion and the elimination of the possibilities of great reform in favor of a sedative meliorism. We can be brief with regard to the danger of exclusion, as it has been a central concern in the discussion of institutional design so far, and we will present further arguments in Part VIII in support of rights-based safeguards against it.<sup>442</sup> Here we only recall the assumption underlying the conviction that decentralized experimentalism can be an instrument for increasing participation, or, put the other way, reducing exclusion, and connect that assumption to the large hopes of what is sometimes called Enlightenment or liberal thought.

The assumption is simply that at the frontiers of human activity, efficiency gains are often achieved through new forms of cooperation that work precisely because persons and groups previously denied a say in ordering the affairs that affect them acquire it. Given this assumption, democratic experimentalism is an apparatus for identifying these successes, and providing the means by which their example can be used to enlarge the circle of participation elsewhere. The assumption itself is but a paraphrase of the liberal credo that freedom is the handmaiden, slavery the mortal enemy, of progress, for self-determination is a precondition of cooperation, and cooperation the condition of joint advance.<sup>443</sup> This is the idea behind Adam Smith's bottom line that slavery is the dearest form of employment,<sup>444</sup> and the bottom line in the anguished calculations of the nineteenth-century elites in Western Europe and the United States that mass democracy in some form is a precondition for national economic

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442. See *infra* text accompanying notes 656–677.

443. See Friedrich A. von Hayek, *Law, Legislation and Liberty* 14 (1973).

444. See Adam Smith, *supra* note 73, at 411. This is not to suggest that slavery fell of its own inefficiency, nor that all or even many of those who opposed it did so out of concerns of efficacy. See Seymour Drescher, *Econocide: British Slavery in the Era of Abolition* 184 (1977) (showing that late-eighteenth-century British abolitionism flourished even though “slavery was more important to Britain during the last decade of the eighteenth and the first decade of the nineteenth centuries, than ever before or after”). Our claim is that there is often a confluence between the economically viable and the morally compelling.

and military self-assertion.<sup>445</sup> And while there are many examples of servitude that paid for the masters, it is a profession of the liberal faith in the emancipatory possibilities of world history that we regard these as exceptions to the liberal rule. Democratic experimentalism is a relentless and deliberate application of that rule in the service of participatory self-determination.

If the fear of exclusion names a challenge that democratic experimentalism is intended to address, the concern about the blanket elimination of large alternatives is, in that general form, a needless worry. Within limits set by national institutions (the Constitution, Congress, the agencies), local governments in democratic experimentalism may pursue generally agreed upon goals by whatever means they prefer. They must explain their choices and provide reasons for preferring those choices over other, plausibly relevant methods. They must agree to measures that allow informative comparisons with others pursuing the same goals under similar conditions; if challenged, they must show that they can give good reasons, based upon serious consideration of periodic mutual evaluation, for sticking to their original choices or modifying them.

But subject to these restrictions, local governments may choose radically different alternatives, and experimentalism, by design, makes it easier for them to do this than it would be in a conventional representative democracy. Consider the archetypal case of welfare reform. A local government that chooses to address the problem by adapting and integrating services to suit the highly specialized needs of citizen users can avail itself of the simultaneous engineering and benchmarking capacities of the local governance council, service providers, and government agencies. Another local government, horrified at the prospect of inducing indolence by providing welfare in the first place, can decide, on the contrary, to provide only minimum training and job placement services (unless and until the decision provokes emergencies or until eventual successes of the integrative solution prompt reconsideration). Contrast this autonomy with the possibilities in present mass democracies, where, until very recently, central welfare bureaucracies, backed by national legislatures, had the authority to block anything like the second type of solution, and lacked the incentives and capacity to realize a workable approximation of the first. (We return in Part VI to the current forced-draft decentralization of welfare reform in the United States as an admonitory illustration of the dangers of abandoning national legislative authority without sufficiently providing for an experimentalist alternative.)

A further sense in which democratic experimentalism by its very nature enlarges the range of alternatives under consideration regards the process of problem solving by direct deliberation. Recall that this process

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445. See generally Walter Bagehot, *The English Constitution* (1963); Friedrich Meinecke, *The Age of German Liberation 1795-1815* (1977); Alexis de Tocqueville, *Democracy in America* (Phillips Bradley ed., Vintage Books 1990) (1835).

depends on drawing the participants beyond the circle of their habits and routines by exposing them to unfamiliar projects and prospects. The diversity of their viewpoints allows evaluation of novelty, and evaluation of novelty allows reexamination of differences. The immediate products of this deliberation are solutions to problems and indications of organizational reforms that could prevent a similar occurrence. But why assume that reflection on possibilities stops here? As patterns in problem solving and institutional reform emerge, they can be formulated as coherent, if previously unimagined, alternatives. Strategic reflection would be in this sense a joint product of problem solving, just as strategic reflection would be a joint product of product development in firms that adopted learning-by-monitoring governance mechanisms. A master skill in the new electoral politics of experimentalism would be precisely the articulation of such patterns and alternatives as a means of furthering the life of the local polity. Thus, because of the freedom to choose among radically different classes of solutions to similar problems, and the possibility of discovering new classes through problem solving itself, it is simply wrong to say that democratic experimentalism, as we describe it, is inimical to large choices, although experimentalism may occasionally overlook some radical possibilities to focus on others.

The fear of paralysis through the decomposition of decisionmaking into infinitely small steps we hold to be similarly misplaced. If all imaginable controversies of interpretation regarding the legality of substantive and procedural proposals had to be fought out in advance of action, then, of course, the concern would not only be pertinent but also irrefutable. But in that case we would no longer be speaking of experimentalism as we have been conceiving it. For the central tenet of experimentalism is that experience matters, or, more precisely, that the best way to assess the viability of plausible but imprecise ideas is to test them in practice under conditions that permit learning from the experience. Experimentalism would be superfluous if its results could be anticipated by reflection. That is why we are, broadly speaking, at pains to make it hard to stop an experiment before the fact simply by imagining possible harms, and to make it easy to demand improvements of a local government or administrative agency if an instrumentality of government in a like situation is in fact doing better.

As we saw in the NHTSA example, the facts are indeed on our side: Empirically, the most effective way to challenge a government regulation is to argue that compliance is in theory impossible.<sup>446</sup> Once someone complies, it proves much harder to demonstrate illegitimacy. If we are right in this, and more generally in our assumptions regarding the efficacy of the participatory safeguards (including the liberal assumption on which all the others rest), then arguably the vulnerable will be at least as well protected in an experimentalist regime as in one that makes their

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446. See *supra* Part V.C.1.

protection depend on evanescent legislative and judicial majorities. But this is a long way from saying that experimentalism sacrifices freedom of action out of overscrupulous regard for procedural perfection.

Behind these concerns, however, are two larger and more substantial worries. Measured by the response they require, the response we can offer is no more than a credo. We offer this response only so that it is clear what beliefs, in advancing the idea of democratic experimentalism presented here, we must eventually defend.

The first of these worries surfaced as the prospect that democratic experimentalism conceived as directly deliberative polyarchy may favor some kinds of alternatives over others, even if some of the favored ones count as large departures from the current situation. Specifically, the worry is that this kind of democratic experimentalism results in local experiments that, however bold, are not likely to produce fundamental change, while ruling out comprehensive, national experiments that could. In its most common, radical-democratic (but also post-Marxist and post-populist) form, the core of the argument is centralist egalitarianism. It claims that the causes of misery and exclusion in contemporary democracies lie in inequalities in the distribution of wealth or access to education, or as the result of these, information needed for active citizenship. Hence, a precondition of participation, and most especially of the highly informed, directly deliberative participation envisaged in democratic experimentalism, is redistribution of assets and opportunities. As rich and poor usually live apart, effective redistribution must be from rich locales to poorer ones, or directly from the rich to the poor.<sup>447</sup> An experimentalism that begins by decentralizing control of (some share of) existing or marginally augmented resources to local jurisdictions will only encourage hopes it must disappoint. Or, in those situations in which the rich and poor find themselves grouped together, the worry goes, wealthy individuals and large corporations will co-opt local government and turn it to their own ends. In this view, wealth and luxury consumption must first be taxed, concentrations of corporate power broken, and the proceeds spent on programs to improve the education, the life conditions, and the economic opportunities of the poor, before (or at least at the same time as) decentralized experimentalism is contemplated at all.

A first, theoretical response to this centralist egalitarianism distinguishes two possible and pernicious consequences of inequality that proponents of the argument often mix together. The first is that inequality

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447. For recent proposals along these lines, see Bruce Ackerman & Anne Alstott, *The Stakeholder Society* (forthcoming 1999) (manuscript at 4, on file with the *Columbia Law Review*) (proposing government payment of \$80,000 to Americans upon reaching the age of majority, to be funded by a wealth tax); Robert H. Haveman, *Equity with Employment*, *Boston Rev.*, Summer 1997, at 3, 6 (proposing combining guaranteed income support with incentives for work as an alternative to policies of North America which lead to low unemployment but high poverty rates, and to policies of Europe, which lead to low poverty rates but high unemployment).

reduces the power of the have-nots to assert their interests in contentious negotiations with the haves, and allows the latter to recoup losses they might unaccountably suffer in one round of bargaining in the next. Call this the bargaining disadvantage of inequality. The second pernicious consequence is the inability to escape or mitigate the consequences of oppressive inequality because of infirmities that result from the oppressive experience itself. Thus, the degradation of slavery is said to reduce, even eliminate, the capacity of the slave to revolt or even to seize the advantages of manumission, just as grinding poverty, passed from generation to generation in a single community, is said to weaken the capacity of the community and its members to take advantage of whatever opportunities for economic self-improvement or (as a condition of this) political self-improvement that arise or might be created. This is the disenfranchisement effect of inequality. What would be the use to the disadvantaged of experimentalist multiplication of the opportunities for participation in the reorganization of services and the redefinition of rules, the centralist egalitarian wonders, if their disadvantages generally bar them from participating and/or render the exceptional effort ineffective?

There is, to be sure, a bargaining disadvantage to inequality; but it is not, we think, nearly so disabling as first appearances in the setting of the overall centralist egalitarian concerns suggest. It is tautologically, but not therefore trivially, true that possession of private resources gives those who have them a stronger hand in bargaining over the distribution of public resources, and better chances of recouping bargaining losses, than those who do not. Having private resources on which to rely in the absence of public ones, the haves drag out negotiations over the distribution of the public goods until the have-nots accept a bargain, or renegotiate an existing one, on terms dictated by their increasing desperation. Carried to its *reductio ad absurdum*, this suggests a ruthlessly one-sided politics in which the haves perpetuate their advantages by extracting an unfair share of public goods, granting in return only the minimal concessions that permit the subsistence of the have-nots.<sup>448</sup> But we know that politics is vastly more complex, and the prospects of the have-nots far more open in historical perspective than this idea of the mechanical reproduction of inequality allows. What is left out—and explains much of the complex political openness we know—is the possibility of alliances between a faction of the haves with the have-nots against another faction of the elite, and the possibility, in moments of crisis and confusion, of uncertainty among haves and have-nots alike as to how to define their advantage, separately or together. The two possibilities are connected, moreover, as the pursuit of new alliances can reveal novel solutions to complex problems, just as the exploration of novel solutions can give rise

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448. For an effort to show that bargaining considerations of this sort set the limits of political reform in capitalist societies, see generally Adam Przeworski, *Capitalism and Social Democracy* (1985).



to new constellations of harmonious interests.<sup>449</sup> As we argued repeatedly above in the discussion of learning by monitoring and direct deliberation,<sup>450</sup> these possibilities are likely to be especially salient in periods of disorientation marked by the kind of volatility and diversity that recommend experimentalism. Alliances and confusion do not nullify the bargaining disadvantage of inequality, but they can transform what might appear to be an insurmountable obstacle to any but radically redistributive reforms into one of the many considerations that would need to be addressed by experimentalist means in making participation in experimentalist deliberation as fair and comprehensive as it can be.

If, on the other hand, inequality regularly led to disenfranchisement, that effect would bar reform, radically redistributive and experimentalist alike. Imagine that misery thoroughly destroys the capacity of the have-nots to imagine a better future, so that none trusts the others to conceive in good faith a project for advancing the group. Without prospects, each scavenges whatever is in reach, expecting everyone else to do the same. Mutual suspicion within the group is paired with anxious, resentful dependence on the others outside, who provide what insiders cannot provide themselves. Chances for participation are squandered as carelessly as social insurance checks.<sup>451</sup>

But the facts repeatedly find against this effect even in the most extreme contexts in which it is alleged, or might, by its nature, be presumed to occur. After the Black Death decimated England in the fourteenth century, the English serfs, servile as they no doubt were, took advantage of the scarcity of labor to improve their conditions of tenancy; emboldened by these successes, some banded together to march on London and demand freedom.<sup>452</sup> When the Civil War broke the slave owners' grip on the American South, many slaves fled the plantations, often to the amazement of masters who sincerely believed them incapable of imagining au-

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449. For example, the farmer-labor alliance in Sweden in the 1930s, originally a response to the Great Depression, broadened into the linked set of insurance institutions and broadly inclusive political alliances characteristic of the post-War welfare state. See generally Bo Rothstein, *Social Classes and Political Institutions: The Roots of Swedish Corporatism* (The Study of Power and Democracy in Sweden, English Series Report No. 24, 1988) (closely analyzing the complex alliances underpinning Swedish social democracy); see also Peter Gourevitch, *Politics in Hard Times: Comparative Responses to International Economic Crises* (1986) (more generally discussing the interplay of economics and politics in the alliances of this period).

450. See *supra* Parts II, III.

451. Versions of this argument are familiar as claims that the poor are hopelessly ensnared in a "culture of poverty," or, in more modern language, by lack of such "social capital" as mutual trust. On the culture of poverty, see generally Oscar Lewis, *La Vida: A Puerto Rican Family in the Culture of Poverty—San Juan and New York* (1966). On social capital, see generally Robert D. Putnam et al., *Making Democracy Work: Civic Traditions in Modern Italy* (1993).

452. See generally Rodney Hilton, *Bond Men Made Free: Medieval Peasant Movements and the English Rising of 1381* (1973) (placing the English peasant movement of 1381 in the context of other medieval peasant movements).

tonomy.<sup>453</sup> In this century, peasants in countries such as Mexico,<sup>454</sup> Vietnam, and Peru,<sup>455</sup> all with histories of debt peonage and other forms of oppression, responded to land reforms offering secure tenancies by making effective use of the new opportunities. Here and now—in situations that, however bad, are not so debilitating as these—we saw that studies of community policing in Chicago find that poor neighborhoods succeed as often as wealthy ones at running the new institutions to maximum advantage. Strikingly similar conclusions emerge from studies of a companion decentralization of control from municipal headquarters to local school councils in Chicago.<sup>456</sup> None of this means that oppression has no consequences or that it is easy to establish experimentalist or other reform institutions.<sup>457</sup> It does, however, mean that there is strong counterevidence to the claim that one of the consequences of oppression is to make it impossibly difficult for the oppressed to take advantage of new opportunities, including experimentalist ones that might be thought especially demanding.

A further, practical response to the centralist egalitarian objection is that mass democracies in the United States and especially in Western Europe have, in living memory, tried to address resource distribution questions as threshold issues, with undeniable but limited and decreasing success, as suggested by persistently high rates of unemployment in advanced welfare states.<sup>458</sup> Substantial resources were transferred, but the programs rarely worked as intended. Perhaps more resources would have produced a different result, but no electorate in any of the advanced countries has embraced this alternative in recent years. In any event, it is at least as plausible to argue that the difficulty came not from the level of resources (when the level was high), but from their ineffective use.<sup>459</sup>

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453. On the interdependence of masters and slaves, and especially the possibilities for autonomy of the latter at the time of the Civil War, see generally Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* 128–36 (1974).

454. On the survival of the capacity for community action despite continuing oppression, discussed in the classic history of the village of Anenecuilco in central Mexico from the time of the conquest to the revolution, see generally Jesús Sotelo Inclán, *Raíz y razón de Zapata* (C.F.E. editorial 1970) (1943–44).

455. For detailed discussion of land reform in Peru, see Cynthia McClintock, *Peasant Cooperatives and Political Change in Peru* 319–51 (1981) (citing Samuel L. Popkin, *Corporatism and Colonialism: Political Economy of Rural Change in Vietnam*, 8 *Comp. Pol.* 431 (1976)).

456. For review and corroborating reanalysis based on the original supplemental data, see Fung, *supra* note 135, ch. 12.

457. In the case of school decentralization, for example, one must be careful to check the tendency towards local corruption.

458. See, e.g., Organisation for Econ. Co-operation & Dev., *Jobs Strategy Series; Making Work Pay: Taxation, Benefits, Employment, and Unemployment* 17–45 (1997) (reporting on the pattern of job-related transfer payments and persistently high rates of unemployment in some member states of OECD).

459. We are not claiming that transfer programs are, by their nature, doomed to failure. Some succeed; others do not. What is needed is a mechanism for assessing programs so that defenders of successes such as Head Start, which provides educational

Resources only count (and attract additional resources) if effectively applied, and democratic experimentalism, we have been arguing, is the way to determine how best to apply them. From this point of view, experimentalism should appeal to any egalitarian who does not make a dogma of centralism.

But it is possible to reformulate this first worry about the selective nature of experimentalism so as to disassociate the criticism from any direct concern with inequality and its effects. This more general and politically agnostic version of the argument starts with the plausible assertion that all-encompassing institutional frameworks favor some forms of action over others. None are neutral.<sup>460</sup> (If there *were* neutral institutional frameworks, courts would find it immeasurably easier than they do to determine the features of background social or legal order that are not, and cannot be, implicated in alleged constitutional wrongs.) But if frameworks are not neutral, the argument continues, a type of democratic experimentalism that, as here, weakens the directive powers of the national legislature to the benefit of local decisionmaking is presumably less favorable to national reform than a constitutional order, perhaps also containing experimentalist elements, that allows rapid generalization of local initiatives through referenda or special elections in addition to conventional omnibus legislation. Unless we know for sure that nationally designed or imposed solutions are always inferior to those that emerge from local initiative, is this not a dangerous form of favoritism?

An initial response to the criticism in its general form is that democratic experimentalism can help break down the very distinction between the big politics of competing visions of national changes and their preconditions on the one hand and the little politics of local survival and small improvement on the other. This occurs, first, through the generalization of successful local initiatives. If democratic experimentalism increases the local effectiveness of resources, it creates savings that can be transferred to the resource-poor; if, as suggested a moment ago, directly deliberative problem solving can suggest novel approaches at higher and higher levels of strategic reflection, then democratic experimentalism can be a source of ideas as to how to redeploy the savings effectively as well. The distinction is effaced as well insofar as experimentalism disaggregates sharply contrasting projects and reassembles their elements in novel hybrids outside the categories of familiar debate through

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and social services to poor preschool children and their families, see generally Edward Zigler & Susan Muenchow, *Head Start: The Inside Story of America's Most Successful Educational Experiment* (1992), have sufficient ammunition to build upon their successes. Cf. Martha Minow, *What Ever Happened to Children's Rights?*, 80 *Minn. L. Rev.* 267, 289 (1995) (observing that Head Start is widely hailed as a success, yet chronically underfunded).

460. For a restatement of social theory that emphasizes the distinction between encompassing frameworks and local routines, but also emphasizes the partiality of all frameworks, see generally Roberto M. Unger, *Politics: A Work in Constructive Social Theory* (1987).

benchmarking and simultaneous engineering. Thus, big and small politics begin to blur together as the constant reordering of local problem solving both recombines and broadens local organizational reforms and programmatic innovations. Fateful choices become less fateful because they emerge, deliberately, from many smaller ones.

But a persistent critic of democratic experimentalism as subversive of large choices may concede all this, and yet still regard the response as evasive. This critic will insist, at a minimum, that experimentalism not favor the local and incremental over the national and the comprehensive, even if it does in some measure attenuate the distinction; and we have offered no demonstration that our proposal meets this standard, or does better than others that pretend to. Nor need we. For here persistence reaches a self-imposed limit. Recall that the starting point of the criticism was the plausible idea that no framework can be neutral. The critic cannot assert that national solutions are inherently better than locally derived ones, while remaining agnostic. Therefore, the most that can be asked is that the experimentalist framework can itself be modified to accommodate "nationalizing" solutions or problem-solving methods when these are revealed as appropriate. This, we claim it is: Experimentalism as we conceive it can be adopted and abandoned piecemeal, as experience indicates. So, choosing experimentalism attenuates fateful choices and is itself not a fateful choice.

But the apparently appealing idea of a politics without fateful choices, paradoxically, evokes the second large worry. The origin of this worry is in the conception of politics, familiar since the time of the French Revolution and the romantic recrudescence of nationalism, as fundamentally a struggle to realize human potential: of a social class, a nation, humanity or, today, as ethnic group or gender or sexual orientation. Without struggle, without defiance of current authority or the doctrine that justifies it, there can be, in this understanding, none of the self-assertion on which self-realization depends. A politics that did not combine limit breaking in the sense of tearing down obstacles to the realization of new possibilities, and self-transcendence in the sense of becoming the persons or group whose visionary imagination spies out behind the current limits, is, at best, a politics of small deals—really, no politics at all. Thus, democratic experimentalism extols a form of participation that deprives politics of its truly human significance.

This is, to be sure, a worry on a tightrope. If the search for transcendent identity in politics becomes too fixed on transcendence alone, politics is reduced to a rebellious cry against the immanence of what is.<sup>461</sup> Or if the political quest becomes too fixed on the assertion of identity, it becomes a call to fealty to a group with a cause—an appeal to loyalties,

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461. For the latest, and perhaps most authoritative, statement of a politics of defiance strongly inclined in this direction, see generally Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (1997).

and their corresponding animosities, so deep that they cannot be discussed without raising doubts about the authenticity of the response.<sup>462</sup> Either way, as rebellious protest or as intolerant rallying cry, by making defiance or compliance too urgent for words, the politics of transcendent identity, unbalanced, chokes off the very discussion of the alternatives it means to foster.

But it is unfair sport to dismiss the motivating idea of a political project by assuming that it must always be denatured in practice. No idea can survive such unsympathetic imagination (not even ideas of politics designed to be proof against such manipulation). A fairer response to the worry that incrementalism robs politics of its justification as the font of identity is to propose an alternative understanding of how we come to be ourselves that does not depend on transcendence, yet does not indulge the world as it is. That alternative, close at hand from the earlier discussion of pragmatism, is the view of identity as mutual self-clarification: We become most truly ourselves, and thus realize the potential to make ourselves what we can be, by examining what we do—the things we say, the rules we make, the institutions we build—through the eyes of others who respond to them. We transform our identity not by fusing with or becoming someone else, but rather by learning to criticize, remake, and affirm parts of it, and that which expresses it, from the vantage points of others doing the same—not by the negative capability to imagine ourselves as other, but by passionate discussion of who we really are and want to be, given what, in the experience of others in a position to know, we really do and make. This is not the politics of authenticity, of identity affirmed, but rather of identity as pastiche, or difference. This hybrid conception of identity takes shape as our life projects butt up against those of others, through the improvised incorporation of various projects with our own as payment for our difficult progress in the world.<sup>463</sup>

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462. The classic statement of politics as the undiscussable choice of loyalties—the distinction of friend from foe—is Carl Schmitt, *The Concept of the Political* (George Schwab trans., Rutgers Univ. Press 1976) (1932). For the criticism that Schmitt's idea of loyalty rests on more general ideas of obligation that it cannot comprehend, see Leo Strauss, *Notes on Carl Schmitt, The Concept of the Political* (1932), reprinted in Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue* 91, 94–96, 119 (J. Harvey Lomax trans., Univ. of Chicago Press 1995) (1988).

463. A familiar point of departure for this conception of self-definition is John Stuart Mill, *On Liberty* (1859), reprinted in *Three Essays* (Oxford Univ. Press 1975) (1912). On the notion of identity as irreducibly hybrid, see Homi K. Bhabha, *The Location of Culture* 37–39 (1994). For the related idea that identity results from a succession of utterances, each revealing the contingency of what came before and inviting a response in kind, see M. M. Bakhtin, *The Dialogic Imagination* (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Texas Press 1981) (1975). Note that contrasting the conception of identity as hybrid with Mill's descriptive starting point of autonomy does not necessarily entail rejecting Mill's *prescriptive* principles. See Mill, *supra*, at 15 (stating the thesis “that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection”).

Dewey and the pragmatists sought, but failed, to establish a relation between democratic institutions and the identity of the democratic citizen conceived on these lines.<sup>464</sup> Dewey, in particular, recognized the fragility of a democracy founded on the distinction between a benign elite of experts and an ignorant mass public held docile by manipulation of the symbols by which it affirmed its identity.<sup>465</sup> How would the mass, in its ignorance, recognize the benefits of manipulation, however benign? How could the experts, isolated in their expertise from all the experience of the mass, know that their designs were indeed broadly beneficial rather than merely self-serving? The way to overcome the distinction, he thought, was to make the public expert by affording the citizens the means to acquire expertise. This democratization of expertise, Dewey thought, would go hand in hand with the creation of a system of government which encourages inquiry into the effects on the developmental capacities of the individual of "every institution of the community when it is recognized that individuality is not originally given but is created under the influences of associated life."<sup>466</sup> But in his programmatic writing, Dewey focused almost exclusively on the elaboration of a project of comprehensive educational reform designed to form the citizen experts of the new democracy.<sup>467</sup> Of the actual institutions of self-government he said little, preferring to exult instead at the prospect of a public of scientist-poets, enlightened by the reading of good newspapers and enlarged in their sympathy with the multitude by their reading of Walt Whitman.<sup>468</sup>

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464. See generally Eric A. MacGilvray, *The Priority of Philosophy to Democracy: Some Consequences of Pragmatism for Democratic Theory* (May 1997) (unpublished manuscript, on file with the *Columbia Law Review*) (contrasting Dewey's views with other conceptions of pragmatism).

465. See Dewey, *supra* note 62, at 185–214.

466. Dewey, *supra* note 56, at 197–98.

467. See *id.* at 81–88, 118–123 (discussing a pragmatist curriculum).

468. See Dewey, *supra* note 62, at 184.

Here is as good a place as any to note the kinship between our proposal for directly deliberative democracy and certain strands of participatory democracy within the skein of Progressive thought in the early decades of this century. Two Progressive institution-building movements in particular stand out. The first, and more remote, was centered in Rochester, New York, and aimed to create "social centers" where the largely immigrant urban working classes could learn that they were capable of taking part in democratic deliberation by actually doing so: participating in debates on important questions of the day with one another, university teachers, and local politicians. On the movement, see Kevin Mattson, *Creating a Democratic Public: The Struggle for Urban Participatory Democracy During the Progressive Era 48–67* (1998). The Rochester Board of Education made public school buildings available for evening meetings upon petition of interested groups, see *id.* at 52, and within these social centers civic clubs were formed for the express purpose of public debate, see *id.* at 54–55. "Most important of all," Mattson notes, "citizens learned that they themselves could create a deliberating, democratic public." *Id.* at 59.

If this social-center movement was much closer to the familiar ideas of the *polis* and the town meeting than to our conception of problem-solving deliberation, the distinction between the two was, for at least some of the participants, more a matter of nuance than principle. Mary P. Follett, for instance, who made strikingly original observations on the

deliberative inventiveness of such groups, participated in the Boston equivalent of the social-center movement, in the Roxbury neighborhood, see id. at 89-90. That experience helped to change her from a partisan of a centralized, technocratic state, see id. at 88-89 (citing Mary P. Follett, *The Speaker of the House of Representatives* 314 (1896)), to a partisan of radical decentralization and participation who wrote that "[y]ou cannot establish democratic control by legislation . . .; there is only one way to get democratic control—by people learning how to evolve collective ideas." Id. at 91 (quoting Mary P. Follett, *The New State* 159 (1918)).

The second social-unit movement, centered in Cincinnati, Ohio, aimed to give institutional substance to the ambition of decentralization and participation. The movement grew out of turn-of-the-century efforts to coordinate the work of doctors and public-health professionals with the activities of poor communities to address problems such as milk-borne tuberculosis and high rates of infant mortality, especially in New York City and Milwaukee. See Patricia Mooney Melvin, "A Cluster of Interlacing Communities": The Cincinnati Social Unit Plan and Neighborhood Organization, 1900-1920, in *Community Organization for Urban Social Change* 59, 61-69 (Robert Fisher & Peter Romanofsky eds., 1981). See generally Wilbur C. Phillips, *Adventuring For Democracy* (1940) (describing the social-unit movement). The lesson of this on-again, off-again collaboration was the mutual dependence of the parties: The professionals were blind without the local knowledge of the neighborhoods and tenements, and the inhabitants of the latter were powerless without the expertise of the professionals. Even technical questions regarding such matters as the efficacy of pasteurization—was it a necessary condition for guaranteeing the safety of milk, or just one sanitary measure among many needed to reduce transmission rates of tuberculosis and other diseases?—were paralyzingly controversial in the absence of practical tests. But with such practical tests, the concerned communities easily resolved such problems. (In the particular case, pasteurization was indeed useful, but not indispensable to public health if other sanitary measures were taken from the farm through the food-processing chain). See id. at 18-47.

This second social-unit movement sought to formalize and democratize collaboration between professionals and communities by establishing in each locale a citizens' and occupational council to direct joint efforts. Election to these councils was indirect. On the citizens' side, neighborhoods of some 100 families and interested citizens elected "block" councils of up to 10 members. The executive head, or block worker, of the block council served as its modestly paid administrative officer, responsible, for instance, for passing information to the neighborhood and collecting information via surveys or discussion from it. The block worker also acted as the block council's representative to the encompassing citizens' council. On the professional side, the doctors, teachers, merchants, electricians, nurses, and members of other trades and callings resident in the district elected vocational councils from their peers. The executives of these then represented the group on the general occupational council. The citizens' council and the occupational council together formed a bicameral general council, which was the supreme organ of governance in the district, ideally with control over all public moneys spent there. See id. at 149-52, 183-89. "Under this plan," wrote Wilbur Phillips, journalist and social activist, who formulated the idea and became its leading protagonist, "the physicians of the district were to constitute, as it were, a democratically organized Department of Health; the social workers, a democratically organized Department of Social Welfare, etc." See id. at 152; see also S. Gale Lowrie, *The Social Unit—An Experiment In Politics*, 9 *Nat'l Mun. Rev.* 553, 554 (1923) (describing the political structure); id. at 555 n.1 (noting the similarity of the scheme to ideas advanced by Follett).

With the help of prominent Progressive intellectuals such as Herbert Croly, Editor of *The New Republic*, and philanthropists such as the wives of Thomas W. Lamont and Daniel Guggenheim, Phillips built a national organization to test the feasibility of the idea at a promising location. Gifford Pinchot, whom we met as the architect of the decentralized Forest Service, was national director of the organization, although he seems to have played

no active role in it. See Phillips, *supra*, at 148. The city of Cincinnati, already known in Progressive circles for the quality of the coordination among its philanthropic service providers, volunteered as a test site. See Lowrie, *supra*, at 557. Within the city, the Mohawk-Brighton district outdid other neighborhoods in its enthusiasm for and dedication to the proposal, and had already begun neighborhood work in connection with a branch public library. See Lowrie, *supra*, at 559. And it was there, at the end of 1917, about a year and a half after the formation of the national social-unit organization, that the experiment was begun. See *id.*

The promising but inconclusive results of the three-year experiment underscored both the strengths and the limits of the social-unit idea. The changing role of doctors, carefully documented in a studiously even-handed study of the effects of the program on the provision of local services, illustrates both aspects. On the one hand, "[t]he standards of preventive medicine, as carried on by the physicians group, grew slowly but fairly steadily, affecting a far larger percentage of the citizens, through the health services, than in the usual type of neighborhood health work," and there was a "worth while [sic] amount of consultation among the physicians in the district, within their own group, and a very commendable study of literature and statements from other health organizations." Courtenay Dinwiddie & Bennet L. Mead, *Community Responsibility: A Review of the Cincinnati Social Unit Experiment with Statistics of Health Services In the Unit District 48 (1921)*. These broad results were especially remarkable because the physicians' professional organization gave only grudging support to the project, see *id.* at 40-44, and it could be supposed that the interests of the doctors, "as members of a group of private practitioners, professional men with habits and traditions of exaggerated individualism," were presumably in direct conflict with the interests of members of a neighborhood organization campaigning for the prevention of disease. *Id.* at 48 n.\*. On the other hand, even in this, its most successful area of endeavor, see *id.* at 48, the project remained closed in upon itself. See *id.* (noting that "[t]he extent of consultation with city and national advisory medical committees has been slight, and the opportunities for improvement of medical diagnosis, of supervision and of study of material were far greater than the accomplishments"). More damaging, no method, beyond debate with the citizens' council and block workers, was found to challenge and correct the decisions of doctors and other local professional groups, whose *de facto* monopolies in service provision gave them a commanding position in many situations. Because of this isolation from the larger public, whose experiences might have enriched and profited from those in Mohawk-Brighton, "a few obstructionists" in, to continue the example, the medical group, had "the power to block progress for so long." *Id.* at 46; see also Lowrie, *supra*, at 566 (discussing the dangers of unchecked local professional power).

In the end, a combination of municipal and national politics stopped the social-unit movement before its defects could be addressed. The local difficulties were rooted in the growing fears of the established municipal service providers: Above all, the health department worried that the success of the social-unit project in one district was creating the nucleus of a counter-administration that could usurp its role in Cincinnati. Amidst the red scare that swept the United States in the aftermath of World War I and the Bolshevik revolution in Russia, it was child's play for the threatened officials to cast their opponents as socialists masquerading as democrats. Despite a referendum in the Mohawk-Brighton district that found heavily in favor of the project, the plan was decryed by the mayor as "a government within government, a step away from Bolshevism," and doomed. Jesse Frederick Steiner, *Community Organization: A Study of its Theory And Current Practice* 355 (1930); cf. Sabel, *supra* note 103, at 87-92 (describing similar, if less virulent reactions by public officials to the creation of a participatory para- or parallel public administration).

Where was John Dewey, whose pragmatism was a pervasive aspect of Progressive thought in this period? Here as in so many other settings in an epoch he helped define, Dewey was at once omnipresent and absent. He was a major influence on Follett, see Mattson, *supra*, at 99, and the social-center movement, having himself been influenced by



To be sure, the institutions of democratic experimentalism provide no guarantee that overworked, self-interested citizens will, from the start, understand their individual interest to be inextricably linked with the good of the community, but then neither do our existing institutions. Experimentalism at least holds the possibility of providing the public mirror of mutual private self-examination needed to make good on Dewey's promise. Its institutions enlarge, perhaps vastly, the circle of expertise by revaluing in the problem-solving setting, forms of knowledge that were previously discounted, and thus encouraging the participants to learn still more. They diminish the hold of great symbols by calling attention to and scrutinizing the many separate facets of life that the large symbolic tokens condense to the point of indistinguishability. They do this not by attempting—as though such a thing were possible—to substitute analysis, purged of poetry, for figurative expression. The method, instead, is to use the differentiations of benchmarking, with its metaphoric and analogic play of similarity and difference, to uncover possibilities that deductive analysis overlooks and that great symbols obscure. For persons, connected to one another through the institutions of pragmatist sociability, the result is a politics of continuing exploration of difference through acknowledgment of diversity. Such a pragmatic view of politics and identity is not higher, truer, or more prudent than the familiar romantic one. But it is no way lesser, either; and we invoke it to suggest the prospect that democratic experimentalism, far from betraying our deepest intuitions of the meaning of politics, may provoke a reexamination of them.

#### F. *Constitutional Scope*

We began this Article by lamenting the breakdown of the defining features of American constitutional government, using the discomfort of existing constitutional law as an indicator of the extent of the breakdown. Our program thus far has focused on what may appear to be, from the perspective of constitutional law narrowly construed, matters of no great moment: We have proposed new organizing principles to be adopted by Congress and implemented by national agencies, state and local bodies, and the courts. How does such a program respond to *constitutional* concerns?

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Jane Addams and her settlement houses, see Alan Ryan, *John Dewey and the High Tide of American Liberalism* 149–53 (1995). Moreover, Dewey's daughter went to observe the social-unit experiment in Cincinnati first hand. See Dinwiddie & Mead, *supra*, at 71. But Dewey himself, oddly and yet somehow characteristically, remained, so far as we can tell, silent, perhaps indifferent to the lessons of a variant of experimentalism in practice.

In presenting these more or less distant antecedents to our own project we do not, it goes nearly without saying, intend to claim historical authority for our endeavors, nor to assume the burden of Progressive failures. The history matters because it attests to the perennity of the problem of reconciling democratic participation with the exercise of technical expertise. The (likewise perennial) hope of democratic experimentalism is to politicize the technocracy and transform the meaning of politics through practical collaboration.

As a threshold matter, we must, of course, show that democratic experimentalism is consistent with our constitutional tradition—for we have not proposed supplanting the existing Constitution with a new one. This is not a trivial burden, for our design principles challenge basic assumptions about the Constitution we have. For the most part, we treat states as, in principle, no different from localities in seeming violation of core notions of state sovereignty. We elevate direct democracy to a status equal with, and in some instances superior to, representative democracy, in seeming violation of the Constitution's system of checks and balances. And we authorize the courts no less than the legislature to adopt experimentalist attitudes, in seeming violation of the principle that the courts stand as defenders of the most deeply entrenched values against experimentalist onslaught by the political branches.

In the succeeding Parts—on federalism, separation of powers, and judicial protection of individual rights—we endeavor to show that our design principles do not contradict the best understanding of the Constitution we have; indeed, in each section, we argue that something akin to democratic experimentalism has been nascent in constitutional doctrine for quite some time. We do not claim that the best understanding of the Constitution *requires* democratic experimentalism. Ours is a program to be adopted by democratic means, not judicial imposition. Nonetheless, we do not merely contend that democratic experimentalism can be made to fit the procrustean bed of constitutional law. At its broadest, our argument is that democratic experimentalism would revitalize the central institutions of American government, and do so in a way that is in harmony with the most attractive features of those institutions.

## VI. FEDERALISM

Resurgent constitutional debate about federalism, understood broadly as the doctrine regarding the proper distribution of authority between the federal government and the states, is both a leading example and a symbol of the disarray of our general understanding of the institutions created and recognized by the Constitution. Some affirmation of a sphere of activity reserved to the discretion of the several states seems necessary to sustain the commitment to check the potential menace of a powerful national government by defending a zone of prior, naturally vital state sovereignty which it cannot invade. But in practice, for half a century, the judiciary itself has criticized every effort to discern the boundaries of this prior and natural zone for capriciously limiting the capacity of the federal government to regulate some matter of national interest. Yet the judiciary has been unable to abandon the quest for a domain of state sovereignty not itself derived from the fugitive distinction between federal and state powers—even as the flows of national and international commerce cut new channels in the landscape of authority. Hence, the Supreme Court oscillates, sometimes rapidly, sometimes slowly, between revisionary revivals of the distinction and weary criticism

of the revision.<sup>469</sup> Surely, it is a sign of deep disorientation repeatedly to assert a doctrine that is independently unsustainable merely because its negation would jeopardize a larger claim of which it is held to be part.

By contrast, in democratic experimentalism, the states and other subnational jurisdictions have (at least) a Madisonian centrality to public action.<sup>470</sup> Their purpose, we saw, is to act as the chief instrument of public problem solving given the manifest limits of central direction. At the limit, the national government supplements and assists the smaller units in this system, not the reverse. But in democratic experimentalism, in contrast to the successive judicial syntheses of the recent past, these subnational jurisdictions do not have natural boundaries to their power. Rather, the fluidity of the divisions of authority among them, and between them and the national government, are necessary to their purpose, not evidence of their irrelevance. For it is only by continually adjusting these boundaries that the jurisdictions can, in fact, be effective problem solvers. This reversal of perspective recasts and renders tractable the problem of federalism. Its central theme, from the vantage point of democratic experimentalism, would no longer be the (impossible) search for immovable boundary stones marking the limits of federal and state power, but rather the definition of general standards for determining the just and effective division of sovereignty with regard to particular public problems.

In this Part, we show that such general standards are inherent in the idea of experimentalism as we have defined it; that they establish potentially far-reaching (if self-imposed) limits on the power of Congress to foist its will on the states; and that these limits include the requirement that Congress allow substantial latitude to subnational jurisdictions to determine for themselves how best to cooperate to realize experimental goals.

It is only a slight exaggeration to say that, but for a quirk of interpretation, the Supreme Court might have established the precedents for an experimentalist doctrine of cooperative federalism in *New York v. United States*.<sup>471</sup> The Court had before it legislation obliging the states to respond to the problem of disposal of low-level radioactive waste, and authorizing them to form jurisdictions of the dimensions they severally or as regional groups found appropriate.<sup>472</sup> The Court invalidated the legislation because of the form of the obligation,<sup>473</sup> missing a chance, we will

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469. See *infra* Part VI.A.

470. Madison's evolution from 1787 Federalist to 1800 Republican should not obscure the fact that even in the earlier period he saw the division of authority between state and national governments as a crucial means of ensuring democratic accountability. See Banning, *supra* note 24, at 294-333. From this vantage point, the nationalizing tendencies of Hamilton were the anomaly in need of explanation.

471. 505 U.S. 144 (1992).

472. See *id.* at 150-54.

473. See *id.* at 177.

argue, to connect limits on what Congress may order states to do with the articulation of standards for the division of jurisdiction between state and national entities. Criticism of that decision provides the occasion for us to sketch the rudiments of cooperative federalism here. As prologue, to fix ideas, we evoke the confusion of current federalism debate; as afterword to our counterview, we note again, that practice is outrunning preaching, in that crucial elements of a regime of cooperative federalism are anticipated in current legislation.

Finally, although our concerns in this Part are largely doctrinal, we are, in conformity with the architecture of our overall argument regarding the relations between an experimentalist Congress and local governments, agnostic in the end as to whether the judiciary should enforce any of the Constitution's federalism norms. Certainly there is considerable historical support for the claim that Congress is better suited to consider the interests of the states, even after the adoption of the Seventeenth Amendment.<sup>474</sup> The argument in this Part is that Congress would act consistently with the best understanding of federalism by fostering democratic experimentalism, and that *if* the courts decide to enforce federalism norms, they would do well to focus on the concerns we identify below.

#### A. *The Arc of Federalism*

Today, again, once-moribund questions of federalism haunt judicial debate. After the 1985 Supreme Court ruling in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>475</sup> the notion that the judiciary would impose limits on national legislative authority in favor of state sovereignty appeared to be breathing its last breath. *Garcia* held that if an affirmative power delegated to Congress by Article I authorizes regulatory competence, the Tenth Amendment poses virtually no bar to exercising the delegated power in derogation of state sovereignty.<sup>476</sup> Because Congress enjoyed virtually plenary power under the Commerce Clause, *Garcia* was understood by the Court itself as abdicating judicial authority to enforce constitutional norms of federalism.<sup>477</sup> As the *Garcia* majority recognized, this left Congress, through the representation of the states in the Senate, as the chief guarantor of state sovereignty.<sup>478</sup> The *Garcia* dissenters, by

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474. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–48 (1985); Paul Brest, *Congress As Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 Ga. L. Rev. 57, 74–75 (1986); Wechsler, *supra* note 29, at 54–64 (1961).

475. 469 U.S. 528 (1985).

476. See *id.* at 549–50.

477. See *id.* at 548.

478. See *id.* at 550–54.

contrast, believed that the Court had left the fox in charge of the chicken coop.<sup>479</sup>

But shortly after *Garcia*, the Court began to revive judicial protection of state sovereignty. In 1991, in *Gregory v. Ashcroft*, the Court invoked many of the principles rejected in *Garcia* in holding that in the absence of utterly unequivocal statutory language, Congress would not be deemed to have intended the Age Discrimination in Employment Act<sup>480</sup> to apply to state judges, as that would constitute an infringement of state sovereignty.<sup>481</sup> Although *Gregory* was a statutory rather than constitutional case,<sup>482</sup> the writing was on the wall: All of the members of the *Garcia* majority remaining on the Court dissented in *Gregory*.<sup>483</sup> One year later, in *New York v. United States*, the Court announced that principles of federalism forbid the national government to “‘commandeer’ state governments into the service of federal regulatory purposes . . . .”<sup>484</sup> Three years after that, in *United States v. Lopez*, the Court invalidated a federal statute imposing criminal penalties for possession of a handgun in the vicinity of a schoolyard.<sup>485</sup> For the first time in over half a century, the Court ruled that Congress had exceeded its authority under the Commerce Clause by attempting to regulate an activity that bore an insufficient connection to interstate commerce. Stressing the states’ traditional role in education and punishing crimes of violence, the Court appeared to revive for Commerce Clause purposes the distinction between traditional and nontraditional state functions that the *Garcia* Court had rejected for Tenth Amendment purposes.<sup>486</sup> And in 1997, the Court again invoked principles of federalism to invalidate portions of two popu-

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479. See *id.* at 560 (Powell, J., dissenting) (“[T]oday’s decision effectively reduces the Tenth Amendment to meaningless rhetoric when congress acts pursuant to the Commerce Clause.”).

480. 29 U.S.C. §§ 621–634 (1994).

481. 501 U.S. 452, 457–64 (1991).

482. For an argument that a clear statement requirement ought to be a key component of the constitutional protection for federalism, see Tribe, *supra* note 399, § 5–8, at 316–17; Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *Sup. Ct. Rev.* 125, 186–88.

483. Compare *Garcia*, 469 U.S. at 560 (Powell, J., joined by Berger, C.J., Rehnquist, J., and O’Connor, J., dissenting, thus leaving a majority of Blackmun, Brennan, White, Marshall, and Stevens, JJ.), with *Gregory*, 501 U.S. at 474 (White, J., joined by Stevens, J., dissenting in part). See also *id.* at 486 (Blackmun, J., joined by Marshall, J., dissenting). Between *Garcia* and *Gregory*, Justice Brennan retired and was succeeded by Justice Souter.

484. 505 U.S. 144, 175 (1992); see also *id.* at 176 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

485. 514 U.S. 549 (1995).

486. See *id.* at 580–83 (Kennedy, J., concurring); see also *Garcia*, 469 U.S. at 546.

lar federal statutes: the Religious Freedom Restoration Act<sup>487</sup> and the Brady Handgun Violence Prevention Act.<sup>488</sup>

Thus, the pendulum of interpretation cuts its familiar arc. If the recent cases appear to undermine *Garcia*, it should be recalled that *Garcia* itself expressly abandoned the states'-rights-protective decision in *National League of Cities v. Usery*,<sup>489</sup> which in turn had overruled the narrower interpretation of the Tenth Amendment given in *Maryland v. Wirtz*.<sup>490</sup> The periodic doctrinal reversals mark time.

## B. New York v. United States

To illustrate the potential of democratic experimentalism to escape such temporizing, we focus on the question at issue in *New York v. United States*. In *New York*, the Supreme Court invalidated a scheme with many of the hallmarks of democratic experimentalism because it held Congress had exceeded its authority in giving impermissibly direct orders to the states.<sup>491</sup> In this section, we will argue that the Court in this case was both too solicitous of state sovereignty and not nearly solicitous enough: Too solicitous because it focused on formal indicia of state autonomy and apparent insults to the sovereign dignity of the states; not nearly solicitous enough because it neglected to recognize that the challenged legislation invited the states to act as independent collaborators with the federal government and one another in developing solutions to their mutual problems. In our alternative framework, it is these substantive limitations, if any, that mark the boundaries of permissible government interference with state sovereignty.

The dispute in *New York* arose out of a crisis caused by the shortage of disposal sites for low-level radioactive waste.<sup>492</sup> Because the nation possessed insufficient facilities for processing the waste, Congress enacted a number of provisions designed to encourage the states to increase their waste-processing capacity.<sup>493</sup> Based on proposals submitted by the

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487. 42 U.S.C. §§ 2000bb-bb-4 (1994). The Court held that, as applied to state and local government, the Religious Freedom Restoration Act exceeded Congress's power to enforce the Fourteenth Amendment. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).

488. 18 U.S.C. § 922 (1994). In *Printz v. United States*, the Court held that the Brady Handgun Violence Prevention Act's requirement that local law enforcement officials perform background checks on prospective handgun purchasers violated the anticommandeering principle of *New York*. 117 S. Ct. 2365, 2376-78.

489. 426 U.S. 833 (1976) (relying on Tenth Amendment to hold unconstitutional application of Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1970 ed., Supp. IV), to states in areas of traditional government functions).

490. 392 U.S. 183 (1968) (upholding, as a valid exercise of the Commerce Clause, application of Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (current version at 29 U.S.C. §§ 203-219 (1994)), to states).

491. See *New York v. United States*, 505 U.S. 144, 174-77 (1992).

492. See *id.* at 149-51.

493. The first set of provisions was enacted in 1980, in the Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980) (repealed 1986). Additional

National Governors' Association, the congressional response placed responsibility on each state to develop its own disposal facilities or to join with neighboring states in a regional compact.<sup>494</sup>

Congress provided several kinds of incentives for compliance. States or regional compacts that developed adequate disposal capacity would be permitted to surcharge (and eventually exclude) waste generated outside the state or compact<sup>495</sup>—a power that the dormant Commerce Clause would otherwise bar the states from exercising.<sup>496</sup> Some of the money collected through such surcharges would be transferred to the federal government, and then paid out to the states if they met a series of deadlines for developing disposal capacity.<sup>497</sup> Noncomplying states would thus be subject to serious financial penalties for failure to meet the statutory deadlines.<sup>498</sup> Finally, the statute provided that a state which neither joined a regional compact nor developed in-state disposal sites by the 1996 deadline,

upon the request of the generator or owner of [in-state] waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste.<sup>499</sup>

Although the Court upheld the other provisions, it invalidated the "take title" provision on the ground that it was the equivalent of an order by the federal government commanding a state to pass legislation, a power the Court believed the federal government lacks.<sup>500</sup> The Court stated:

The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution.<sup>501</sup>

Under existing constitutional doctrine, the decisive fact in the above passage is that the state government is given "no option other than" implementing federal legislation. For, as *New York* itself makes clear, where Congress does give the states alternatives, even onerous ones, it can re-

measures were passed five years later in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified at 42 U.S.C. § 2021 (1994)). See *New York*, 505 U.S. at 150-51.

494. See *New York*, 505 U.S. at 151-52.

495. See *id.* at 152.

496. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) (barring state discrimination against interstate commerce in waste disposal).

497. See *New York*, 505 U.S. at 152-53.

498. See *id.*

499. *Id.* at 153-54 (quoting 42 U.S.C. § 2021e(d)(2)(C) (1994)).

500. See *id.* at 176-77.

501. *Id.* at 177.

quire that the states implement federal legislation as the price of declining these alternatives. Thus, as alternatives to implementing federal legislation, Congress may offer states the possibility of forfeiting federal funds to which they would be entitled if they did choose implementation, or the (menacing) possibility of federal preemption.<sup>502</sup> Even at this general level of analysis, therefore, the requirement that the state be given the option of refusing Congress's orders appears to be little more than a formality. Closer examination confirms that this is so.

Take conditional exercises of the spending power.<sup>503</sup> Although theoretically subject to constitutional limits, the power to attach strings to federal grants to the states enables Congress to dictate state policy to a considerable degree.<sup>504</sup> In an era of scarce governmental resources, few states can afford to forego federal funds as the price of avoiding implementing federal imperatives. A state that decides to refuse federal funds essentially opts to subsidize the states that accept federal funds, because, of course, the state's refusal does not result in a diminished federal tax burden for its citizens. This is a steep price to pay.

Conditional preemption also exacts a high price. Conditional preemption provides that, if a state does not regulate according to federal standards, its citizens will be subject to direct federal regulation.<sup>505</sup> To be sure, the direct federal regulation must be of a kind otherwise in the federal government's power, typically under the rubric of the Commerce Clause. But even after *Lopez*, this is a minor constraint. Even if Congress is not the only enforcer of federalism norms (as *Garcia* suggests), it is certainly the principal one.<sup>506</sup> In this sense, each additional instance of federal (as opposed to state) regulation shifts the federalism balance away from the states. Conditional preemption thus forces the states to choose between two threats to their sovereignty: They must either accept the indignity of implementing federal regulation or acquiesce in the displacement of their authority by the federal government.

This is not to say that conditional spending and conditional preemption are cost-free endeavors for the federal government. In the case of the former, the federal government must allocate sufficient funds to make the states a financial offer that they will have difficulty resisting. Similarly, conditional preemption requires the federal government to provide the funding to make credible the threat of regulation by a federal agency should the state decline to implement the federal regulations at

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502. See *id.* at 171–72 (upholding a conditional exercise of the spending power); *id.* at 173 (upholding conditional preemption).

503. See U.S. Const. art. I, § 8, cl. 1.

504. See *South Dakota v. Dole*, 483 U.S. 203, 208 n.3 (1987) (declining to decide outer limit, if any, of requirement that condition of funding be relevant to activity being funded, while upholding the conditioning of highway funds on states' raising their minimum drinking age to twenty-one).

505. See *New York*, 505 U.S. at 173.

506. See Wechsler, *supra* note 29, at 49–82.



issue. Thus, both conditional spending and conditional preemption are effective tools only to the extent that the federal government puts its money where its mandate is. But this need to ante up has not prevented the federal government from using these tools effectively to discipline state behavior.<sup>507</sup>

Yet, the *New York* Court is prepared to accept these methods of discipline as the background conditions for modern federal democracy. It simply asserts that conditional funding and conditional preemption "offer [ ] the States a legitimate choice rather than issuing an unavoidable command," adding that these mechanisms "have now grown commonplace."<sup>508</sup> The Court does not even ask whether, much less argue that, the states' choice is a real one. The Court essentially assumes that the greater power to deny funds or preempt entirely includes the lesser power to fund or preempt conditionally.

The Court likewise notes and appears prepared to tolerate more subtle insults to the states' sovereignty. In arguing on behalf of the anticommandeering principle of *New York*, Justice O'Connor observes that when the federal government issues directives to the states, state officials must divert time, energy, and resources from state priorities and redirect them towards federal priorities.<sup>509</sup> This perturbs states in the setting of their own agendas and blurs the lines of governmental accountability.<sup>510</sup> Yet, choices made as a result of such intentional or unintentional derangement of the states' agenda are no more—and no less—an expression of autonomy than choices made under the threat of losing funding or losing regulatory authority entirely. To the extent that the Court's federalism doctrine is not a mere formality, it appears that the Court is at once overly protective of, and callously indifferent to, the states' freedom of action.<sup>511</sup>

But if the Supreme Court's anticommandeering principle does not actually protect states' rights to set and execute their own agendas, what is it designed to do? As in much of the Supreme Court's federalism jurisprudence, the wellspring is not the desire to protect particular powers of

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507. For example, even though the legislation upheld in *Dole* only attached conditions to five percent of federal highway funds, within four years of the enactment of that legislation, all fifty states had adopted the twenty-one-year drinking age, up from only sixteen states the year prior to enactment. See *Aggressive Driving: Testimony Before the Subcomm. on Surface Transp. of the House Comm. on Transp. and Infrastructure*, 105th Cong. (July 17, 1997) (statement of David F. Snyder, Assistant Gen. Counsel, Am. Ins. Ass'n), available at 1997 WL 11235113, at 22.

508. *New York*, 505 U.S. at 185.

509. See *id.* at 168; *FERC v. Mississippi*, 456 U.S. 742, 787 (1982) (O'Connor, J., concurring in part and dissenting in part).

510. See *New York*, 505 U.S. at 185–86.

511. Cf. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1954–88 (1995) (arguing by analogy to unconstitutional conditions doctrine that conditional spending ought to be invalid if federal government would lack power to impose condition directly).

the states, but rather to respect their historical position with respect to the federal government. Otherwise, it would be hard to make sense of the judicial preoccupation with the dignitary interest of the states. Their prerogative to be shielded against any exercise of federal power that manifestly treats them as completely subordinate units of the national government apparently aims to preserve their status as the legatees of the thirteen original states that ratified the Constitution, acting as independent sovereigns, and reserving for themselves an impregnable residuum of autonomy.<sup>512</sup> According to this view, the federal government simply lacks the authority to invade that residual area of state authority no matter how expedient it may be. What looks like protection for the “feelings” of the state,<sup>513</sup> is thus really the consequence of treating state autonomy as an inviolate *historical* principle. This brings us full circle to the dilemma of modern federalism sketched at the outset of this Part: Fidelity to constitutional history requires, *in extremis*, defense of state sovereignty, yet nothing in the historical understanding provides a guide to substantive understanding of that defense that is workable under modern conditions.<sup>514</sup>

Further doctrinal oversights<sup>515</sup> and confusions concerning the Articles of Confederation aside,<sup>516</sup> all this points to the conclusion that

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512. See generally Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121 (1996) (arguing that Article V's amendment mechanism was meant to be exclusive, in part as a means of preserving state sovereignty).

513. See Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 *Harv. L. Rev.* 102, 132 (1996) (discussing limits of state sovereign immunity).

514. See Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 *Colum. L. Rev.* 133, 173–75 (1997) (book review) (observing the difficulty of constructing a coherent account of state sovereignty under modern conditions).

515. The *New York* majority does not seem to notice that international law, which knits sovereign nations together much more loosely than the American Constitution binds the states, depends for its enforcement largely on national implementing legislation—what the Court would call commandeering. See Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 *U. Kan. L. Rev.* 493, 525 (1993); see also George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *Colum. L. Rev.* 331, 403–04 (1994) (arguing that the principle of “subsidiarity” of the European Union would be an inappropriate model for as integrated a system as the United States). But see Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Tex. L. Rev.* 795, 831–36 (1996) (invoking the European Union's subsidiarity principle as a model for the United States). And when Justice Breyer, dissenting in the sequel to *New York*, calls the Court's attention to the European model, see *Printz v. United States*, 117 *S. Ct.* 2365, 2404–05 (1997) (Breyer, J., dissenting), the majority simply dismisses the examples because they are foreign. See *id.* at 2377 n.11.

516. The Court's failure to provide an adequate distinction between direct and conditional imperatives points to a more significant difficulty: The assumption that requiring the states to implement a federal program infringes state sovereignty may be unwarranted, at least in many cases. For one thing, as Justice Stevens notes in dissent in *New York* and again in *Printz*, the federal government had the authority to require state regulation under the Articles of Confederation. The Constitution *expanded* national power by giving the federal government authority to regulate primary conduct without the states

the *New York* Court focuses on the wrong criterion. The question should not be whether the federal government gives the states a nominal alternative to regulating according to federal standards. Rather, as we argue in the next section of this Part, the question should be whether the federal government has treated the states purely as instruments of its national will, or by contrast, as partners in policy formulation and implementation. The availability of alternatives matters in answering this question, but only when it counts as evidence of the choices that matter.

### C. *Toward a New Delegation Doctrine*

Under existing doctrine, federalism acts largely as a side constraint on legislation of national scope. In contrast, in democratic experimentalism, federalism is an essential ingredient of the national framework. Congress authorizes and helps finance experimental elaboration of programs, and the state and local governments actually do the experimenting. Should such a vision become reality, a revised federalism doctrine—whether judicially enforceable or not—would defend a zone of active and substantive collaboration between the two by imposing a double limit on the power of Congress to delegate authority to the states and other local governments. The first limitation requires that when Congress delegates authority to the states, it must provide some guidelines as to the objectives that the states will pursue. It cannot simply pass the buck by declaring local governments responsible for attending to the well-being of citizens. Rather, it must announce general, yet limited goals. The warrant for this, we find, in an extension of traditional nondelegation doctrine. The second limitation is that Congress may not provide *too much* guidance: It must leave some important aspects of policy setting for the states themselves, and do this without surreptitiously introducing preferences for some means over others. We find the warrant for this in a rectification and extension of the commandeering doctrine evoked in *New York*. It is in the band between these limits that democratic experimentalism thrives.

Nondelegation may seem an odd place to begin a discussion of experimentalist federalism. The traditional nondelegation doctrine prohibits Congress from delegating lawmaking authority to an administrative agency without specifying at least a broad policy objective the agency should pursue.<sup>517</sup> For a delegation to be effective, there must be a “declared policy by Congress and its definition of the circumstances in which

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acting as intermediaries. It is quite strange to treat the legislative mechanism of the state-centered Articles of Confederation as an affront to state sovereignty. See *New York v. United States*, 505 U.S. 144, 210 (1992) (Stevens, J., dissenting); *Printz*, 117 S. Ct. at 2389–90 (Stevens, J., dissenting); see also Levy, *supra* note 515, at 515–22 (arguing that framers’ intent does not support result in *New York*).

517. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935) (invalidating congressional delegation of authority to regulate oil production to the President, in the absence of standards to guide the President’s discretion).

its command is to be effective.”<sup>518</sup> In part because of its historical association with heightened review of economic legislation during the *Lochner* era, the nondelegation doctrine, since 1937, has rarely been invoked when administrative discretion has not affected protected private rights.<sup>519</sup> Nonetheless, its basic underpinnings rest on a widely accepted insight. Nondelegation doctrine seeks to serve democratic values by ensuring that Congress itself makes (and thus takes the heat for) important decisions of policy.<sup>520</sup> In the setting of democratic experimentalism, this requires that Congress must take seriously the obligation to connect the national and the local by setting priorities in the sequence of reform and innovation, by making use of emerging local results to reframe large problems (without precluding their subsequent redefinition through local adjustment). As the zone of democratic experimentalism is intended to be wide, the nondelegation doctrine would be evoked sparingly, to compel deliberation in Congress where political expediency might work against it. Below, we will see that the helter-skelter decentralization of welfare reform to the states is an example of the abdication of deliberative responsibility to which this approach would apply.<sup>521</sup>

Whether or not *New York v. United States* was rightly decided, commandeering of state and local policymakers<sup>522</sup> is bad for the republic, whether the democracy is representative or experimental. Under what conditions, after all, might Congress prefer to instruct the states to enact legislation containing terms dictated by Congress itself, rather than sim-

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518. *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 144 (1941) (finding no violation of nondelegation doctrine in Congress’s authorization of fact-finding by the Department of Labor).

519. See Ely, *supra* note 2, at 131–34 (arguing for a partial revival of nondelegation doctrine); Tribe, *supra* note 399, § 5-17, at 366. But see Stewart, *supra* note 31, at 1695–97 (arguing against such a revival).

520. See *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in the judgment) (stating that ensuring “that important choices of social policy are made by Congress” is a central function of nondelegation doctrine).

521. See *infra* text accompanying notes 547–561.

522. By focusing on state *and* local policymakers, we mean to distinguish *New York v. United States* from its sequel, *Printz v. United States*, 117 S. Ct. 2365 (1997) for we accept the proposition, advanced by the government but rejected by the Court in *Printz*, that some duties may be classified as ministerial, and we see no important difference between assigning such duties to state or local, as opposed to federal, officials. In rejecting this distinction, the Court expressed skepticism about nondelegation doctrine generally. See *id.* at 2380. Because we are more hopeful about the possibility of some form of nondelegation doctrine (even if a nonjusticiable one), we find the Court’s complete rejection of the policymaking/ministerial distinction unpersuasive for our purposes. On the other hand, we acknowledge that a properly experimentalist approach to administration would take advantage of local knowledge by leaving some of the details of even seemingly ministerial tasks to local discretion. By this acknowledgment, however, we do not mean to concede that local law enforcement officials asked to perform background checks *must*, as a matter of constitutional principle, be consulted about the propriety of the very goal of limiting access to handguns.

ply enacting legislation with those terms? Two troubling possibilities come to mind. First, Congress may believe that it lacks the affirmative constitutional authority to legislate directly. Second, in the case of legislative programs requiring funding, Congress may not have the political wherewithal to make the necessary appropriation. Neither justification is satisfactory. The first suggests that Congress is merely circumventing the limits on its affirmative powers,<sup>523</sup> the second that Congress abdicates its fiscal responsibilities.

One problem with traditional federalism doctrine, as we suggested above, is that it does not go far enough. A prohibition on outright commandeering may block flagrant circumventions of congressional authority and evasion of responsibility, while also banishing explicit affronts to the idea of state autonomy. But it still tolerates control of the states by conditional federal spending, threats of preemption, and interference with agenda setting. In an experimentalist democracy, dependent on the innovative vitality of autonomous local government for learning, these intrusions would be prohibited by an anticommandeering doctrine as well. In drawing the line defining impermissible commandeering, Congress (or, in the justiciable variant of this theory, the Court) would focus on whether the states have been given a substantial role in shaping the federal policy they are to implement, and, in particular, whether the conditions imposed on their receipt of federal funds unduly limited their freedom to experiment. This would be a substantive standard for federalism, not a formal, historical one.

Notice, too, that federal programs defined by a broad policy goal with the obligation to benchmark do not pose as great a threat to state agenda setting as does a highly detailed directive. One of the principal advantages of performance standards (including broad federal directives to states) over design standards, we saw, is that the former enable the regulated entity (including states) to use simultaneous engineering methods to achieve the stated goal in the manner most consistent with the current, effective disposition of the entity's other operations.<sup>524</sup> Thus, under democratic experimentalism, congressional delegation that meets the noncommandeering tests also responds directly (if partially) to the concern about the disruptive effect of federal agendas on state agendas, because the directive is sufficiently open and the agenda sufficiently adaptable to minimize disruption.

The anticommandeering principle, as we would see it practiced, finally, does not require that all discretion be ceded to the states. Congress could often choose, for example, between delegating a matter to an (experimentalist) administrative agency or to local governments, provided that the one collaborate with the other in either case. Our anticommandeering principle only requires that when the federal government

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523. See Baker, *supra* note 511, at 1954–88.

524. See *supra* text accompanying notes 183–192.

does find it attractive to enlist the states directly in its regulatory programs, it does so by offering them the possibility of true cooperation.

For example, in *South Dakota v. Dole*, the Court upheld a federal statutory provision that denied federal highway funds to states that permitted persons under the age of twenty-one to buy liquor.<sup>525</sup> *New York v. United States* expressly relies upon *Dole* to uphold the conditional spending at issue there.<sup>526</sup> Assuming, however, that the states cannot generally afford to forego federal highway funds, the provision at issue in *Dole* works just as effectively to commandeer the state legislative process as did the take-title provision in *New York*. In practice, it acts as a directive from Congress to the state legislatures, instructing the latter to set a minimum drinking age of twenty-one. Under the version of the anticommandeering principle that we propose, this statute should have been rejected by Congress for treating the states as servants rather than as partners of the federal government as surely as if Congress had simply enacted a statute requiring each state to enact a statute setting the drinking age at twenty-one.

In the experimentalist alternative, Congress would have established a broader goal: highway safety.<sup>527</sup> Consider a hypothetical statute requiring each state to reduce its rate of highway fatalities to no greater than a rate determined by reference to the experience of other states or lose a fraction of its highway funding reflecting the degree to which the state falls short of the target. States would be free to set the minimum drinking age below twenty-one, but only if they found some equally or more effective means of avoiding highway fatalities. Such legislation would encourage learning, as different locales experimented with various solutions and benchmarked the results. The states would, finally, be true laboratories of democracy because many eyes would be turned to the outcome of the experiments.

Experimentalist criticism of the condition upheld in *Dole* shows further that requiring Congress to delegate experimental policymaking as well as policy-implementation authority can help purge legislation of surreptitious, even impermissible preferences, and ensure that Congress is actually pursuing a power delegated to it by Article I. Suppose that Congress's real reason for seeking a national drinking age of twenty-one was the belief that consumption of alcohol is always immoral but espe-

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525. 483 U.S. 203 (1987).

526. 505 U.S. 144, 171 (1992).

527. We recognize that Congress will inevitably have some latitude to manipulate the level of generality at which it specifies a policy objective. Shall it specify the goal as highway safety, or, *more* generally, as preventing accidents, or, *less* generally, as preventing accidents caused by drunk driving? But some purposes—those that build in the means of achieving them, such as “preventing accidents caused by youthful drunk driving”—will be recognizable as shams, and it is to the task of identifying such sham purposes that judicial energy might be usefully directed. Cf. Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 111 (1991) (arguing, in the individual rights context, that courts should be skeptical of characterizations that appear to have been concocted for the litigation at hand).

cially so for persons under the age of twenty-one. Such a policy objective may not be within the scope of the Commerce Clause and arguably contradicts the Twenty-first Amendment. Yet, under traditional principles, the tying of the condition to the spending power essentially suffices to insulate it from review. By contrast, the relatively broad policy of reducing highway fatalities more clearly falls within the rubric of the Commerce Clause. Moreover, under a flexible mandate such as the one hypothesized above, the states are not required to regulate alcohol at all, so long as they find some effective means of reducing highway fatalities.<sup>528</sup> If a state, convinced of the ill effects of alcohol consumption, preferred to reduce highway fatalities by restricting the driving age rather than by other means, and could show that this was among the effective ways of achieving the overall goal, then, as argued above, it would be allowed to do so.

This first articulation of a revised anticommandeering principle is necessarily tentative and sketchy. To repeat, we recognize the strength of the arguments against any judicially enforceable federalism limits. However, whether or not it is judicially enforceable, an anticommandeering principle that is sensitive to the distinction between treating states as servants and treating them as partners seems, from the vantage point of experimentalism, especially appropriate.

Moving to a regime of democratic experimentalism dissolves what, from the perspective of the Court's existing doctrine, must be a puzzle. The puzzle is why Congress may not commandeer the states, or why—put the other way around—it must give them at least a formal role in national programs, if it may take the more intrusive step of direct preemption. This is, at bottom, the question with which the Court struggled in *New York v. United States* and again in *Printz v. United States*. For us, however, preemption no longer appears as an *alternative* to implementation through the states; for, under an experimentalist regime, preemption is simply another word for federal regulation, which in turn gives to states and localities a substantial role in policy formation and implementation. Hence the solution to the problem of the legitimacy of administrative agencies converges with the reformulation of principles of federalism.

#### D. *Experimentalist Federalism in Existing Legislation*

Even as the Supreme Court has been adopting rules of constitutional law designed to protect a residuum of state sovereignty, Congress has been devolving power to the states at an accelerating pace. In the case of

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528. Of course, in the example we have chosen, there is a multistate dimension to the highway safety problem: As the Court recognized in *Dole*, the existence of neighboring states with different drinking ages creates incentives for youthful drivers "to combine their desire to drink with their ability to drive." *Dole*, 483 U.S. at 208. While this fact may justify the formulation of regional alcohol policies, it does not alter the degree to which the conditions at issue in *Dole* were coercive.

the Clean Air Act<sup>529</sup> and the educational-standards bill called Goals 2000,<sup>530</sup> congressional devolution of authority to the states can be construed as an incipient form of experimentalist federalism based on models of cooperation among levels of government better suited to problem solving under current conditions than the dignity-based model of federalism on which the Supreme Court appears to rely. In the case of welfare reform, devolution amounts more nearly to abandonment by the federal government of responsibility for the poor. Contrasting the former cases with the latter illustrates how the ensemble of conditions on experimentalist lawmaking elaborated above distinguishes forms of decentralization aimed at encouraging local and joint learning from those where that aim is pretextual. This contrast points towards the kinds of debates over federalism likely to erupt in coming years as the tension between judicial and (different) congressional understandings of decentralization are articulated under the pressure of events.

Consider first the Clean Air Act and its amendments. Regulation of air quality might be thought to be a quintessentially federal function. Pollution generated in one state causes harm in other states (and indeed nations). This is especially true of air pollution, which once released, cannot be locally contained. Yet, state democratic processes will undervalue out-of-state harms, because the harmed are not typically represented in the state political bodies. For example, legislatures in industrial states may be more willing to permit manufacturers to discharge pollutants into the air that come back to the earth in other states as acid rain than to allow pollution of local streams and rivers. National (or international) regulation appears to be the appropriate solution.<sup>531</sup>

Nonetheless, effective pollution regulation must also take into account local variations. Externalities aside, differences in topography and population density, as well as in the sources, and hence, the fluctuations in the level of pollution, may make standards that are reasonable for one region unreasonable in another. Thus, an effective regime of air pollution control should consider the problem at a variety of jurisdictional levels. That is what Congress has done through the Clean Air Act.

Under the Clean Air Act, the federal government establishes a broadly defined emissions standard, but leaves to the states authority for creating plans for "implementation, maintenance, and enforcement of such primary standard."<sup>532</sup> The program of cooperative federalism utilizes key features of democratic experimentalism. For example, the state plans must establish means of collecting and making available information about the program's success.<sup>533</sup> Strikingly, the Act provides that as a prerequisite to an agency's eligibility for funding as a regulator of air

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529. 42 U.S.C. §§ 7401-7671 (1994).

530. 20 U.S.C.A. §§ 5801-5932, 5951-5985, 6061-6084 (West Supp. 1997).

531. See David L. Shapiro, *Federalism: A Dialogue* 39-40 (1995).

532. 42 U.S.C. § 7410(a)(1).

533. See *id.* § 7410(a)(2)(B).



pollution, it must assure the federal administrators that the "agency provides for adequate representation of appropriate State, interstate, local, and (when appropriate) international, interests in the air quality control region."<sup>534</sup> The Clean Air Act thus establishes a program of joint federal/state responsibility that functions largely according to principles of democratic experimentalism.

Congress has used the model of cooperative federalism in other areas as well. Education, traditionally a state function, is a prominent example. Under the Goals 2000 legislation, states are encouraged to meet broad education goals in core academic subjects and to promote "bottom up" reform of education.<sup>535</sup> Here, states play a vital role in the formulation of goals. Federal standards are quite broad: States must improve their content standards and must set specific benchmarks by which to measure progress.<sup>536</sup> The principal substantive statutory requirement for the Secretary of Education's approval of a plan is that it hold "reasonable promise" of promoting student achievement.<sup>537</sup> On the other hand, participation rights are guaranteed in mandatory terms: "Each State improvement plan shall describe strategies for how the State educational agency will involve parents and other community representatives in planning, designing, and implementing the State improvement plan."<sup>538</sup>

A plan like Goals 2000 would survive a challenge under *New York v. United States*, but only, it appears, because it uses the mechanism of conditional funding. Were it a direct command of the federal government it might well run afoul of the Court's anticommandeering principle. Indeed, it might then also be suspect under *Lopez*, because like the statute invalidated in *Lopez* itself, Goals 2000 represents an intrusion into the traditionally state-controlled domain of education.<sup>539</sup> Yet, in our view, the validity of a program like Goals 2000 should not turn on the formalism of counting it as an exercise of the spending rather than the commerce power. Instead, Goals 2000 and other programs of cooperative federalism in the area of education<sup>540</sup> ought to pass constitutional muster because they advance rather than impede the goals of federalism understood as experimentalist collaboration between the states and the federal government.

The 1996 reform of the nation's welfare laws is in many ways the evil twin of legislation like Goals 2000. It has been advertised by its supporters as devolving power to the states. In a technical sense, this may be correct: States play a larger formal role in the formulation of welfare

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534. Id. § 7405(a)(2).

535. See 20 U.S.C.A. § 5886(h).

536. See id. § 5886(k).

537. See id. § 5886(n)(2)(B).

538. Id. § 5886(f).

539. See *United States v. Lopez*, 514 U.S. 549 (1995).

540. See The School-to-Work Opportunities Act of 1994, Pub. L. No. 103-239, 108 Stat. 568 (codified at scattered sections of 20 U.S.C.A. (West Supp. 1997)).

policy than they did under the old regime, and they appear to have considerable policy-setting discretion. However, because the new legislation imposes arbitrary (and unrealistic) goals with inadequate funding, the powers of self-determination it gives states are illusory. Indeed, it gestures at experimentalism as a pretext for punitive moralizing that restricts the freedom to innovate while excusing the national government of responsibility for the results.

The 1996 Welfare Reform Act abolished the principal cash aid program for poor families, Aid to Families with Dependent Children (AFDC), along with a variety of other federal programs that we shall not discuss directly here.<sup>541</sup> Under AFDC, states were required to set state-wide eligibility requirements and benefit levels as a condition for reimbursement by the federal government of a portion of the resulting expenditures. In this sense, AFDC was an "entitlement" program: All persons meeting criteria in a state plan that satisfied the federal limits were entitled to receive payments.<sup>542</sup> Within fairly strict federal standards,<sup>543</sup> AFDC thus also offered states an incentive to provide at least minimal benefit levels for their most destitute residents.<sup>544</sup> Even with such incentives, however, the inflation of the 1970s and 1980s substantially eroded the value of AFDC. Measured in 1993 dollars, the average monthly AFDC benefit declined from \$676 in 1970 to \$373 in 1993.<sup>545</sup>

The new legislation replaces federal reimbursement of state entitlement payments to qualifying families with block grants to the states. These grants are determined by a funding formula that is not adjusted for inflation.<sup>546</sup> Thus, population growth plus any increase in the price level will reduce the real value of benefits per recipient in the absence of offsetting savings in program expenditures. Congress expects the savings to come from a shrinkage in the welfare rolls as recipients move into the workforce. Indeed, the statute requires that by the year 2002, fifty percent of recipient families must include an adult working at least thirty

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541. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 1996 U.S.C.A.N. (110 Stat.) 2105, 2112-61 (codified as amended 42 U.S.C.A. §§ 601-619, 1308 (West Supp. 1997) (repealing AFDC, 42 U.S.C. §§ 601-617 (1991))). The Act also abolished Emergency Assistance to Families with Children, and JOBS, a work and training program for welfare recipients. See *id.* § 103 (repealing 42 U.S.C. §§ 606(e)(1), 681-686 (1994)). Further, it cut funding for food stamps, see *id.*, limited the availability of Supplemental Security Income (SSI) for children, see *id.* § 212, and eliminated legally resident aliens' eligibility for SSI or food stamps, see *id.* §§ 400-402.

542. See 42 U.S.C. § 601 (1994) (repealed 1996).

543. See *id.* § 602(a).

544. See *id.* § 603 (setting forth the funding formula).

545. See House Comm. on Ways and Means, 103d Cong., Overview of Entitlement Programs: 1994 Greenbook 325 (Comm. Print 1994); see also David E. Rosenbaum, Welfare: Who Gets It? How Much Does It Cost?, N.Y. Times, Mar. 23, 1995, at A23 (describing data from 1994 Green Book).

546. See, e.g., 42 U.S.C.A. § 603(a)(1)(B) (West Supp. 1997).

hours per week, with transition percentages in effect until then.<sup>547</sup> Congress apparently assumes that most of these people will obtain private sector jobs, as the Act appropriates very little money for job creation. Other requirements, such as the provision that a family may receive federal funds for no longer than a total of five years (with permission to states to exempt only twenty percent of the caseload)<sup>548</sup> also point to a cost savings achieved either by a transition to work or, more ominously, by exiting the state or sinking into destitution. While early experience provides a basis for cautious optimism that, at least while the national economy is booming, states will find effective means of moving recipients from welfare to work,<sup>549</sup> the new legislation provides little in the way of funding for programs that accomplish this, nor does it address the group action problem that welfare presents at the national level: the possibility that states with a substantial number of persons who appear unemployable will abandon them in the (vain) hope that they will migrate to neighboring states with more generous programs.

Even putting to one side questions of the adequacy of funding under the new legislation, and its likely consequences should the robust economy slacken, welfare reform is decidedly less experimentalist than the regime it replaced. Under section 1315 of the Social Security Act, the Department of Health and Human Services had the authority to grant waivers of federal eligibility rules to experimental state programs designed to move people from welfare to work.<sup>550</sup> The Clinton Administration was especially aggressive in granting such waivers. Prior to the 1996 legislation, it had approved seventy-eight welfare reform experiments in forty-three states.<sup>551</sup> The new law permits states with valid waivers to continue their approved programs until the waiver's original expiration date,<sup>552</sup> but at that point the states will have to comply with the very stringent requirements described above.

Similarly, the Family Support Act of 1988, which sought to move AFDC recipients to work, also provided for the creation of the kind of information infrastructure upon which democratic experimentalism thrives. It is worth quoting one section in full:

#### Performance Standards

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547. See id. § 607.

548. See id. § 608.

549. See Jason DeParle, *Getting Opal Caples to Work*, N.Y. Times, Aug. 24, 1997, (Magazine), at 33 (describing welfare reform in Wisconsin); see also Administration for Children & Families, U.S. Dep't of Health & Human Servs., *Change in Welfare Caseloads Since Enactment of the New Welfare Law* (visited Jan. 17, 1998) <<http://www.acf.dhhs.gov/news/aug-jul.html>> (on file with the *Columbia Law Review*) (reporting sixteen percent decline nationally).

550. See 42 U.S.C. § 1315 (1994), amended by 42 U.S.C.A. 1315 (West Supp. 1997).

551. See The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, HHS Fact Sheet (U.S. Dep't of Health & Human Servs., D.C.), Aug. 22, 1996, at 5.

552. See 42 U.S.C.A. § 615(a)(1).

(a) Development of standards; recommendations; periodic review and modification.

Not later than 4 years after the effective date [of a provision of the Family Support Act], the Secretary shall—

(1) in consultation with the Secretary of Labor, representatives of organizations representing Governors, State and local program administrators, educators, State job training coordinating councils, community-based organizations, recipients, and other interested persons, develop criteria for performance standards with respect to [experimental job training programs] that are based, in part on the results of the studies conducted under [another provision of the Family Support Act], and the initial State evaluations (if any) performed under [a repealed section of the U.S. Code].<sup>553</sup>

The provision went on to require that information collected from the states be used in the regulatory formulation of performance standards,<sup>554</sup> and form the basis for proposals to Congress regarding technical assistance to the states in the meeting of performance standards.<sup>555</sup> The new legislation phases out and then repeals this exercise in democratic experimentalism.<sup>556</sup> In its place the new law directs the Secretary of the Department of Health and Human Services to compile annual rankings of state performance,<sup>557</sup> to develop innovative means of disseminating information,<sup>558</sup> and to develop innovative “outcomes measures.”<sup>559</sup> In time, these provisions may blossom into the necessary information infrastructure, but as with experimentalism more generally, the question will be resolved in practice.<sup>560</sup>

Whatever its other merits, in its setting of fixed, statutory time limits and proportions of recipients that must be working, the new legislation flies in the face of the localism that ostensibly animates it, to say nothing of the experimentalism advocated here. The new legislation does not set mere preliminary benchmarks to be replaced by rolling best-practice standards. Instead, it sets rigid requirements that many critics claim to be based on unrealistic assumptions.<sup>561</sup> Moreover, should the critics’ predic-

553. 42 U.S.C. § 687 (1994), amended by 42 U.S.C.A. § 687 (West Supp. 1997).

554. See *id.* § 687(b).

555. See *id.* § 687(c).

556. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act of 1996), Pub. L. No. 104-193, § 108(e), 1996 U.S.C.A.N. (110 Stat.) 2105, 2167 (codified as amended at 42 U.S.C.A. §§ 681-687 (West Supp. 1997)).

557. See Welfare Reform Act of 1996 § 103(a)(1), 42 U.S.C.A. § 613(d) (West Supp. 1997).

558. See Welfare Reform Act of 1996 § 103(a)(1), 42 U.S.C.A. § 613(c).

559. See Welfare Reform Act of 1996 § 107, 42 U.S.C.A. § 613 note.

560. In the meantime, the government operates a web site that includes, among other things, links to descriptions of various state programs under construction. See Welfare Reform State Links (visited Jan. 17, 1998) <<http://www.acf.dhhs.gov/news/welfare/stlinks.htm>> (on file with the *Columbia Law Review*).

561. See Peter Edelman, *The Worst Thing Bill Clinton Has Done*, *Atlantic Monthly*, Mar. 1997, at 43, 50.

tions that the goals are unrealistic prove false, the combination of congressionally chosen mandates (rather than rolling best-practice standards) and inadequate information-sharing infrastructure makes it unlikely that successes will spread as rapidly as they would under a truly experimental regime.

Of course, it is possible that voters in one state will demand that the responsible officials adopt the successful methods of their neighbors, and we do not discount the possibility that this will happen. But as in other contexts, there is no reason to assume that this result will come about automatically. Welfare reform devolves power to the states, but offers no special reason to hope that devolution will result in fruitful experimentation. Taken as a whole, the bill capriciously limits the range of experiments the states may undertake and diminishes the potential significance of those that occur by trivializing the information pooling necessary for joint learning.

#### VII. DEMOCRATIC EXPERIMENTALISM AND SEPARATION OF POWERS

The existence of administrative agencies with the power to fashion rules of law, institute enforcement actions, and adjudicate disputes poses a double dilemma for the constitutional principle of separation of powers. First, in the Madisonian synthesis, the combination of executive, legislative, and judicial power in one branch of government invites tyranny.<sup>562</sup> Second, this combination is especially egregious when it occurs outside any of the institutions contemplated directly by the Constitution, in a fourth, administrative branch of recent pedigree and uncertain democratic legitimacy.

Both of the standard responses to this embarrassment seek to avoid the problem by pleas for a mature worldliness. The first argues against a narrow or formal understanding of the constitutional doctrine of separation of powers.<sup>563</sup> The second argues that delegation to administrative agencies in particular is democratically legitimate because, under the Administrative Procedure Act (APA),<sup>564</sup> those agencies are accountable to the citizens affected in ways analogous to the way the legislature is accountable to its constituents.<sup>565</sup> But these arguments are more apologia

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562. See *The Federalist* No. 47 (James Madison); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 640–41 (1996).

563. See 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.3, at 38 (3d ed. 1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 578–79 (1984).

564. 5 U.S.C. § 551 (1994).

565. See *South Carolina ex rel. Patrick v. Block*, 558 F. Supp. 1004, 1015 (D.S.C. 1983) (stating that APA rulemaking is “intended to insure that the process of legislative rule-making in administrative agencies is infused with openness, explanation, and participatory democracy which is essential to minimize the dangers of arbitrary and irrational decision-making”); Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 *Yale J. on Reg.* 147, 206 (1993) (stating that “the notice and

than analysis. The Administrative Procedure Act “democratizes” (traditional hierarchical) agencies at the cost of substantially paralyzing them; indeed, it is more nearly true that traditional agencies are neither democratic nor effective than that they are both.

Yet we do not mean to cast the New Deal agencies as villains. The explosion of agencies that began to gain steam in the first decades of the twentieth century<sup>566</sup> was itself a recognition that older forms of regulation were inadequate, and thus from the perspective of the eighteenth-century Constitution, the paradigmatic New Deal or 1970s agencies may be seen as truly “experimental” themselves.<sup>567</sup> Indeed, it is partly a testimony to the vigor of these entities that they have begun to transform themselves, as we have seen above. But it is no secret that the older model of the agency never fit comfortably within the Madisonian framework.

Recast on experimentalist lines as projected in Part V.B, however, administrative agencies more readily fit within the framework of American government than do the agencies as we currently know them. On the one hand, experimentalist administration creates the mirror—the systems of information exchange and benchmarking—in which the doings of the other branches, and its own as well, are reflected for public scrutiny. In this way, the new methods limit the possibilities of self-aggrandizement of any one branch of government, the central concern of contemporary separation-of-powers doctrine.<sup>568</sup> On the other hand, the decisions of experimentalist agencies depend on direct deliberation by citizen users. In this, the administration is of a piece with the democracy it serves, not merely democratic by analogy to it. If the judiciary, as the shield of liberty against the danger of tyranny by government or majority, was the least dangerous branch of the original Madisonian democracy, the administrative agencies, as mirror and motor of direct deliberation, are the least dangerous branch of democratic experimentalism.

#### A. *Separation-of-Powers Doctrine and its Discontents*

We begin by recalling the separation of powers as it appears in the Constitution, and as it does not. The commonplace that our system of

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comment procedures of the APA are invaluable to democratic participation”); Philip J. Harter, *The APA at 50: A Celebration, Not a Puzzlement*, *Admin. & Reg. L. News*, Winter 1996, at 2, 2 (stating that APA rulemaking “provides a democratic means by which the people who will be affected . . . can participate in the decision”).

566. See James Willard Hurst, *Law and Social Order in the United States* 35–41 (1977).

567. See 1 Davis & Pierce, *supra* note 563, § 1.4, at 9 (quoting a 1916 speech by American Bar Association President Elihu Root characterizing broad delegations to agencies as worthwhile “experiments”).

568. See *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (upholding the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591–599 (1982 ed. Supp. V)), makes aggrandizement of the power of a branch of government the touchstone of separation-of-powers analysis.

government separates legislative, executive, and judicial power is, of course, overstatement. The Constitution contains no express principle of separation of powers. That principle must be inferred from the Constitution's structure—which sets forth “legislative Powers” in Article I,<sup>569</sup> “executive Power” in Article II,<sup>570</sup> and “judicial Power” in Article III.<sup>571</sup> But any closer reading establishes that the Constitution does not perfectly match branches with functions. As Justice Jackson explained in his concurrence in the *Steel Seizure Case*, “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”<sup>572</sup> The fundamental question in traditional debates about the separation of powers then becomes how much integration will be permitted consistent with the Constitution's architecture?

Where the Constitution expressly delegates a power to a branch of government, there can be no complaint. For example, the President's authority to veto legislation is a kind of lawmaking, rather than law-enforcing power; yet Article I, Section 7, Clause 2 provides the definitive answer to any claim that the practice is unconstitutional. Similarly, the express grant of an exclusive power to one branch precludes its exercise by another.<sup>573</sup> But these are easy cases for traditional constitutional law, with answers provided by the Constitution's text alone, without any reference to a more abstract principle of separation of powers.

Harder cases arise when a government practice contravenes no express constitutional norm but departs from the presumed structure of separation. In modern times, the clearest example of such a departure was posed by *INS v. Chadha*.<sup>574</sup> Section 244(c)(2) of the Immigration and Nationality Act authorized one House of Congress to override the Attorney General's decision not to deport an otherwise deportable alien.<sup>575</sup> After Congress overrode the Attorney General's decision to permit Chadha, who had overstayed his student visa, to remain in the United States, Chadha challenged the Act, claiming that the unicameral legislative veto violated the principle of separation of powers.<sup>576</sup> The Court held for Chadha, ruling that however expedient, the legislative veto was inconsistent with Article I's prescription that Congress legislate by bicam-

569. U.S. Const. art. I, § 1.

570. U.S. Const. art. II, § 1.

571. U.S. Const. art. III, § 1.

572. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

573. See, e.g., *Nixon v. United States*, 506 U.S. 224, 230–31 (1993) (holding that by granting to the Senate “the sole Power to try all Impeachments,” in Article I, Section 3, the Constitution precludes a court challenge to procedures employed by the Senate in conducting an impeachment).

574. 462 U.S. 919 (1983).

575. See *id.* at 925 (citing 8 U.S.C. § 1254(c)(2) (1976) (repealed 1986)).

576. See *id.* at 928.

eral action followed by presentment to the President.<sup>577</sup> According to the *Chadha* Court, the lawmaking formula set forth in Article I is exclusive.<sup>578</sup>

Even this limited affirmation of the separation of powers, however, was enough to renew questions about the legitimacy of administrative agencies. In his lone dissent in *Chadha*, Justice White accused the majority of formalism, contending that “[i]f Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power for itself.”<sup>579</sup> In the ensuing years, therefore, commentators and the Court itself have sought to deny their equivalence in order to reconcile the delegation of lawmaking authority to administrative agencies with *Chadha*. According to the prevailing view, the flaw in congressional delegation that *Chadha* repairs is “aggrandizement,”<sup>580</sup> the attempt by Congress to increase its power at the expense of the other branches. By contrast, when Congress delegates power to administrative agencies, it does not increase its own power, and thus poses no constitutionally significant threat to liberty.

Questions of what constitutes aggrandizement aside,<sup>581</sup> this reconciliation seems untenably narrow. Why assume that democracy is served by the agencies merely because their existence does not threaten liberty by aggrandizing the power of any other branch? Surely there is some risk to democracy in removing lawmaking power from the hands of the people’s representatives and placing it in the hands of bureaucrats. This danger is most apparent in the case of so-called “independent” agencies, but even

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577. See *id.* at 944–51. These are both necessary conditions. See *Consumers Union of Am., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff’d mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) (invalidating bicameral legislative veto).

578. See *Chadha*, 462 U.S. at 956–58. One could quibble with the Court’s characterization of a decision to override deportation as “legislative,” given that it affects the rights and duties of a particular person. See *id.* at 964–65 (Powell, J., concurring in the judgment) (arguing that the legislative veto in *Chadha* was an unconstitutional *judicial* act by the legislature). Whether the Court correctly identified the nature of the legislative veto in *Chadha* itself, or not, it clearly meant to endorse a general principle that whenever Congress engages in what would concededly be legislation, it must follow the procedures of Article I.

579. *Id.* at 986 (White, J., dissenting). For the canonical discussion of formalism and functionalism in separation-of-powers jurisprudence, see generally Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488 (1987).

580. See *Morrison v. Olson*, 487 U.S. 654, 693–94 (1988); Manning, *supra* note 402, at 715–17.

581. One pervasive problem is that of drawing a neutral baseline. In *Chadha* itself, after all, the authority of the Attorney General to withhold deportation in the first place stemmed from an act of Congress. In the absence of that initial delegation, the status quo for persons such as *Chadha* would have been deportation. From this perspective, the legislative veto did no more than place a limit on Congress’s prior delegation of authority to the executive branch. See *Chadha*, 462 U.S. at 990–96 (White, J., dissenting).



those agencies that are in principle answerable to the President lack the kind of connection to the people that Article I envisions for congressional lawmaking. Thus, in our view, Laurence Tribe's attempt to explain *Chadha* as "a rejection of a quasi-parliamentary form of government in which Congress delegates legislative power to itself or its parts,"<sup>582</sup> fares no better than the less precise formulations of the nonaggrandizement principle. For if the express provisions of Article I may be seen as implicitly rejecting an alternative, parliamentary form of democracy, do they not, a fortiori, reject manifestly *undemocratic* forms of government?

The problem is heightened, we saw, because Congress cannot monitor the use of the authority it delegates: Agencies exist because Congress is unable to devote the time and resources necessary to respond to the complex facts of the modern world.<sup>583</sup> It follows, therefore, that Congress cannot supervise all of the details of agency action, and that agency decisions with which Congress might disagree if it gave them serious consideration will necessarily escape Congress's attention.

#### B. *Present and Future Solutions*

In the worldly view, the Administrative Procedure Act<sup>584</sup> provides a solution to the antidemocratic character of agency lawmaking. Agencies subject to the APA must, as a precondition to substantive rulemaking, give the public notice of a proposed rule and permit comments on whether it should be adopted.<sup>585</sup> Notice and the opportunity for comment give the public many of the same opportunities for influencing the adoption of rules that they would have in the case of norms adopted directly by Congress. Of course, persons dissatisfied with agency rulemaking do not have the opportunity to express their views at the ballot box (except indirectly, through, for example, presidential elections). But here too the APA seeks to democratize the agencies' functioning by providing judicial review of final agency action for aggrieved persons.<sup>586</sup>

Thus, the APA aims to domesticate the "fourth branch" by subjecting it to checks similar to those imposed on the other three. This solution may have worked so long as the methods of centralized fact-finding plausibly provided the necessary information for effective regulation, but that, as we have seen, is no longer true. A quarter century of efforts to further democratize and improve the performance of the agencies largely by extending the circle of those participating at the center of centralized

582. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1238 (1995).

583. See, e.g., Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 Colum. L. Rev. 427, 428-30 (1989) (contrasting a nineteenth-century legislative solution to transportation-safety problems with a twentieth-century delegation to an agency for purposes of solving transportation-safety problems).

584. 5 U.S.C. §§ 551-559, 701-706, 3105, 3344, 6362, 7562 (1994).

585. See *id.* § 553(b) (notice); *id.* § 553(c) (opportunity to submit views).

586. See *id.* §§ 701-706.

rulemaking have produced confusion and stasis that resemble the turmoil of Congress itself.

Indeed, the APA in some ways makes the agencies more vulnerable to the defects of centralized representative democracy under conditions of volatility and diversity than the legislature to which they have been in part assimilated. For while the notice-and-comment requirement for rulemaking ensures that agencies conduct congressional-style hearings, the availability of judicial review of agency rulemaking undercuts their ability to respond rapidly to new developments in specialized areas. Rulemaking, in consequence, can be tortuously slow, as we saw in the context of NHTSA's efforts to require passive restraints.<sup>587</sup> The clash between procedural safeguards and administrative adaptability is so great and manifest that open enemies of government regulation can think of no more expeditious way to frustrate the agencies than to impose on them additional requirements of procedural due process.<sup>588</sup>

These results notwithstanding, we believe that the fundamental impulses behind the worldly view of the APA are correct: To domesticate the agencies within American constitutionalism, they must be rendered democratic. The separation-of-powers principle in part serves to frustrate democracy by making it difficult for the government to act. But that is only half of the story. By ensuring that legislative decisions are made by persons accountable to the people, the separation-of-powers principle also *empowers democracy*.<sup>589</sup> Thus, a successful account of the role of agencies in American government must, at a minimum, answer to democracy.

In retrospect, the shortcomings of the APA derived from the attempt to apply the conventional methods of democratic domestication to institutions born of the recognition of the limits of convention. Had the agencies worked in conformity with the APA, they would have created a firmament of little democracies, each responsible in effect for legislation, adjudication, and administration in a specific area of economic activity. In that case, they would have resembled, more than anything, the world of sectoral councils and parliaments contemplated by British pluralists

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587. See *supra* Part V.C.1; see also Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *Admin. L. Rev.* 59, 60 (1995) ("For more than a decade, administrative law scholars have complained that the agency rulemaking process has become ossified."); *id.* at 60 n.4 (collecting sources).

588. For example, the "Contract with America" that served as the Republican Party platform in the 1994 congressional elections proposed additional procedures as a means of impeding rulemaking. See Republican National Committee, *The Contract with America 141* (1994); see also Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 *Wake Forest L. Rev.* 745, 768 (1996) (observing that subtitle E of Title II of the recently enacted Contract with America Advancement Act, 5 U.S.C. §§ 801(a)(1)(A), (C), 801(a)(3) (1994), institutionalizes congressional review of all agency rulemaking).

589. See Ely, *supra* note 2, at 131–34 (arguing for "a legislative lawmaking process").

such as Laski and Cole in the early decades of this century.<sup>590</sup> What, then, would have become of the authority of Congress and the integrity of our Constitution? We will never know how much the difficulties of the agencies derived from the limits of representative democracy, even in the small world of highly specialized activity, and how much from fomenting novel arrangements while compelling respect for the constraints of the old.

Experimentalist administration as conceived in the broader setting of directly deliberative democracy, in contrast, is democratically domesticated from birth. Thus, the central separation-of-powers problem of conventional agencies—their insulation from politics—never arises. The experimentalist agencies we described in Part V<sup>591</sup> serve local government by facilitating benchmarking, set national standards by benchmarking rolling best practice, and benchmark services that they themselves provide. Thus, they coordinate the expertise of others instead of attempting to constitute themselves as a substitute for it, and their success reinforces rather than saps the democratic efficacy of the other institutions of government. By setting and continuously improving the standards for directly deliberative participation by which all instrumentalities of government are judged, as a condition of their own activities, the agencies safeguard democracy while advancing it. In this sense they would be the least dangerous branch of a new Madisonian synthesis.

### VIII. INDIVIDUAL RIGHTS

We have argued for democratic experimentalism thus far in doctrinal contexts that may seem unusually well suited to it. The delivery of services analogous, if not identical, to those provided by private-sector firms, and the setting of complementary rules and standards, are significant parts of the work of administrative agencies. Thus, it is not surprising that we find the current experience of private firm restructuring relevant to the restructuring of administrative agencies. Similarly, federalism has also long been seen as an efficient instrument of decentralization, however much our tradition of federalism also values state sovereignty in its own right. Hence, novel forms of economic decentralization easily suggest new forms of federalism. Discussion of the courts, correspondingly, has focused so far on their scrutiny of the experimentalism of the other actors in a system of service provision through collaborative federalism.<sup>592</sup>

Perhaps it would be wise to go no further, and forswear the extension of experimentalism to the remaining pillar of American constitution-

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590. For the relevant essays in the setting of contemporaneous pluralist works, see generally Paul Q. Hirst, *The Pluralist Theory of the State: Selected Writings of G.D.H. Cole, J.N. Figgis, and H.S. Laski* (1989).

591. See *supra* Part V.B.

592. See *supra* Part V.D.

alism: the protection of individual constitutional rights against decisions of local, state, and national majorities. To do this, we would have to distinguish the subconstitutional, rolling best-practice rights to participate in local decisionmaking available under democratic experimentalism from familiar constitutional safeguards. In such a two-tiered system, for example, a new, presumably statutory, rolling best-practice right to be consulted in the experimentalist formulation of a locale's welfare policy would be qualified by the limits on pre-enforcement litigation and other experimentalist techniques described above, while the old constitutional rights to such liberties as freedom of speech and religion would still hold sway in their traditional domain.

But this distinction between protections based on an experimentalist structure and rights founded in the Constitution is ultimately untenable. Even a partial transformation of our understanding of the Constitution's structural provisions as described in the foregoing sections shades understandings of rights. The preservation of liberty typically serves as a principal justification for the Constitution's division of power. At the same time, horizontal (separation-of-powers) and vertical (federalism) limits play a crucial role in the substantive interpretation of the Constitution's individual-rights provisions. The most important rights-based controversies of the century—involving economic liberty, racial segregation, incorporation of the Bill of Rights, free speech, the rights of criminal defendants, and procreative autonomy—concerned the limits of federal judicial tribunals as much as the underlying substantive norms. Thus, a new understanding of the separation of powers and federalism will reshape thinking about individual constitutional rights as well.

Moreover, as democracy increasingly comes to mean decentralized, direct deliberation, it will be increasingly difficult to distinguish the citizens' participatory rights in these particular settings from those more general "process-perfecting" rights to democratic participation that are frequently taken as the most fundamental of all political liberties. The more community policing effaces the distinction between crimes and lawful actions by disrupting behavior that leads directly to crime, the harder it will be to distinguish between the traditional constitutional immunities due those suspected of crimes and the rights enmeshed in the new institutional mechanisms by which citizens will police the new police. The more citizens tailor public services to the way they live, the more previously suppressed ways of life are publicized and granted official recognition. Consequently, it becomes increasingly difficult to distinguish constitutional protections of a prepolitical sphere of intimate association and conscience—modeled on the right to freedom of religion and expressed in the notion of a right to privacy<sup>593</sup>—from protection of experimentalist participation in all its diversity.

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593. It is interesting to note that when, in the leading modern constitutional privacy case, *Griswold v. Connecticut*, the Court sought jurisprudential antecedents, see 381 U.S. 479, 482 (1965), it turned to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a case that

Thus, experimentalist and traditional constitutional understandings of rights cannot be durably separated, at least without recourse to a question-begging formalism that asserts that the former simply are nowhere to be found in the Constitution's text. To complete our project, therefore, we must find a way of reconciling them in the concept of an enforceable Constitution that—democratizing the judicial determination of rights and constitutionalizing the everyday exercise of democracy—begins to reduce the familiar tension in constitutional democracies between popular sovereignty and a constitutional order entrenched against the decisions of the polity.

This is the task of this Part. We begin by marking out what we take to be the common ground in contemporary philosophical discussion of rights and underscoring the affinities between the historically contextualized view of rights central to that discussion and the notion of pragmatist sociability that undergirds democratic experimentalism.<sup>594</sup> Then, we connect this pragmatist conception of rights with a seemingly peripheral aspect of the Supreme Court's rights doctrine, the concept of prophylactic rules, and suggest a radical generalization of that concept.<sup>595</sup> Next, we describe the mechanism of judicial review that would give practical effect to the experimentalist understanding of rights.<sup>596</sup> Finally, we illustrate how experimentalist learning can transform our notion of what we hold as holders of fundamental rights.<sup>597</sup>

### A. *The Awkward Consensus on Rights*

Current discussion of rights as both immunities from state and private interference, and entitlements to public goods due the citizens of a democracy—even when calculation of the public good suggests otherwise—has arrived at an uneasy, half-spoken agreement that rights matter. The agreement arises out of the failure of ambitious and promising projects to establish rights on universally valid foundations,<sup>598</sup> and the persistence, despite this failure, of the conviction that rights, in a democracy, ought to be respected as though they were indeed so founded.<sup>599</sup> Because the agreement that rights matter grows more from common disappointments than from the complementary discoveries of meeting

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ought to have grounded the parents' right to educate their children in an extension of religious freedom, but in fact grounded it in principles of economic liberty.

594. See *infra* Part VIII.A.

595. See *infra* Part VIII.B.

596. See *infra* Part VIII.C.

597. See *infra* Part VIII.D.

598. See, e.g., Ronald Dworkin, *Taking Rights Seriously* (1977) (proposing a deontological account of rights); John Rawls, *A Theory of Justice* (1971) (deriving rights from purportedly basic tenets of democracy).

599. See, e.g., Ackerman, *supra* note 15, at 12 (allowing for rights as trumps that are nonetheless based on consensus); cf. Dworkin, *supra* note 598, at 199 n.1 (accepting the possibility of an entrenched consequentialist account of rights as an alternative to his deontological account).

minds, however, it seems to discourage exchange rather than invite it. Like wayfarers crossing paths at a desolate inn, the participants are too absorbed by the vicissitudes of their separate journeys to welcome conviviality. Yet this reticence to the side, there is, on examination, a short step from these points of agreement to a shared positive view of rights as historically contextual. This view corroborates the general pragmatist idea of sociability and begins to connect it to an understanding of rights in an experimentalist democracy.

Consider, then, the awkward consensus of the moment. Consider specifically the foundational project, most closely identified with the work of John Rawls. Its original grand aim was to understand the rights we associate with democracy not as an historical legacy of certain societies, but rather as accomplishments of moral reason itself.<sup>600</sup> The core task, therefore, was to demonstrate how rational beings, acknowledging only their freedom and equality, and thus ignorant of their separate destinies in life, would on reflection choose to live by rules reconciling freedom and equality akin to those actually observed in the advanced social democracies of the post-War world.<sup>601</sup> The force of the demonstration was to reveal the principle behind the practice, and so to make the social democracies more defensible against their political enemies, while guiding the efforts of their friends to join the benefits of freedom to those of effective equality.

Criticism—no one decisive, all together overwhelming—focused relentlessly on the way the foundational results relied in the end on just such historically dependent indicia of identity as gender or social class whose irrelevance was to be demonstrated. One line of attack fixed on the implausibility of imagining any future, much less one reconciling freedom and equality, in abstraction from all the marks of identity that give meaning to life projects.<sup>602</sup> Another traced the inconsistencies in principle of defining constitutional rules in ignorance of the world and then living by the principles of those rules once the veil of ignorance is lifted.<sup>603</sup> Unable to advance his original project, Rawls himself eventually validated the criticism by reformulating the democratic freedoms of the

600. See Rawls, *supra* note 598, 118–92 (supporting his principles of justice by invoking a hypothetical agreement among idealized, deliberately acontextualized actors).

601. See *id.*

602. Feminists made this point with considerable force. See, e.g., Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* 2–3 (1992) (linking the critique of liberalism to a more general critique of Enlightenment reasoning); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 *S. Cal. L. Rev.* 1699, 1713 (1990) (noting how, in contemporary culture, the values advanced by Rawls are associated with masculinity, while going on to offer a pragmatist reconceptualization).

603. See, e.g., Alasdair MacIntyre, *After Virtue* (1981) (questioning the possibility of rational argument absent agreement upon a conception of the good); Michael J. Sandel, *Liberalism and the Limits of Justice* 28–46 (1982) (arguing that Rawls's theory assumes a human identity artificially isolated from community influences and obligations); Michael Walzer, *Spheres of Justice* (1983) (rejecting Rawls's effort to root political justice in a very small number of abstract principles).

moderns as a grand historical legacy of centuries of intolerance and tyranny.<sup>604</sup>

Yet, paradoxically and revealingly, the recognition of the historical contingency of our freedom that led to Rawls's (and others') reversal only served to reinforce commitments to the centrality of rights in modern political life on both sides of the debate. Critics of the foundational program were quick to affirm that their quarrel was not with the broad substance of the rights in question, but only with the claim to elaborate and motivate allegiance to them without reference to the experience of particular communities or identity groups;<sup>605</sup> adherents to the foundational program followed Rawls's lead, situating the rights of freedom and equality more precisely in their historical context while recommending them as vital examples of broad principles in action.<sup>606</sup>

Important nuances of motivation and definition aside, there is agreement that commitments to rights to freedom and equality are part of our identity as members of democratic societies.<sup>607</sup> Apparently, our rights do not lose their majestic and independent authority when we come to acknowledge that in some sense we chose them. Because our rights are part of who we are, they shape, explicitly or not, all the manifold projects by which we determine the future of our polities. Indeed, as the criticism of foundationalism suggests, given the centrality of rights to our political identity, we cannot imagine a future for our polities at all without contemplating how we shall affirm or modify our rights.<sup>608</sup>

Observe that this conception of political rights and personhood as mutually defining is a variant of the pragmatist idea of the joint determination of individuality and sociability. In pragmatism, because of the irreducibly social character of learning, we form ourselves as individuals by interpreting, in collaboration with others, the possibilities for self-development that society takes for granted; our joint elaboration in turn transforms those possibilities. The common-ground view specifies rights just as the immunities and entitlements that qualified persons alone and to-

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604. See John Rawls, *Political Liberalism* at xv-xxv (1993).

605. Of course, the critics meant the point as a criticism. See, e.g., Paul F. Campos, *Secular Fundamentalism*, 94 *Colum. L. Rev.* 1814, 1819-21 (1994) (arguing that even in his later work, Rawls's conception of "reasonableness" is considerably narrower than he acknowledges).

606. See Richard Rorty, *The Priority of Democracy to Philosophy* (1988), reprinted in *1 Philosophical Papers: Objectivity, Relativism, and Truth* 175, 185 (1991) (stating approvingly that "[w]hen reread in the light of" Rawls's later work, "*A Theory of Justice* no longer seems committed to a philosophical account of the human self, but only to a historico-sociological description of the way we live now"); Tribe & Dorf, *supra* note 527, at 114-17 (1991) (connecting this project to common-law methods).

607. See, e.g., Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 *Harv. L. Rev.* 1175, 1194-99 (1996) (noting substantive similarity between deontological and consequentialist accounts of rights).

608. For a statement of the common-ground position from the vantage point of the antifoundational position by one of its principal advocates, see Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *Pol. Theory* 6, 13-15 (1990).

gether may at any moment suppose in their life plans. Correlatively, only those who may take these rights for granted qualify, as citizens, to exercise sovereign self-determination. More precisely, the common-ground view can be rendered as the idea of the joint determination in context of rights, of the identities and capacities of individuals and groups: The identity to which we aspire shapes and is shaped by the capacities for action in the world that we acquire, just as our identity and practical abilities are shaped by and shape the immunities and benefits we (ought to) hold as a matter of right.<sup>609</sup>

These relations are both analytic and practical. Neither as observers nor as actors can we say what rights are, or how they are to be used, without reference to the identities and capacities that give them substance, just as no specification of individual identity is adequate without reference to rights. Thus understood, rights, far from estranging us from one another, are a crucial part of the common ground of mutual recognition upon which we raise our individuality.<sup>610</sup>

The close association in historical context between rights, on the one hand, and ideas of personal honor and dignity associated with sovereignty, on the other, suggests an explanation of what might be called the resistance of rights to skepticism: How we can both acknowledge that the justification of rights may vary historically—or, contemporaneously, from setting to setting within any one society—yet continue to regard rights as basic to our understanding and evaluation of ourselves in relation to others. The respect we accord the rights we know, regardless of knowledge of alternatives, is recognition of their priority in our self-understanding as the political and practical expression, however approximate, of the very preconditions of humanity. Particular rights may be conceived as the pragmatist principles upon which we must provisionally stand to exercise our powers of human self-determination (including, of course, the power to press for changes in rights). So closely are the rights of citizenship identified with the preconditions of humanity that persons denied rights, the exercise of which they believe within their capacity, will often risk their lives protesting the denial. For the same reason, audacious persons and groups will struggle to acquire the capacities for forms of self-determination (ranging from economic independence to participation in public affairs) thought to merit recognition of corresponding rights.

This mutual dependence of rights and identities explains why the extension of rights so often appears as an instrument for enlarging the current understanding of humanity, and why enlarging the polity so often appears as an instrument for extending rights. New rights arise amidst the contentious exploration of the ambiguities of existing ones.

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609. This view of rights is explored in Joseph Raz, *Right-Based Moralities*, in *Theories of Rights* 182 (Jeremy Waldron ed., 1984).

610. For the contrary view of rights as entailing isolation and so obstructing community, see Karl Marx, *On the Jewish Question* (1843), reprinted in *Selected Writings* 39, 51–55 (David McLellan ed., 1977), and Sandel, *supra* note 603, at 60–65.



Because they enjoy the capacity to exercise the citizenship (or personhood) rights as newly defined, persons formerly excluded become full citizens (or come to be understood as full persons). The wider scope of citizenship or its equivalent brings with it a broader spectrum of backgrounds and experiences, and these in turn prompt another reexamination of the understanding of rights. As a result, there arise new understandings of all the terms of these relations, as unpredictably innovative in their way as the discovery of new practical solutions through the recombination of diverse perspectives.

For example, arguments for religious toleration in the seventeenth and eighteenth centuries affirmed belief in a Creator to be a condition of citizenship, but held establishment of any religion an affront and a threat to the sincerity of this devout acknowledgment.<sup>611</sup> Thus, the heretic and infidel became citizens by admission to the extended community of sincere believers, even as sincere belief came, through this new association, to partake of a kind of divinity independent of doctrine.

In the last century, questions about the relationship of sex and citizenship provide a practical illustration of the mutual dependence of rights, capacities, and identities. The legal struggle for equality of the sexes began with an effort to establish rights for women on the principle that women have the same capacities as men, and therefore, that sex is not an important characteristic of identity.<sup>612</sup> The strategy made sense given that it opposed a legal regime in which sexual difference was taken as the justification for inequality. In upholding a prohibition on the practice of law by women, the Supreme Court opined that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>613</sup>

Formal equality,<sup>614</sup> or *sameness* feminism, was a useful vehicle for challenging this most basic denial of citizenship rights for women. Yet the acceptance of women as full citizens posed an immediate difficulty, for the fact is that men and women are alike in some ways and different in others. With the battle for the most basic right of inclusion over, the possibility arose that treating men and women as the same treated them unequally because they are situated differently. How, for example, can

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611. Most famously, Locke and, later, Burke avowed religious freedom and toleration, but not for atheists. See Edmund Burke, *Speech on a Bill for the Relief of Protestant Dissenters* (Mar. 17, 1773), in 7 *The Works of the Right Honorable Edmund Burke* 21, 36 (1904); John Locke, *A Letter Concerning Toleration* 51 (J. Tully ed., 1983) (1690).

612. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1115–16 (1997) (noting how protest movements of the nineteenth century succeeded in removing some of the most explicitly unequal aspects of marital property law).

613. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

614. See Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 *Stetson L. Rev.* 701, 701 (1994) (describing formal equality feminism as arguing that “[s]imilarly situated women and men should be treated identically”).

and should the law take account of pregnancy?<sup>615</sup> And given the still-recent victories in the name of sameness, how to speak of difference without risking the progress already made?<sup>616</sup> Are separate colleges for women justifiable where they are not for men?<sup>617</sup> Successive answers to such questions simultaneously articulate a view of women as fully human and of humans as gendered beings. And this mutual redefinition, in turn, recasts our conceptions of both humanity and gender. These are the latest legal questions in this area—and it is impossible to think about the rights questions without inquiring after capacities and identities as well.<sup>618</sup>

In a closely related context, the fight to legalize same-sex unions analogously sees the identification of the family with biological procreation as a capricious, even bigoted narrowing of a broader understanding of marriage as the institution of abiding and responsible intimacy under the aegis of the state. Should this argument succeed, the state will honor the exchange of vows between gays or lesbians as any others.<sup>619</sup> The possibility of discovering new and reconcilable understandings of rights once held to be antagonistic becomes our compensation for the disappointment that rights are too closely tied in their meaning to particular contexts to be founded on unambiguous first principles once and for all.

Thus, experimentalist rights, in the sense of deeply entrenched immunities and benefits whose meaning and validity appear at once beyond the reach of history and conflict yet to depend on both, are a pleonasm,

615. See, e.g., Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 56–60 (1990) (arguing that as long as the model employee is male, accommodating women means treating them “specially,” but once the benchmark itself is pluralized, equal protection becomes possible); Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. Rev. 101, 127–39 (1992) (same).

616. This fear no doubt played at least as great a role in the feminist community’s lukewarm reception of the work of Carol Gilligan, in *A Different Voice: Psychological Theory and Women’s Development* (1982), as the (more academic) charge of essentialism. See, e.g., Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L.J. 1373, 1380–81 (1986) (warning that Gilligan’s work might become “the Uncle Tom’s Cabin of our century”).

617. The Supreme Court’s opinion in *United States v. Virginia*, striking down the Virginia Military Institute’s exclusion of women, notes the lower court’s observation that single-sex education may have greater pedagogical benefits for females than for males. 116 S. Ct. 2264, 2277 n.8 (1996).

618. Indeed, the most sophisticated legal scholarship on the subject recognizes that the very discussion of gender underscores both its power to organize social relations and its contextual dependence on those relations. See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1 (1995) (advancing a conception of equality that permits individuals to choose their gender without regard to their sex); Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 Stan. L. Rev. 691 (1997) (arguing that sexual harassment constitutes sex discrimination because it reinforces sex-role stereotypes of men as sexual subjects and women as sexual objects).

619. See *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at \*18 (Haw. Cir. Ct. Dec. 3, 1996).

not an oxymoron. They are the only kind of rights that we actually have, and what we know best. The history of the expansion of the franchise and other rights of political participation from white male property owners, to white male citizens, to all male citizens, to all adult citizens—perhaps the master narrative of political and constitutional understanding—is surely this general form of experimentalism writ large, and in blood. It was precisely the commitment to democratic ideology that, at each step in the redefinition of rights, enabled critics of the limited scope of citizenship to accuse their opponents of hypocrisy, and to rally their friends when open struggle was unavoidable. Neither cynics nor sloppy historians, abolitionists who invoked the Declaration of Independence in support of the proposition that “all men are created equal”<sup>620</sup> were invoking democracy’s capacity to democratize itself, and so the canonical experimentalist capacity of revising a deep assumption in light of the experience it enables.

### B. *Pragmatist Conceptions of Rights in Existing Doctrine*

The foregoing account of rights suggests that, however characterized in existing constitutional understandings, rights are inevitably experimentalist, and indeed, careful examination of Supreme Court doctrine reveals occasional recognition of this fact. We begin with cases of expressly experimentalist rights.

In a number of Warren Court decisions clarifying the protections due suspected criminals, the Supreme Court developed, in the form of what came to be called prophylactic rules, a jurisprudence of rights that gives practical and potentially general effect to an experimentalist understanding of constitutional immunities and entitlements in context. In *Mapp v. Ohio*, the Court required that evidence obtained in violation of the Fourth Amendment protection against illegal searches and seizures be suppressed during the prosecution’s case-in-chief.<sup>621</sup> This exclusionary rule, the Court later explained, was not required by the Fourth Amendment itself; rather, the rule was justified as a judicial deterrent to unlawful police conduct.<sup>622</sup> In *Miranda v. Arizona*, the Court surveyed the then-existing state use of psychological pressure to extract statements from criminal suspects held in custody for questioning, and concluded that these practices often rendered the resulting statements “compelled” in violation of the Fifth Amendment protection against self-incrimina-

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620. See Republican Platform of 1856, in 1 National Party Platforms 1840–1956, at 27, 27 (Donald B. Johnson & Kirk H. Porter eds., rev. ed. 1978) (relying on the Declaration as a basis for Congress’s power to prohibit slavery in the territories); Howard Jay Graham, Our “Declaratory” Fourteenth Amendment, 7 Stan. L. Rev. 3, 4–5 (1954); Trisha Olson, The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment, 48 Ark. L. Rev. 347, 364 (1995).

621. 367 U.S. 643, 655–60 (1961).

622. See *Stone v. Powell*, 428 U.S. 465, 482–85 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

tion.<sup>623</sup> Accordingly, the Court disallowed the subsequent use of confessions unless the prosecution “demonstrate[d] the use of procedural safeguards effective to secure the privilege against self-incrimination.”<sup>624</sup>

Despite differences in their formulation, the rights that the Court derived from the Fourth and Fifth Amendments were experimental in an important sense. In cases following *Mapp*, the Court insisted on the Fourth Amendment exclusionary rule as a particular remedy while acknowledging that the Constitution did not immediately require it. In contrast, the *Miranda* Court, despite finding the constitutional requirement of a remedy, held that it was a matter of constitutional indifference what procedural safeguards a state adopted, so long as the privilege against self-incrimination was protected.<sup>625</sup> Experimentation by law enforcement authorities would be permitted, but only if the alternative procedures they developed proved to be at least as effective as those prescribed by the Court in a baseline that has since become familiar: Prior to commencing custodial interrogation, the police must apprise the suspect of his right to remain silent, his right to counsel (including free counsel if he is indigent), and the consequences of waiving these rights.<sup>626</sup> The police must then honor a suspect’s invocation of his rights.<sup>627</sup> Synthesizing these and other cases, commentators, and then the Court, came to speak of both the exclusionary rule and the *Miranda* rules as *prophylactic*.<sup>628</sup> The Court adopts a prophylactic rule when it identifies circumstances that threaten constitutional values, without necessarily being able to specify the causal chain by which the threat will eventuate, and where, accordingly, it may both fix general preventive measures and invite other actors, with better knowledge of the specifics, to improve on them.<sup>629</sup>

If the Constitution does not itself require the precise *Miranda* warnings or the Fourth Amendment exclusionary rule, from where does the Court derive the authority to impose these requirements, even if only un-

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623. 384 U.S. 436, 445–57 (1966).

624. *Id.* at 444.

625. See *id.* at 467 (“[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”).

626. See *id.* at 468–69.

627. See also *Edwards v. Arizona*, 451 U.S. 477, 487 (1981) (holding that police interrogation of a suspect following his request to obtain counsel violated his *Miranda* rights).

628. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 647 (1993) (White, J., dissenting); *Oregon v. Elstad*, 470 U.S. 298, 305–06 (1985); *New York v. Quarles*, 467 U.S. 649, 657 (1984); *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980); *Brewer v. Williams*, 430 U.S. 387, 423–25 (1977) (Burger, C.J., dissenting); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974); *Schneekloth v. Bustamonte*, 412 U.S. 218, 251 (1973) (Powell, J., concurring). For an argument that most rules of law are in some sense prophylactic, see David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 195 (1988).

629. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 20–26 (1975).

til the states do better?<sup>630</sup> The leading attempts to explain prophylactic rules<sup>631</sup> do so—mistakenly, we think—by treating them as a response to merely interstitial ambiguities in the larger body of what are supposed to be well-defined constitutional rights. This view takes for granted Justice Brandeis's famous observation in *Erie Railroad Co. v. Tompkins* that "[t]here is no federal general common law."<sup>632</sup> Federal courts, by contrast with state courts of general jurisdiction, have no warrant to formulate basic norms of conduct absent a statute or a delegation of authority by the Constitution. This circumscribed jurisdiction of the federal courts still leaves the possibility, however, of federal common-law adjudication of the presumably less basic norms that regulate conduct in the zones of ambiguity in the interstices between the laws derived from these sources.<sup>633</sup> On this view, decisions like *Miranda* and *Mapp* (as later reimagined) are legitimate because in them the Court announces just such rules of "constitutional common law,"<sup>634</sup> or, in a closely related variant, merely exercises its traditional discretion in selecting a remedy upon finding a violation of the primary (here constitutional) norms of conduct.<sup>635</sup>

Interpreting the Fourth Amendment exclusionary rule on these lines has a straightforward appeal. The Constitution itself deems some searches and seizures invalid and requires an adequate remedy for violations but is indifferent as between particular, adequate remedies.<sup>636</sup> The combination of requirements and indifference legitimates the Court's decision to impose the exclusionary-rule remedy as an act of constitutional common-law adjudication. Like conventional common-law adjudication, it can be superseded by a contrary legislative decision (provided of course, that the remedy chosen by the legislature is itself adequate).

But the idea of constitutional common law is, at most, a metaphor, and an awkward, ultimately misleading one at that. For one thing, the designation "common law" does not quite fit. When a state high court

630. For skeptical views about the legitimacy of this sort of judicial lawmaking, see Akhil R. Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 791–92 (1994); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 *Nw. U. L. Rev.* 100, 124–56 (1985); Monaghan, *supra* note 629, at 21–23; Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 *Nw. U. L. Rev.* 761, 768–83 (1989).

631. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 *Harv. L. Rev.* 881, 892 & n.42 (1986); Monaghan, *supra* note 629, at 20–26.

632. 304 U.S. 64, 78 (1938).

633. See Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 *N.Y.U. L. Rev.* 383, 405–22 (1964).

634. See, e.g., Field, *supra* note 631, at 892 n.42, 894 n.51.

635. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 *Harv. L. Rev.* 1733, 1777–91 (1991) (arguing that there is considerable flexibility in selection of a remedy for a constitutional wrong).

636. See U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

makes common law in the conventional sense (such as rules governing torts, contracts, or property) there is one specific body that may supersede the court's choice: the legislature of the same state. Similarly, when the federal courts make common law under a specific statutory grant of authority, such as Federal Rule of Evidence 501,<sup>637</sup> Congress alone has the authority to supplant the Court's decisions. Conventionally understood, common law and statutory law work together to provide a single regulatory regime.<sup>638</sup> In contrast, in the criminal procedure area, constitutional common law sets a default that may be followed by some states and superseded by others. The question whether Congress may impose a single solution for all of the states introduces further complications. If constitutional common law is like true common law, then conventional preemption principles suggest that Congress has this power. On the other hand, if the point of constitutional common law is to permit state-by-state flexibility and experimentation, then, allowing a unitary congressional regime to replace a provisional judicial regime appears to defeat the experimental purpose of the "common law" category. These same considerations make it clear that the Fourth Amendment exclusionary rule is no more a remedy in the traditional sense<sup>639</sup> than it is an instance of common-law jurisprudence. Therefore, the explanation of *Mapp* as an exercise of the traditional authority of the Court to select remedies, like the notion of constitutional common law, conceals more than it reveals.<sup>640</sup>

We find more plausible the alternative view that finds the legitimacy of prophylactic rules not by distinguishing them as a special class of adjudication, but rather by treating their characteristic, explicit recognition of the two-fold ambiguities of rights on the one side and remedies on the other as exemplary of the most general features of constitutional jurisprudence: by treating prophylactic rules, that is, as prototypes, rather than exceptions. In this view, most closely associated with the work of David Strauss, the notion of serviceably clear distinctions between firmly grounded core rights and vaguer interstitial ones is simply wrong, because, in practice, we encounter just the kinds of ambiguity in the elabo-

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637. Fed. R. Evid. 501 (stating that in most federal question cases, the applicability of a privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience").

638. Cf. Guido Calabresi, *A Common Law for the Age of Statutes* 163-66 (1982) (proposing a common law methodology for courts in interpreting statutes).

639. This is especially clear if we understand the primary intended beneficiaries of the Fourth Amendment to be law-abiding citizens. Under such an approach, a guilty person concealing a crime but searched illegally is entitled to relief primarily because giving such a guilty person a "remedy" will deter illegal searches of the innocent. See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 *Colum. L. Rev.* 1456, 1496 (1996).

640. The remedy model is poorly suited, moreover, to cases such as *Miranda*, in which the very determination whether there has been a violation is made via a prophylactic rule.

ration of the former that, in the constitutional common-law view, we associate with the latter.<sup>641</sup>

Strauss advances this argument with examples of rules that embody core constitutional protections against majority decisionmaking such as free speech and equal protection. The Supreme Court's First Amendment decisions make a critical distinction between content-based and content-neutral restrictions on speech,<sup>642</sup> and judge the former under a stricter standard of review than the latter.<sup>643</sup> The distinction does not, however, immediately follow from the text of the First Amendment, which simply prohibits laws "abridging the freedom of speech."<sup>644</sup> The reason the Court views content-based measures with suspicion, Strauss points out, is that these are "likely to have been influenced by the legislature's hostility to the speech in question."<sup>645</sup> Because it will too often be impossible to discern the legislature's actual motives and because of the risk that the Court's own views of the value of speech would infect case-by-case balancing, the Court uses content-discrimination as a proxy for what may be its ultimate concern: regulations that strike at speech because it expresses a disfavored view.<sup>646</sup>

Thus, just like the *Miranda* safeguards, rules about content-based and content-neutral laws "are relatively rigid doctrines designed to reduce the likelihood that the authorities (generally legislatures in the case of the first amendment, the police in the case of *Miranda*) will violate the law, and designed to improve a reviewing court's chances of identifying violations where they occur."<sup>647</sup> Just as we might say that the "real" Fifth Amendment does not require *Miranda* warnings prior to custodial interrogation,<sup>648</sup> so we might say that the "real" First Amendment does not require strict scrutiny of all content-based regulations of speech.<sup>649</sup> The fact that the Court's Fifth Amendment jurisprudence is labeled prophylactic while its jurisprudence of the First Amendment is not, at best imperfectly reflects the Court's view about the relative importance of these rights, but it reflects no deep reality.<sup>650</sup>

641. See Strauss, *supra* note 628, at 195 ("Constitutional law is filled with rules that are justified in ways that are analytically indistinguishable from the justifications for the *Miranda* rules.")

642. See Dorf, *supra* note 607, at 1200–01; Strauss, *supra* note 628, at 198.

643. See generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 50 (1987) (arguing that Supreme Court decisions typically uphold content-neutral regulations of speech under a very deferential standard).

644. U.S. Const. amend. I.

645. Strauss, *supra* note 628, at 200.

646. We do not mean to suggest that such viewpoint hostility is the only concern of free speech law. See Dorf, *supra* note 607, at 1200–10. This concern does, however, justify the Court's use of a stricter standard for judging content-based regulations. See *id.*

647. Strauss, *supra* note 628, at 200.

648. See *Michigan v. Tucker*, 417 U.S. 433, 439 (1974).

649. See Strauss, *supra* note 628, at 201–03.

650. Strauss makes the same point concerning two doctrines relating to the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 204–07. First, laws employing

Although the Court has expressly authorized experimentation with respect to *Miranda* and the Fourth Amendment exclusionary rule, it has not similarly authorized experimentation with the rules implementing all constitutional rights. Strauss's analysis, however, suggests that this reflects a confusion about the nature of prophylactic rules,<sup>651</sup> and we agree. Wherever judicially established rules comprise an effort to give effect to more deeply established but vaguer legal norms, the judicial doctrine may be regarded as prophylactic, or, if one adopts an experimentalist attitude, as prescribing presumptive rules to be applied until experience provides a better alternative.

Before looking more directly at the implications for an experimentalist judiciary of this generalization of the idea of prophylactic rules to all rights, we must address three likely criticisms to the argument presented in this Part so far. First is the concern that openly questioning the "reality" of rights and the Constitution as a whole puts the frame of our government up for grabs in just the way the very existence of a written constitution is meant to obstruct, and incites us to imagine horrors, such as an experimental return to slavery, that may attain a reality in the imagining. To use a somewhat less drastic example, it might be thought that maintaining the fiction of absolute rights to free speech keeps infringements on speech to a minimum.<sup>652</sup> Openly acknowledging that the Emperor has no clothes, on this view, in fact contributes to his nakedness.

But after nearly a century of legal realist critique of foundational rights, it seems that (to mix the metaphor) the cat is already out of the bag. Experimentalism does not name an alternative to the identification of Platonic rights. It names an organized, considered alternative to a haphazard mixture of metaphysical nonsense and ungrounded speculation about empirical matters. Moreover, this first criticism reflects, in a new form, a confusion between general, theoretical skepticism and actual doubt that we have encountered several times before. Recall the pragmatist argument about the impossibility of such generalized skepticism, and its challenge to us to abandon by force of will even one part of the mass of ideas we hold true. The outcome of the dispute between the founda-

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racial classifications are presumptively invalid (subject to strict scrutiny), and second, social and economic legislation that neither employs a suspect classification nor infringes upon a fundamental right is presumptively valid (subject to rational basis scrutiny). As Strauss notes, we might think of these rules as implementing the "real" Equal Protection Clause. Although racial classifications could be scrutinized for prejudice on a case-by-case basis, our national experience with race argues for a (prophylactic) presumption that they are invalid. Similarly, the relative toothlessness of rational basis review for most social and economic legislation reflects the view that the legislature is in a better position to make the kinds of balancing judgments that such rules require, and its judgment should therefore be respected. See *id.*

651. See *id.* at 195 ("'Prophylactic' rules are, in an important sense, the norm, not the exception.")

652. For a useful summary of the debate on this question, see Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 1031-32 (13th ed. 1997).



tionists and antifoundationalists sustains the pragmatist view in a setting immediately relevant here: The discovery that rights at the most abstract level are not “real” in the sense of having firm foundations led, we saw, not to skepticism about the existence of rights but rather to a reaffirmation of their importance as central to our identity. Surely our revulsion at slavery does not diminish upon learning that the constitutional prohibition of it rests on the interpretation—compelling enough to rally the Union—of certain norms, and ensuing amendments, rather than on universal rights revealed to our forebearers and forever fixed in principle.

The second criticism in crucial ways reverses the first. It accepts the pervasive ambiguity of rights and accuses proponents of anything like the experimentalism developed here not of exacerbating, but rather of downplaying the significance of that ambiguity. When deeply held values clash in the interpretation of rights to abortion or (more abstractly) equal protection, this argument goes, only political struggle, entwined with normative debate, and not any device so tame as prophylactic rules, decides the outcome.<sup>653</sup> Thus, this objection replaces the distinction between core rights and interstitial or peripheral ones with a distinction between a core of “really” contested rights that get fought out, and a peripheral mass of merely contested or contestable ones susceptible, perhaps, to experimentalist tinkering.

But where the first objection overstates the vulnerability of rights in practice to skepticism, the second understates their practical accessibility to redefinition through reinterpretation in new contexts and combinations. Because new understandings of rights in one context in time ramify to others, the distinction between a “really” contested core and merely contested periphery is no more stable than the earlier one. A crude indication of this is that the rights associated with the greatest conflict in one period are seldom the same as the most conflicting rights in another—for the understandings of personhood, citizenship, and sovereignty on which, we saw, rights and conflicts about them depend will have changed. Sometimes conflicts are indeed settled by naked political force, not experimentalist discovery of hidden possibilities, and the tranquility surrounding a right in one epoch is thus the outcome of a fight in a preceding one.<sup>654</sup> But the nature of such struggles as they bear on the Constitution and its amendment has itself changed in history, and may be changing again in a way that widens the scope of experimentalist rights

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653. Note that phrased this way, the criticism may be voiced by those who embrace deep moral deliberation by judges, see, e.g., Dworkin, *supra* note 14, at 343–47, as well as those who would instead commit it to politics, see, e.g., Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *Yale L.J.* 1501, 1533–38 (1989) (book review).

654. See Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 *Geo. L.J.* 1837, 1845–46 (1997) (describing the current consensus that sex discrimination is inconsistent with a principle of human equality as the product of a past struggle).

jurisprudence.<sup>655</sup> In any case, we will be at pains in a moment to demonstrate how such a jurisprudence, generalizing prophylactic rules, can encourage the exploration of new understandings of dignity and entitlement even in situations that count, by any standard, as really contested.

Still there remains a third objection, which, if true, trumps the earlier ones and moots our exhortation to consider rights in context. This third objection, unlike the first two, accepts an experimentalist conception of rights. Indeed, it goes our exhortation one better by soberly observing that the very prophylactic rules that we would put at the center of a new experimentalism have in fact been as rigidly applied as any standard rule of formal doctrine. Anyone familiar with the way the *Miranda* rules and the Fourth Amendment exclusionary rule are actually used, and, more important, with the unwillingness of states to accept the Court's invitation to improve on its baseline, will be tempted to laugh out loud at the suggestion that such could be the basis for a democratization of rights jurisprudence. Before proceeding, therefore, we must present an explanation of the practical failure to make use of the doctrinal possibility, and indicate the kinds of institutional changes that would allow the courts to encourage and then evaluate experimental articulation of constitutional rights.

### C. *Institutional Correlates*

Accompanying the Supreme Court's announcement of the *Miranda* rules was the following invitation:

We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [Court's own] safeguards must be observed.<sup>656</sup>

On the surface, the Court's framework in *Miranda* looks very much like an exercise in democratic experimentalism. The Court identifies a set of practices as problematic under the Constitution. It formulates a benchmark that fixes the minimum necessary to comply with the Constitution. Recognizing that its benchmark is just that, and that experimentation may yield solutions which safeguard the rights of suspects as well or better, while allowing more effective law enforcement, the Court announces that jurisdictions may depart from the benchmark upon a proper showing. One might then expect the states and the federal government to devise a variety of alternative approaches. Yet that did not occur.

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655. See *infra* text accompanying notes 708–720.

656. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

Although *Miranda* was initially met with hostility by law enforcement agencies,<sup>657</sup> this hostility was not matched by exertions to devise alternative procedures for safeguarding the right to silence. In fact, in 1968, the year after the *Miranda* decision itself, Congress enacted a provision that purported to partially overrule *Miranda*, by making voluntariness the touchstone of admissibility of suspects' statements in federal court.<sup>658</sup> That statute, which the federal government has declined to invoke in the Supreme Court,<sup>659</sup> clearly does not qualify as a response to the Court's invitation.<sup>660</sup> It does not even purport to provide an alternate means of safeguarding the suspect's right to silence. It simply denies the existence of such a right,<sup>661</sup> and thus violates that portion of *Miranda* which is not subject to experimentation.

Nor have the states been especially eager to experiment in this area. New York prohibits all postindictment questioning of a suspect without a waiver of the right to silence in the presence of counsel.<sup>662</sup> New York also requires as a precondition to the validity of a waiver that a suspect who has a lawyer be permitted to consult the lawyer prior to waiver.<sup>663</sup> These requirements, however, are *in addition to* the *Miranda* requirements. The New York Court of Appeals interprets the New York Constitution as providing greater protection against interrogation than the federal Constitution (in much the same way as the New York Court of Appeals interprets other state constitutional provisions as providing greater protection than their federal constitutional counterparts).<sup>664</sup> That, of course, is a perfectly legitimate approach to state constitutional interpretation,<sup>665</sup> but it does not in any way respond to the Court's specific invitation in *Miranda*.

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657. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500, 501 (observing that *Miranda* was "[w]idely maligned at first").

658. See Act of June 19, 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 210, 210 (codified as amended at 18 U.S.C. § 3501(a)-(b) (1994)).

659. See *Davis v. United States*, 512 U.S. 452, 457 n.\* (1994) (noting the government's failure to invoke the statute).

660. For an argument to the contrary, see Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 Sup. Ct. Rev. 81, 123-32 (contending that the statutory provision is a valid exercise of Congress's power to enforce the Fourteenth Amendment). The Court's decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), casts further doubt on Burt's already dubious reading of *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

661. See 18 U.S.C. § 3501(a), (b) (asserting that a confession shall be admissible if found to be voluntary).

662. See *People v. Samuels*, 400 N.E.2d 1344, 1347 (N.Y. 1980).

663. See *People v. Hobson*, 348 N.E.2d 894, 896 (N.Y. 1976).

664. See, e.g., *People v. Scott*, 593 N.E.2d 1328, 1332-37 (N.Y. 1992) (interpreting the New York State Constitution to provide greater protection against searches and seizures of open fields than the Supreme Court interprets the federal Constitution to provide); see also *id.* at 1331-32 (listing numerous cases in which the New York Constitution has been held to provide greater protection than the federal Constitution).

665. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548-52 (1986)

One unlikely explanation for this inaction is that the Court's modest estimation of its own solution notwithstanding, the *Miranda* warnings are the best means of safeguarding the suspect's right. How better to inform a suspect of his right to remain silent than simply to tell him prior to subjecting him to custodial interrogation? This answer may be correct, but one can have little confidence in it, given that there has been so little practical experience with alternatives. Indeed, there is reason to believe that the warnings are not especially effective in preventing coerced confessions.<sup>666</sup>

Of course, the very ineffectiveness of the warnings may explain the states' reluctance to experiment. The provision of warnings is a relatively simple procedure for police to follow; it does not impede interrogation; and it ensures that a statement obtained from the suspect will be admissible in court. In short, despite their initial objections to an apparently cumbersome procedure, law enforcement authorities may have grown fond of the default procedures selected by the *Miranda* Court. Most of the reform proposals (such as New York's requirement of counsel or the suggestion that custodial interrogation be abolished altogether)<sup>667</sup> would place further limits on police conduct without simultaneously empowering the police in other ways. It is thus not wholly surprising that there has been so little experimentation.

Were this the only area in which the federal and state governments have declined the possibility of experimentation, we might simply conclude that law enforcement officials like, or at least have learned to live with, *Miranda*. But the same cannot be said of the Fourth Amendment exclusionary rule. Police hostility to the exclusionary rule is well known, and leads to the equally well-known but nonetheless disturbing phenome-

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(urging state courts to provide their citizens greater protection for their rights under state constitutions than the U.S. Supreme Court recognizes under the federal Constitution); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 503 (1977) (same). For a lively debate on the theoretical basis for this power, compare James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 *Mich. L. Rev.* 761 (1992) and Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 *Harv. L. Rev.* 1147 (1993), with Daniel R. Gordon, *Superconstitutions Saving the Shunned: The State Constitutions Masquerading as Weaklings*, 67 *Temp. L. Rev.* 965 (1994), Burt Neuborne, *A Brief Response to Failed Discourse*, 24 *Rutgers L.J.* 971 (1993), and David Schuman, *A Failed Critique of State Constitutionalism*, 91 *Mich. L. Rev.* 274 (1992).

666. The most comprehensive analysis of the empirical studies conducted in *Miranda*'s immediate wake indicates that the case resulted in a small decline in confession rates, no discernible change in police interrogation practices after the giving of warnings, and at most a small decline in the overall effectiveness of criminal investigation. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 *J. Crim. L. & Criminology* 621, 645 (1996). Leo's own study found that seventy-eight percent of suspects waived their *Miranda* rights, and that suspects with prior felony records were four times more likely to invoke their rights than were suspects with no prior criminal record. See *id.* at 654-55.

667. See Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Interrogation*, 68 *N.C. L. Rev.* 69, 109-13 (1989).

non of widespread police perjury.<sup>668</sup> The hostility is hardly surprising: The rule requires that reliable evidence of guilt be discarded to deter unconstitutional police practices.<sup>669</sup> Although *Miranda* too sometimes requires suppression of evidence, it is crucially different from the perspective of the police.<sup>670</sup> *Miranda* sets forth relatively clear rules that are easy to follow and have predictable consequences, whereas the limits of acceptable police conduct under the Fourth Amendment are considerably more ambiguous.<sup>671</sup> As a consequence, police often believe that exclusion under the Fourth Amendment is an unfair penalty.

In light of the animosity that law enforcement authorities feel towards the exclusionary rule, one might expect significant efforts on the part of states and localities to devise a substitute that would satisfy the Court. Although there has been no shortage of academic proposals,<sup>672</sup> here too there has been almost no actual experimentation.

Whatever other reasons contributed to the failure of the states and the federal government to experiment with alternative procedural frameworks in the *Miranda* and Fourth Amendment exclusionary rule contexts,<sup>673</sup> one factor stands out. The Court did not provide the states with a secure environment within which to experiment.

Consider the incentives facing a state legislator who believes that she can provide as much or greater protection for Fourth or Fifth Amendment rights as the Court's defaults do, and with fewer costs for law enforcement. For concreteness, assume that the legislator wishes to replace the Fourth Amendment exclusionary rule with a comprehensive system of civil liability, including punitive damages, municipal liability, class actions, attorney's fees, and streamlined administrative review.<sup>674</sup> Let us also assume that the legislator's preliminary research, based on theoretic-

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668. See Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. Crim. L. & Criminology 693, 698-701 (1996).

669. For an analysis of the interests served by exclusion and the Fourth Amendment more generally, see Colb, *supra* note 639, at 1459-61.

670. Beyond the difference mentioned next, *Miranda* warnings differ from the exclusionary rule because, by seeking to reduce the pressure on suspects, they sometimes directly prevent a coerced confession from an innocent suspect. See *Withrow v. Williams*, 507 U.S. 680, 690-92 (1993) (drawing this contrast between *Miranda* and the Fourth Amendment exclusionary rule).

671. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (adopting "totality of the circumstances" test for judging probable cause).

672. Most involve some combination of civil damages awards and internal review. See, e.g., Amar, *supra* note 630, at 811-16 (advocating enterprise civil liability, punitive damages, attorney's fees, class actions, injunctive relief, and expedited proceedings); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 56 (proposing a tort remedy).

673. As a general matter, it could be argued that state legislators are naturally risk-averse, and thus unlikely to experiment, see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. Legal Stud. 593, 594 (1980), absent specific incentives of the sort described below.

674. See Amar, *supra* note 630, at 811-16.

cal models and experience in other jurisdictions, suggests that the new remedial system will result in fewer illegal searches and seizures than the exclusionary rule does. The legislator cannot know this for sure, however, both because of the uncertainty of such comparisons and because she cannot predict in advance what criteria the courts will use to compare the alternative and the default. Under these circumstances, it would be very risky to adopt the alternative, because if the courts ultimately find that it does not measure up to the default, criminals convicted in the interim will have to be retried and perhaps released.<sup>675</sup>

As we saw in Part I, private-sector learning by monitoring does not occur unless collaboration is organized to reduce the risks of increased vulnerability to a level acceptable given the potential gains from experimentation.<sup>676</sup> Similarly, the mere invitation to the states to seek advantages through experimentation is ineffective without mechanisms to reduce the associated risks. Yet nothing in the Court's account of the "prophylactic" nature of *Miranda* and the Fourth Amendment exclusionary rule does this.

What guarantee can be given to states that experiments will not result in post hoc liability? The logic of the argument so far suggests a form of temporary immunity to operate on the same lines as the bar on pre-enforcement litigation in the administrative context. Of course, the experimental impulse must not be permitted to erode constitutional guarantees. Constitutional rightholders, especially if they are putative criminals, do not fare especially well in majoritarian politics. "Alternatives" like the federal statute purporting to overrule *Miranda* could readily become the norm in the absence of real oversight. Yet requiring states and localities to qualify for immunity in advance, through a judicial hearing—in which they explained the goals of their particular solution, reasons for believing it more effective than the benchmark, and suggested measures for assessing if it did—would act as a major impediment to experimentation. Moreover, it would require judicial assessment of a proposed experiment prior to the accumulation of the sort of information necessary to judge it.

The challenge is to devise a mechanism of judicial review that discourages sham experiments, while not requiring bona fide experiments to pass through a potentially stifling and uninformed preclearance mechanism. One of many possible methods of reconciling these competing pressures would be the creation of a new category (or new categories) of explicitly experimental constitutional adjudication. Under current doc-

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675. Cf. Fallon & Meltzer, *supra* note 635, at 1739 ("It was much easier for the Court to lay down the *Miranda* rules, for example, knowing that the prison doors need not necessarily swing open for every inmate convicted with the aid of confessions not preceded by the requisite warnings.")

676. See *supra* text accompanying note 90.

trine, a state policy or practice either is or is not constitutional.<sup>677</sup> Courts have no opportunity to rule that a proposed experiment was well designed in the sense that it was based on the input of an acceptable cross section of interested parties; that it considered their perspectives; that, on its face, the proposal had some reasonable likelihood of succeeding in giving effect to the relevant constitutional guarantee; and that it gave serious attention to that guarantee.

By way of illustration we propose that the Court, when evaluating a state's effort to defend an ongoing experiment or to extend one from smaller jurisdictions of the state to larger ones, choose from one of three possibilities within the new category of adjudication. First, it should be able to declare the experiment a contingent success and allow expansion. Second, it should be able to declare the experiment to have been *ex ante* legitimate but an *ex post* failure. Such a declaration would preclude expansion or continuation without significant modification but would not provide affected parties with retrospective relief. Third, sham experiments should give rise to both retrospective and prospective relief (although the court might well invite the parties to help formulate the remedy). Necessarily, judicial review would be more deferential in the early, local stages of an experiment but less so as the state compiles data about its effectiveness.

The sorts of factors that bear on whether an experiment was *ex ante* permissible are the same ones discussed in our general account of the role of courts in democratic experimentalism in Part V.D. All identifiable parties, including groups representing the interests of future defendants, should be permitted to participate in the formulation and monitoring of the experiment. Both plaintiffs and defendants would invoke comparisons with the best practice in similarly situated jurisdictions. And so forth.

This sketch suggests, moreover, that there is no reason to limit the benchmark to the Court's initial minimum, as in *Miranda* (and by assumption in the Fourth Amendment exclusionary rule cases). Suppose, to return to our hypothetical example, that experimentation in State A reveals that expedited civil damages and continuous police training lead to greater compliance with the Fourth Amendment than does the exclusionary rule, and at no greater cost. Then practices in State B should be measured by the experience of State A, rather than the lesser threshold initially set by the Court. In this way, experimentalism provides ever more rigorous benchmarks, and rights, to use the language of the earlier discussion of administrative rules, are rolling too.

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<sup>677</sup> For an intriguing suggestion to the contrary, see *Washington v. Glucksberg*, 117 S. Ct. 2258, 2292–93 (1997) (Souter, J., concurring in the judgment) (arguing that the Court's decision to sustain Washington's prohibition on physician-assisted suicide could be reconsidered on the basis of future experiments).

*D. The Transformative Potential of Experimentalist Methods*

Thus far we have described the experimentalist conception of rights, provided some evidence that current Supreme Court doctrine already incorporates important experimentalist insights, suggested a far-reaching generalization of that doctrine, and prescribed curatives to render experimentalist understandings of rights more effective. We now turn to the task of explaining what experimentalist rights are. But where our earlier discussion was conceptual, here it is practical; by answering the question, "how are experimentalist rights discovered and implemented?" we also answer the question, "what are experimentalist rights?" The examples move from "merely" contested to "really" contested rights. We thus illustrate the most salient features of experimentalist-rights jurisprudence as a dispute shifts from "merely" how to apply a generally acknowledged right to whether a right "really" exists in the first place.

Consider first the fusion of prophylactic and rolling best-practice rules currently in progress under the name of "adequacy litigation" in cases successfully seeking to enforce a right to education. In the quarter century since *San Antonio Independent School District v. Rodriguez*,<sup>678</sup> petitions urging enforcement of such a right have been addressed to state courts.<sup>679</sup> In *Rodriguez*, the Supreme Court, declining on grounds of federalism to interfere with the states' traditional responsibility for education, rejected an equal protection challenge to the financing of public school education through local property taxes as supplemented, but not equalized, by state grants.<sup>680</sup> Appeals were made at the state level, not merely because of the obstacle of this precedent, but also because many state constitutions contain broad guarantees of equality in general and, beyond that, of minimal or adequate education.<sup>681</sup>

The innovation of recent years has been a shift from suits seeking equal treatment of school children, as measured by the equality of resources available per capita, to suits seeking to enforce the right to a minimally adequate education for all. Again, obstruction encouraged the search for a new path: Plaintiffs in legal challenges based on equality were often unsuccessful,<sup>682</sup> not least because of the divisive character of claims pitting community against community; and even when equality-based challenges succeeded,<sup>683</sup> state constitutions could sometimes be amended to undo judicially imposed funding equalization (as in

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678. 411 U.S. 1 (1973).

679. See *infra* notes 686–690 and accompanying text.

680. See *Rodriguez*, 411 U.S. at 40–44.

681. See Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. Mich. J.L. Reform 493, 497–98, 500 (1995).

682. See *id.* at 501–02 (noting the failure of funding challenges in Kansas, Illinois, Virginia, North Dakota, Minnesota, and Wisconsin).

683. See *id.* at 501 (citing New Jersey, Massachusetts, Alabama, Tennessee, Missouri, Kentucky, Texas, and Montana).



California).<sup>684</sup> Worse still, equal funding, once finally secured, often did not increase the quality of education in poorer districts. The obvious alternative, given the corresponding guarantees in state constitutions, was to focus on adequacy rather than equality of education.

As the earlier discussion of experimentalism would suggest, this shift went hand in hand with an increasing emphasis on measurement, and the constant adjustment of measures to experience.<sup>685</sup> Thus, a recent account addressed to practitioners of educational-reform litigation in Alabama, presents adequacy litigation, at the core, as a problem in identifying a legally and practically effective combination of measures of educational input and output:<sup>686</sup> input standards<sup>687</sup> to indicate whether it is at all possible for a school district to meet its constitutional obligations, and output standards<sup>688</sup> to determine whether, given appropriate inputs, the school district is actually fulfilling its obligations.<sup>689</sup> As these standards are typically rolling benchmarks set by various professional and public-private entities at the state, regional, and national levels, courts are thus being asked, and in many cases are agreeing, to decide whether the public-school authorities are complying with their obligations by determining their conformity to current best practices. Thus, a prophylactic rule giving expression to and protecting a right to an adequate education is specified as an experimentalist rolling rule that takes account of performance in other districts and states.

Now consider, as an instance of a clash of rights so sharp as to raise the questions of whether some of the clashing rights "really" exist, a dispute between Georgetown University and a coalition of gay and lesbian Georgetown law school students.<sup>690</sup> Georgetown, affiliated with the Roman Catholic Church, refused to recognize a group of gay and lesbian students and to accord them the privileges, including use of an office on

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684. See William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. Mich. J.L. Reform 481, 489 (1995).

685. See *supra* Part II.

686. See Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. Mich. J.L. Reform 559, 592-94 (1995) (discussing *Alabama Coalition for Equity, Inc. v. Hunt*, No. CV-91-0117-R, 1993 WL 204083, at \*1 (Ala. Cir. Ct. Apr. 1, 1993) (finding that the state was in violation of its legal obligation to provide students with an adequate and equitable education)).

687. Input standards concern, for example, the definition of adequate textbooks, educational supplies, school facilities, and guidance and library services. See *id.* at 569 (discussing state statutory requirements).

688. Output standards concern, for example, drop-out rates, performance on various kinds of tests, or readiness for further education or work. See *id.* at 581.

689. For an account of the typical measures, see Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 Harv. J. on Legis. 423, 426-41 (1991).

690. See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc).

campus, normally due recognized student groups.<sup>691</sup> The student coalition sued under the District of Columbia Human Rights Act of 1977, which prohibits discriminatory denial of services or facilities by educational institutions for, among other reasons, sexual orientation.<sup>692</sup> Georgetown responded that to compel its recognition of an organization advancing the interests of gays would be to coerce affirmation of practices it finds immoral, in violation of its own rights to free speech and the free exercise of religion.<sup>693</sup>

On appeal to the District's highest court, Judge Mack resolved the case with a simple device that appeared to split the baby, but in fact opened the possibility of moving beyond framing the case in terms of irreconcilable demands: Georgetown would not be compelled to *recognize* the coalition, in violation of its convictions, but would nonetheless be obliged to furnish the office and other facilities that would normally be provided recognized student associations.<sup>694</sup> Thus the university community was distinguished from the Catholic fellowship. Gays were accorded full rights in the university community on conditions that did not directly affront the citizenship rights of the Catholic fellowship. The decision, to be sure, was attacked from the one side as an outrage to the integrity of those who find homosexuality immoral<sup>695</sup> and on the other as an offer of second-class citizenship to gays entitled to unqualified recognition of their rights.<sup>696</sup> But we note that the decision was defended by a distinguished law professor at Georgetown, himself an advisor to the student coalition, as a contribution to the reconciliation of the gay and Catholic communities, and, beyond that, as a small step in the larger process of integrating gays into full citizenship on the model, discussed earlier, by which nonconforming believers were included in the polity in preceding centuries.<sup>697</sup> Whether Georgetown and the larger society will take the further steps necessary to complete the process remains an open question, but the beginning of even partial engagement offers at least some reasons to be hopeful. For once mutual engagement begins, some form of transformation of the actors becomes unavoidable.

A recent wide-ranging reconsideration of affirmative action by Susan Sturm and Lani Guinier suggests how the kind of redefinition of apparently irreconcilable rights that the Georgetown case promises can be combined with the practical experimentalism of rolling rules so that continuing assessment of current experience can inform our deep and pas-

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691. See William N. Eskridge, Jr., A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 *Yale L.J.* 2411, 2431-32 (1997).

692. See D.C. Code Ann. § 1-2520 (1981).

693. See *Gay Rights Coalition*, 536 A.2d at 20-26.

694. See *id.* at 38-39.

695. See *id.* at 71, 74 (Belson, J., concurring in part and dissenting in part).

696. See *id.* at 49-54 (Ferren, J., concurring in result and dissenting in part).

697. See Eskridge, *supra* note 691, at 2447-56.

sionately held ideas of rights in relation to personhood in context.<sup>698</sup> The starting point of their analysis is the connection between affirmative action as originally conceived and the model of the mass-production firm, and the implications for the former of the breakdown of the latter. Work in mass-production firms, they observe, was typically a sequence of tasks, each fixed in itself and equipping those who performed it to proceed to the next and more demanding one.<sup>699</sup> Workers were presumed to be homogeneous except for differences in skill, reflecting increasing experience within the firm itself. Under this assumption, the problem for excluded groups was simply to gain entry, for participation automatically led to advancement; and the way to gain entry was to be given some preferential treatment (in the form, say, of supplementary points) on whatever standard entrance examination was routinely used to select new employees.<sup>700</sup> But debate about the benefits of equity and the disadvantages of the divisiveness of this method, although they continue, are simply moot when the context of work changes with the restructuring of the economy. As firms, for reasons we examined earlier, abandon mass production, they come to value diversity as a contribution to the capacity for problem solving in teams evaluating distinct projects and problems from alternate points of view.<sup>701</sup> Indeed, the search for employees, and discussion or trial experience with candidates, becomes a way of determining eventual definition of the job to be filled. Thus, experience outside the firm counts, and the only way to determine whether someone fits well in a particular team setting is to see how he or she performs in it.<sup>702</sup>

Under these circumstances, discussion of affirmative action begins to shift from the advisability and effectiveness of preferential treatment on standard tests to the possibilities of organizing internships and apprenticeships that help residents of particular communities acquire the portfolio of experiences they need to make contributions that afford careers in the emerging flexible economy. Ideas of personal competence, in turn, will change as a broader experience of diversity reveals abilities with surprising origins. As learning to organize such internships and apprenticeships will be a matter of experience, experimentalist techniques of benchmarking will help identify broadly inclusive and effective methods, and so shape and enlarge our notions of worthiness. Thus, a new form of affirmative action, reflecting and respecting the context of the world in which it is affirmed, may one day be the model of an experimentalist right directly connecting practical activity with our understanding of ourselves in relation to each other.

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698. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 1008–36 (1996).

699. See *id.* at 1003–07 (describing the breakdown of this model).

700. See *id.* at 968–1008.

701. See *supra* Part II.

702. See Sturm & Guinier, *supra* note 698, at 1003–08.

And yet an important doubt remains. For rightholders denied relief during the pendency of an experiment, justice is, for that time, denied. For them, and others who may come into their situation, it would seem that experimentalism substitutes utilitarian projects for fundamental rights. But this is a reflection within experimentalism of a problem of constitutional law in general and not a dilemma peculiar to our program. Under existing free-speech doctrine, for instance, whether the government may enforce a time, place, or manner regulation depends in part on whether the government leaves open adequate alternative channels of communication.<sup>703</sup> Whether, for example, leafletting is an adequate substitute for a sound truck<sup>704</sup> depends in part on a normative judgment about how important the medium is as a component of the message, but it also depends on the empirical question of how people respond to sound trucks on the one hand and leafletters on the other. Whether a twenty-four-hour waiting period is an undue burden on a woman's right to abortion<sup>705</sup> depends in part on a normative judgment about the value of additional reflection before important decisions, but also on empirical questions about how difficult it is for women in various regions to make two trips to abortion providers. District courts sometimes make findings of fact about such questions, but they are poorly situated to do so on a systematic basis. Legislatures have greater fact-finding ability but, absent judicial pressure, may incline to undervalue individual rights.

Thus, we do not face a choice between experimentation or no experimentation. The status quo is an ongoing, albeit haphazard, experiment. Between that kind of experiment and a more democratically and systematically organized one, we think the choice is easy.

#### CONCLUSION

In proposing an experimentalist renewal that redirects American constitutionalism to current tasks while reanimating its connection to the founding inspiration, we have slighted questions of constitutional history and amendment that, because of the nature of the Constitution, are central to contemporary debate. By way of conclusion, therefore, we indicate how our program of reform, conceived largely outside the categories of that debate, may nonetheless contribute to a reexamination of them.

Prior to the American Revolutionary period, a "constitution" was the ensemble of public institutions, law, and custom, as directed by their *stamina vitae*, or animating principles.<sup>706</sup> This notion of a constitution as the totality of government as it is, usually coupled with acceptance of par-

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703. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

704. See *Dorf*, *supra* note 607, at 1210.

705. See *Planned Parenthood v. Casey*, 505 U.S. 833, 881–87 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

706. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 175 (1967).

liamentary supremacy, still describes English constitutionalism.<sup>707</sup> In the United States, however, and indeed throughout most of the world, the Revolutionary period transformed constitutionalism. To render coherent the claim that duly enacted Acts of Parliament nonetheless violated the legal rights of the colonists required that existing arrangements be measured by, rather than be definitive of, the constitution.<sup>708</sup> Combined with the emerging notion of popular sovereignty, this reversal of perspective made it a short but nonetheless revolutionary step to the view that a legitimate constitution was an explicit, entrenched, and therefore enduring expression of We The People's understanding of self-rule: written down, popularly approved, and difficult to amend.<sup>709</sup>

Given the deliberate difficulty of amendment, the great challenge for constitutionalism of the American sort is the accommodation of change. If government is only legitimate when acting in conformity with a written—that is to say, fixed—constitution, how can government adapt to the changing needs of society? Chief Justice John Marshall's classic answer, formulated in what, in his day, was an expansive interpretation of Congress's authority to regulate interstate commerce, was that constitutional provisions empowering government action may be construed broadly to enable responses to new exigencies. There was, he thought, no alternative to this continuing interpretive adjustment, given the inevitable ambiguity of general constitutional language.<sup>710</sup> The modern Court extended this idea to include broad interpretation not just of powers, but of individual rights to freedom and equality in response to changing circumstance. This extension is especially controversial because it authorizes the judiciary to invalidate the legislative work of the democracy, whereas broad interpretivism of the original Marshallian sort was invoked to validate it.

This specific variant of the countermajoritarian difficulty aside, the generalization of the Marshallian solution to both powers and rights raises a new and deeper difficulty for constitutionalism: How can an effective constitution, written in broad terms that are themselves broadly construed, correspond to the revolutionary ideal of a fixed, framing document, derived from popular sovereignty, that checks the abuses of government? At the limit, broad interpretivism reinvents the older, English conception of constitutionalism, substituting judicial for parliamentary supremacy. However, broad interpretivism also acknowledges that the

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707. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 39 (10th ed. 1959).

708. See Bailyn, *supra* note 706, at 176–82.

709. See *id.* at 183–84.

710. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (stating that “[a] constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind”).

product of the ultimate authority (now judicial rather than legislative) is itself constitutive of the Constitution.

Restorationists, we noted at the outset, balk at this description, and reassert what they claim to be original understandings of the Constitution. Yet, the manifest impracticality of their proposed solutions<sup>711</sup> demonstrates an unwillingness to take seriously the problem of drastically changed circumstances. Conversely, those who embrace a frankly evolutionary model of the Constitution must answer not only to the countermajoritarian difficulty, but also provide a modern variant of the Marshallian synthesis to show how powers and rights can be adjusted to circumstance without affront to the idea of the Constitution as an entrenched document. For most practitioners and scholars of constitutional law, the result is an uneasy truce between the demands of fidelity to the original understanding and the demands of modern reality.<sup>712</sup>

The most ingenious and ambitious of contemporary attempts to resolve the conflict, that of Bruce Ackerman, focuses, accordingly, on the problem of amendment.<sup>713</sup> Siding with the originalists and against the evolutionists, Ackerman acknowledges popular ratification of amendments as the only legitimate source of constitutional authority.<sup>714</sup> His innovation is the argument, and accompanying historical demonstration, that the notion of Article V amendment has itself been amended in the course of constitutional dispute. It includes forms, not explicit in the Constitution, that provide an answer to the problem of entrenched adjustment. In particular, Ackerman contends that the Constitution has, in fact, from time to time been amended by popular expressions of higher lawmaking authority even when no change in the constitutional text resulted.<sup>715</sup> This theory of "constitutional moments" sharply distinguishes between the vast stretches of ordinary politics of vote trading and the short, intense periods of higher lawmaking.<sup>716</sup> In the latter, citizens, moved by crisis, sustain *en masse* the deliberative politics of public virtue that the civic republican tradition holds necessary to constitutional change. This deliberation *en masse* both amends and ratifies amendment of the Constitution, adjusting it to changed circumstance and publicizing the adjustment even if there is no change of the text by procedures originally anticipated. In other words, just as the meaning of rights changes with their historical context, so too does the meaning and procedure of amendment.

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711. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (urging a return to the original understanding of the Commerce Clause).

712. See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 86 *Geo. L.J.* 1765, 1795–96 (1997).

713. See generally Ackerman, *supra* note 15.

714. See *id.* at 264 (arguing that the Supreme Court should defend constitutional text and amendments, however radically defined, against the gradual change of ordinary politics).

715. See *id.*

716. See *id.* at 6 (setting forth the notion of "dualist democracy").

The New Deal is the prototypical constitutional moment. The unprecedented electoral success of President Franklin D. Roosevelt and the Democratic Party in the mid-1930s through the early 1940s repudiated the old understanding of a Constitution that enshrined rights of property and contract as well as a sharply limited national government.<sup>717</sup> But the argument also extends to the Civil War Amendments (whose significance, Ackerman believes, derives from the Civil War and associated debates, rather than the manipulations of the Reconstruction Congress),<sup>718</sup> and to other, less obviously transformative events as well.<sup>719</sup>

The strength and weakness of Ackerman's view are equally conspicuous. The strength is to make constitutional sense of salient facts—particularly the conditions surrounding the New Deal—that otherwise do not. American government looks radically different today from how it appeared in 1791 or 1868. And although no change in constitutional text accompanied the change in institutions, much of the institutional innovation occurred in the 1930s and 1940s amidst continuing national political debate as to its advisability and legitimacy. Among the theory's weaknesses is its failure to account for disaffection with the New Deal: not rejection of particular institutions, but rather what seems at times a popular repudiation of the idea of omnibus reform, let alone constitutional amendment on the New Deal model. Thus, politically conservative efforts to repeal, in effect, the New Deal by linked measures with some of the sweep of those that inaugurated the period seem to disperse, rather than concentrate, the many separate complaints about particular programs and institutions. Noting this phenomenon, the response by even those who favor the New Deal synthesis as an integral whole has been to defend what can be defended piecemeal, to forswear any intent to engage in the high politics of deliberation, and, in effect, to accuse their opponents of radicalism for doing so. Given the changes underway, and the identification in the theory of constitutional moments with national deliberation, We The People may be amending the New Deal constitution by anticonstitutional means.<sup>720</sup>

But if, as we have argued, the very form of deliberation is changing from the seigniorial Madisonianism inspired by civic republicanism to directly deliberative democracy with affinities to pragmatism, the paradox may begin to dissolve. As the foregoing examples of institutional renova-

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717. See *id.* at 42–44, 47–50, 105–30.

718. See *id.* at 42, 44–47, 81–104.

719. See Bruce Ackerman, *A Generation of Betrayal?*, 65 *Fordham L. Rev.* 1519, 1521 (1997) (equivocating as to whether the Civil Rights Movement of the 1960s spoke with the voice of popular sovereignty); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799, 805 (1995) (constitutional moment validating the use of congressional-executive agreements in lieu of the treaty power).

720. Ackerman may, of course, save his theory by reference to any of many speculative possibilities, for example, that there may eventually be national legislation of New Deal proportions that in effect repeals the New Deal. Time will tell whether such speculation was prescient or an exercise in compensating fallacy.

tion suggest, the drift away from the New Deal has been accompanied by, indeed accelerated by, the drift towards the prospect of a form of self-determination in which the little politics of daily life offer citizens the opportunity to reflect in partial steps on the means and ends of their lives, and through this on the larger choices of the republic. With this drift, the context and meaning of amendment changes as well: In place of constitutional moments we would have the constitutionalization of everyday life and the democratization, through experimentalist connection to that life, of the Constitution. In place of mobilization to focus attention on higher things, we would have a form of participation that links, in its practically inventive reelaboration of rights as well as rules and services, the magisterial and the banal. Thus, amending again the notion of amendment, as it transforms the idea of deliberation, the present may mark the beginning of a constitutional revival as faithful today to the Founders' deepest hopes as their own design.