

NOTES

These notes are linked to the text by page number and key phrase. Key phrases enclosed in quotation marks represent exact wording from quoted material; those without quotation marks are the author's exact wording. Bracketed language identifies general topics that do not exactly match wording in the text.

Preface

- 1 [Franklin Township flooding]: Rick Epstein, "Franklin Township Official Bemoans \$12K in Paperwork to Remove Tree from Creek," *Hunterdon County Democrat*, February 17, 2012.
- 1 US behind other countries: The US ranks 13th in ease of starting a business. See International Finance Corporation, "Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises," p.203, <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf>. In the 2014 edition of the report, the US falls to 20th. See World Bank, "Worldwide Governance Indicators, 2013 Update: Aggregate Indicators of Governance 1996–2012," www.govindicators.org: The US ranks behind 20 other countries in terms of "government effectiveness."
- 1 "government must go away completely": Jon Stewart, in his interview of the author on *The Daily Show with Jon Stewart*, Comedy Central, November 18, 2010, <http://www.thedailyshow.com/watch/thu-november-18-2010/exclusive---philip-k--howard-extended-interview>.
- 2 \$5 billion to weatherize some 607,000 homes: Michael Grunwald, *The New New Deal* (New York: Simon & Schuster, 2012), 305–10. See US Government Accountability Office, *Recovery Act: Progress and Challenges in Spending Weatherization Funds*, GAO-12-195 (Washington, DC: GAO, 2011), 5–7, <http://www.gao.gov/assets/590/587064.pdf>; Louise Radnofsky, "A Stimulus Project Gets All Caulked Up," *Wall Street Journal*, September 21, 2010, http://online.wsj.com/article/SB10001424052748704488404575441410775239560.html?mod=WSJ_hpp_LEFTTopStories.
- 2 costs taxpayers about 20 percent more: James Sherk, "Examining the Department of Labor's Implementation of the Davis-Bacon Act," Heritage Foundation, April 28, 2011, <http://www.heritage.org/research/testimony/2011/04/examining-the-department-of-labors-implementation-of-the-davis-bacon-act>.
- 2 the actual total was twelve: US Department of Energy, Office of Inspector General, Office of Audit Services. *Special Report: Progress in Implementing the Department of Energy's Weatherization Assistance Program under the American Recovery and Reinvestment Act*, OAS-RA-10-04 (Washington, DC: US Department of Energy, 2010), 2, <http://energy.gov/sites/prod/files/igprod/documents/OAS-RA-10-04.pdf>.

Part I: The Rule of Nobody

The Rule of Nobody

- 7 [Bayonne Bridge]: Most facts about the Bayonne Bridge process came from interviews with Joann Papageorgis and review of project files in 2012 and 2013. The final environmental assessment can be found at <http://www.regulations.gov#!documentDetail;D=USCG-2012-1091-0118>. A fact sheet can be found at http://www.uscg.mil/d1/prevention/bridges/BayonneBridge_FactSheet_ENG_v8.pdf. See also "Bayonne Bridge Navigational Clearance Program—Draft Environmental Assessment," US Coast Guard, January 4, 2013, <http://www.regulations.gov#!documentDetail;D=USCG-2012-1091-0002>. According to the US Coast Guard, the \$1 billion Bayonne Bridge project would save an average of \$169 million per year over fifty years.

- 9 [environmental requirements]: Agency guidelines for the implementation of the National Environmental Policy Act (NEPA) are issued by the White House Council on Environmental Quality. They are available at http://ceq.hss.doe.gov/nepa/regs/ceq/toc_ceq.htm.
- 10 [environmental objections]: Letter dated December 8, 2011, from William J. Schulte (Eastern Environmental Law Center) to Commander Gary Kasoff, US Coast Guard. See Steve Strunsky, "Attempt to Raise Bayonne Bridge Roadway Puts Politicians, Environmental Groups at Odds," *Star Ledger*, July 27, 2012, http://www.nj.com/news/index.ssf/2012/07/attempt_to_raise_bayonne_bridg.html. For quality of life in Newark, see "Building Bridges," *Need to Know*, PBS, January 18, 2013: video, <http://www.pbs.org/wnet/need-to-know/economy/video-building-bridges/16069>; transcript, <http://www.pbs.org/wnet/need-to-know/uncategorized/transcript-january-18-2013/16072>.
- 11 [Obama expediting the project]: White House, Office of the Press Secretary, "We Can't Wait: Obama Administration Announces 5 Major Port Projects to Be Expedited," news release, July 19, 2012.
- 11 "shoddy review": Jeff Tittel from the Sierra Club, as quoted in Steve Strunsky, "Fast-Tracking Raising of Bayonne Bridge a Bad Idea, N.J. Sierra Club Pres. Says," *Star Ledger*, July 20, 2012, http://www.nj.com/news/index.ssf/2012/07/fast-tracking_raising_of_bayon.html. See also the December 8, 2011, letter from William J. Schulte to Coast Guard Commander Gary Kasoff, <http://cleanandsafeports.org/wp-content/uploads/2012/07/20111208-CHPS-Comments-Re-Bayonne-Bridge-Project1.pdf>.
- 12 "a basic impasse still exists": EPA Preliminary Remarks, Bayonne Bridge Navigation Clearance Project Preliminary Draft Environmental Assessment, August 16, 2012, <http://www.regulations.gov/api/contentStreamer?objectId=0900006481218c1e&disposition=attachment&contentType=pdf>. EPA repeated its objections in remarks dated December 6, 2012, after the Port Authority had commissioned a study on the effects of allowing more efficient ships in the harbor.
- 12 [Coast Guard approval]: US Coast Guard, "Finding of No Significant Impact for Proposed Modification of the Bayonne Bridge across the Kill Van Kull between Bayonne, Hudson County, New Jersey and Staten Island, Richmond County, New York," http://www.uscg.mil/hq/cg4/cg47/docs/FONSI_SIGNED_9MAY13.doc.pdf.
- 12 [over eight years for highway projects]: Petra Todorovich and Daniel Schned, *Getting Infrastructure Going: Expediting the Environmental Review Process* (New York: Regional Plan Association, 2012), 6, <http://www.rpa.org/library/pdf/RPA-Getting-Infrastructure-Going.pdf>.
- 12 [Goethals Bridge]: The Goethals Bridge review began in 2003 and still was not complete in mid-2013. The Port Authority web page on the Goethals Bridge states that the environmental review was completed in 2010, after six and a half years. But this statement does not include a variety of related approvals.
- 13 [antiquated electrical grid]: US Department of Energy, *Large Power Transformers and the U.S. Electric Grid*, June 2012, http://energy.gov/sites/prod/files/Large%20Power%20Transformer%20Study%20-%20June%202012_0.pdf. See also US Energy Information Administration, "How Much Electricity Is Lost in Transmission and Distribution in the United States?" <http://www.eia.gov/tools/faqs/faq.cfm?id=105&t=3>, and other information in the EIA's "Frequently Asked Questions" web page.
- 14 "rule by Nobody": Hannah Arendt, "A Special Supplement: Reflections on Violence," *New York Review of Books*, February 27, 1969: "Bureaucracy . . . could be properly called the rule by Nobody. Indeed, if we identify tyranny as the government that is not held to give account of itself, rule by Nobody is clearly the most tyrannical of all, since there is no one left who could even be asked to answer for what is being done." See also Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 40: "The rule by nobody is not necessarily no-rule; it may indeed . . . be one of its cruelest and most tyrannical versions."
- 15 not by the whim of some official: The traditional limitation of state power is that there must be "no offense without a law" (*nullum crimen sine legem*). John Locke's conception is that the Rule of Law aimed to "make sure power does not catch us unawares." See discussion in John Braithwaite, "Rules and Principles: A Theory of Legal Certainty," *Australian Journal of Legal Philosophy* 27 (2002): 47–82.
- 15 National Environmental Policy Act: 42 USC § 4331(a) (1969). "The Congress . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures,

including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”

- 15 “Government in all its actions”: Friedrich Hayek, *The Road to Serfdom* (London: Routledge & Sons, 1944), 75. Hayek stated a similar confined view of the authority of judges: “When we obey laws, in the sense of general abstract rules . . . we are not subject to another man’s will and are therefore free. It is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.” Friedrich Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press 1960), 153.
- 16 “Let all the laws be clear”: Voltaire, as quoted in John R. Howe, *Language and Political Meaning in Revolutionary America* (Amherst: University of Massachusetts Press, 2004), 38.
- 16 A teacher in Chicago: John Stewart, “Class Disrupted: Disorder and Its Effects on Learning and School Culture” (paper presented at Common Good Conference, Washington, DC, October 31, 2007).
- 17 [New York law prohibiting facility closure]: Associated Press, “Gov.-Elect Andrew Cuomo Warns of Tough Choices in New York’s Future,” November 22, 2010, http://www.syracuse.com/news/index.ssf/2010/11/gov-elect_andrew_cuomo_warns_o.html. (“We’re paying 30 staff people to baby-sit an empty building,” Cuomo said.) See also Russell Sykes, “Unions v. NY Youth,” *New York Post*, March 22, 2012, http://www.nypost.com/p/news/opinion/opedcolumnists/unions_ny_youth_spvTW1YdtBR11Ursfv3jpL.
- 17 [Medicare history]: Robert Ball, as quoted in M. G. Gluck and V. Reno, eds., *Reflections on Implementing Medicare* (Washington, DC: National Academy of Social Insurance, 2001). Legislative carelessness was there in the beginning. In the legislative push to create Medicare in 1965, one key part (reimbursement of doctor’s fees, known as Part B) was inserted over a weekend with no advance planning, at the instruction of Wilbur Mills, the powerful head of the House Ways and Means Committee. Staffers simply marked up a standard Aetna policy without, as the main drafter put it, “appreciating the implications of its basic assumptions” (ibid., 3). See also Robert M. Ball, “The First 60 Days of Medicare,” *Journal of the National Medical Association* 58: 475–79 (November 1966); Robert M. Ball, “What Medicare’s Architects Had In Mind,” *Health Affairs* 14: 62–72 (1995).
- 17 “energetic gaming strategies”: Theodore R. Marmor, *The Politics of Medicare*, 2nd ed. (New York: Aldine Transaction, 2000), 97. See also D. Peter Birkett, *Psychiatry in the Nursing Home* (Binghamton, NY: Haworth, 2001), 58: “In the early days of Medicare notorious examples of ‘gang visits’ abounded. The doctor would visit a nursing home containing 100 or more patients, not leave the administrator’s office, yet charge for having seen all the patients.”
- 18 [Medicare mud wrestling]: See Steven Brill, “Bitter Pill: Why Medical Bills Are Killing Us,” *Time*, March 4, 2013.
- 18 [Medicare waste]: Robert Pear, “Health Official Takes Parting Shot at ‘Waste,’” *New York Times*, December 3, 2011, <http://www.nytimes.com/2011/12/04/health/policy/parting-shot-at-waste-by-key-obama-health-official.html>: “The official in charge of Medicare and Medicaid for the last 17 months says that 20 percent to 30 percent of health spending is ‘waste’ that yields no benefit to patients, and that some of the needless spending is a result of onerous, archaic regulations enforced by his agency . . . If his estimate is right, Medicare and Medicaid could save \$150 billion to \$250 billion a year by eliminating waste, which he defines as ‘activities that don’t have any value.’”
- 18 70 percent of federal tax revenue: See the Heritage Foundation’s report: William W. Beach and Patrick D. Tyrrell, *The 2012 Index of Dependence on Government*, SR-104 (Washington, DC: Heritage Center for Data Analysis, 2012), https://thf_media.s3.amazonaws.com/2012/pdf/sr104.pdf.
- 19 [New York City civil service rules]: Stephen Goldsmith and Stephen Dobrowsky, separate interviews by author, 2011.
- 19 [federal IT technician]: Interview with affected federal employee, by Betselot Zeleke (a researcher for the author), 2011.
- 19 Accountability is virtually nonexistent: Stephen Dobrowsky, interview by author, 2011. In California, a nurse’s aide who stole money from patients and a hospital employee who beat a disabled patient with a shoe could not be held accountable. Their firings were overturned by the state Personnel Board, which determined that the firings were not consistent with “progressive discipline.” See Jack Dolan,

“Little-Known State Board Overturns Employee Terminations,” *Los Angeles Times*, November 3, 2011.

19 [math on public employees]: The number of government employees in 2011 was 22.3 million (2.9 million federal and 19.4 million state and local). US Census Bureau, “Federal Government Civilian Employment,” March 2011, <http://www2.census.gov/govs/apes/11fedfun.pdf>; and US Census Bureau, “2011 Public Employment and Payroll Data, State and Local Governments: United States Total,” <http://www2.census.gov/govs/apes/11stlus.txt>.

The total compensation and benefits of public employees in 2011 (the latest year for which information is available) was \$1,551,439 million (\$476,991 million federal, plus \$1,074,448 million state and local). See “Compensation of Employees: Federal General Government (B568RC0A144NBEA),” Bureau of Economic Analysis, March 31, 2013, <http://research.stlouisfed.org/fred2/series/B568RC0A144NBEA>; and “Compensation of Employees: State and Local General Government (B251RC0A144NBEA),” Bureau of Economic Analysis, March 31, 2013, <http://research.stlouisfed.org/fred2/series/B251RC0A144NBEA>.

The approximate amount spent by government in 2011 (the latest year for which complete information is available) was calculated by taking all government expenditures at all levels—\$5,300.6 billion—and backing out employee compensation (\$1,551,439 million) and the major transfer payments: Medicare (\$479,923 million); Medicaid (\$274,964 million); Social Security (\$724,923 million); and debt service (\$577,559 million—\$453,987 million federal, plus \$123,572 million state and local), for total remaining expenditures of \$1,691,792 million, excluding personnel costs, major transfer payments, and interest. See Office of Management and Budget, “Historical Tables,” tables 15.2 and 8.5, <http://www.whitehouse.gov/omb/budget/historical>, accessed August 2013; and Jeffrey L. Barnett and Phillip M. Vidal, “State and Local Government Finances Summary: 2011,” G11-ALFIN (Washington, DC: US Census Bureau, July 2013), 7, http://www2.census.gov/govs/local/summary_report.pdf.

20 The failures . . . are hardly surprising: See Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978), 64: “Detaching legal thought from social reality,” Nonet and Selznick note with academic understatement, works “to the detriment of practical problem-solving.”

20 [doubling down on rigidities]: See Paul C. Light, *Thickening Government: Federal Hierarchy and the Diffusion of Accountability* (Washington, DC: Brookings Institution Press, 1995). Sociologist Michel Crozier pointed out the tendency of bureaucracy to feed itself in his 1964 landmark study: “Finally, when one rule prevents adequate dealing with one case, its failure will not generate pressure to abandon the rule, but, on the contrary, will engender pressure to make it more complete, more precise, and more binding.” Michel Crozier, *The Bureaucratic Phenomenon* (Chicago: University of Chicago Press, 1964), 187. See also James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Indianapolis, IN: Liberty Fund, 2000; originally published 1975 by University of Chicago Press), 91: “If something is wrong, have government regulate it. If the regulators fail, regulate them, and so on down the line.”

20 [Morristown soup kitchen]: William McGurn, “Government vs. Soup Kitchen,” *Wall Street Journal*, November 22, 2011.

21 [Bethesda lemonade stand]: Emily Maltby, “Lemonade Stand Gets Squeezed,” *Wall Street Journal*, June 17, 2011, <http://blogs.wsj.com/in-charge/2011/06/17/lemonade-stand-gets-squeezed>. See also Michael Laris, “Near U.S. Open, Montgomery Tries to Put the Squeeze on Lemonade Stands,” *Washington Post*, June 17, 2011, http://www.washingtonpost.com/local/dc-politics/montgomery-tries-to-put-the-squeeze-on-lemonade-stand/2011/06/17/AGJ9fWZH_story.html.

21 [lemonade stand shutdowns across the country]: Erik Kain, “The Inexplicable War on Lemonade Stands,” *Forbes*, August 3, 2011, <http://www.forbes.com/sites/erikkain/2011/08/03/the-inexplicable-war-on-lemonade-stands>. See also Erik Kain, “Twelve-Year-Old’s Green Tea Stand Shut Down in Massachusetts,” *Forbes*, August 25, 2011, <http://www.forbes.com/sites/erikkain/2011/08/25/massachusetts-state-police-shutdown-twelve-year-olds-green-tea-stand>.

21 Opening a new restaurant: Diane Cardwell, “A New Team Helps Steer Restaurateurs through a Thicket of Red Tape,” *New York Times*, December 27, 2010, <http://www.nytimes.com/2010/12/28/nyregion/28permits.html>. The emergency manager appointed to take over bankrupt Detroit, Kevyn Orr, “found ‘bureaucracy on steroids’—for example, ‘more than two dozen layers of

- approval for planning and zoning.” George F. Will, “Kevyn Orr, Motown’s One-Man Show,” *Washington Post*, August 2, 2013, http://www.washingtonpost.com/opinions/george-will-kevin-orr-motowns-one-man-show/2013/08/02/5d0a0672-facd-11e2-a369-d1954abcb7e3_story.html.
- 22 Retired scientists can’t teach: See <http://www.theatlantic.com/national/archive/2013/01/teacher-bar-exams-would-be-a-huge-mistake/267133>, citing “Report to the President: Prepare and Inspire: K-12 Education in Science, Technology, Engineering, and Math (STEM) for America’s Future,” President’s Council of Advisors on Science and Technology, September 2010, <http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-stem-ed-final.pdf>. Almost any volunteer activity for schools or government arouses the ire of public employee unions, who often claim that volunteers violate union agreements. In Wausau, Wisconsin, for example, the union filed a grievance to prevent an elderly resident from serving as a volunteer crossing guard for the local elementary school. See Meg Bonacorsi, “Union Has Issues with Volunteer Crossing Guard,” *WAOW.com*, January 27, 2010, <http://www.waow.com/Global/story.asp?S=11891208>.
- 22 The inexorable growth of bureaucratic requirements: Stephen Rathgeb Smith, “Civic Infrastructure in America,” in *Civil Society, Democracy, and Civic Renewal*, ed. Robert Fullinwider (New York: Rowman and Littlefield, 1999), 144–45. See also Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980); Robert J. Chaskin, “Bureaucracy and Democracy in a Community Planning Context,” *Journal of Planning Education and Research* 24 (2005): 408–19; and Marc Hertogh, “Through the Eyes of Bureaucrats: How Front-Line Officials Understand Administrative Justice,” in *Administrative Justice in Context*, ed. Michael Adler (Oxford: Hart, 2010), 203–26 (describing how a crime-ridden neighborhood in the Netherlands was stabilized by giving local officials more autonomy from bureaucratic requirements).
- 22 to ignore what’s legally required: See Steven Maynard-Moody and Michael C. Musheno, *Cops, Teachers, Counselors: Stories from the Front Lines of Public Service* (Ann Arbor: University of Michigan Press, 2003); and Hertogh, “Through the Eyes,” *supra* note for page 22, p. 204. See also Lipsky, *Street-Level Bureaucracy*, *supra* note for page 22, p. 71: “To deliver street-level policy through bureaucracy is to embrace a contradiction. On the one hand, service is delivered by people to people, invoking a model of human interaction, caring, and responsibility. On the other hand, service is delivered through a bureaucracy, invoking a model of detachment and equal treatment.”
- 22 The system wears people down: See Cary Cherniss, *Professional Burnout in Human Service Organizations* (Westport, CT: Praeger, 1980). In hierarchical bureaucracies, burnout is often “caused by emotional drain due to routine, monotony, and lack of control.” Wilmar B. Schaufeli, Christina Maslach, and Tadeusz Marek, eds., *Professional Burnout: Recent Developments in Theory and Research* (Washington, DC: Taylor & Francis, 1993), 132. The first listed cause of “burnout” by the Mayo Clinic is “lack of control.” Mayo Clinic, “Job Burnout: How to Spot It and Take Action,” <http://www.mayoclinic.com/health/burnout/WL00062>, accessed July 2013. For a description of Pavlov’s experiments, see Michael Polanyi, *Personal Knowledge: Towards a Post-critical Philosophy* (Chicago: University of Chicago Press, 1958), 367.
- 22 “tired of feeling powerless”: Adam K. Edgerton, “Why I Quit Teaching,” *Huffington Post*, September 5, 2012.
- 23 “The guy standing there”: Joe Tanner, interview by author, 2008. Leaving soldiers free to make decisions on the battlefield is a basic tenet of military organization. Since at least the turn of the twentieth century, the US Army field service regulations have specified that “an order shall not trespass upon the province of a subordinate. It should contain everything beyond the independent authority of the subordinate, but nothing more.” Colonel Clinton J. Ancker III, “The Evolution of Mission Command in U.S. Army Doctrine, 1905 to the Present,” *Military Review*, March/April 2013, 43.
- 23 “at least nine-tenths”: Chester Irving Barnard, *The Functions of the Executive* (Cambridge, MA: Harvard University Press, 1938), 232.
- 23 “will give full scope”: Peter F. Drucker, *Management*, rev. ed. (New York: Collins, 2008), 267. Thomas Edison put the point his way: “Nothing that’s good works by itself. . . . You’ve got to make the damn thing work.” See generally Harold Evans, *They Made America* (Boston: Little, Brown, 2004), 169.
- 24 Centralized legal dictates: Tocqueville talks extensively about the evils of centralized administration. See Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (New York: Vintage, 1990), 1:86–92, 2:300–320. He distinguishes between centralized legal goals, which can enhance freedom, and dictating to people how people meet those goals: “It is especially dangerous to enslave men in the

minor details of life. For my own part, I should be inclined to think freedom less necessary in great things than in little ones . . . Subjection in minor affairs . . . does not drive men to resistance, but it crosses them at every turn, till they are led to surrender the exercise of their own will. Thus their spirit is gradually broken and their character enervated” (ibid., 2:320).

25 “A government ill-executed”: Alexander Hamilton, “No. 70,” in Hamilton, Madison, and Jay, *Federalist*, 341.

26 “Policy problems are multiplying faster”: Donald F. Kettl, “Administrative Accountability and the Rule of Law,” *PS: Political Science and Politics* 42, no. 1 (January 2009): 16.

Rethinking the Rule of Law

26 The Rule of Law: For a comprehensive account of the Rule of Law, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

26 [requirements of the Rule of Law]: Scholars and philosophers have posited numerous variations of the requirements of the Rule of Law. For example, see Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969), listing eight factors, most of which I believe can be incorporated into the doctrines of predictability and nonarbitrariness. See also discussion in Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” *Law and Philosophy*, no. 2 (March 2002): 137–64.

27 [the Rule of Law as boundary conditions]: See, for example, Isaiah Berlin, “Two Concepts of Liberty,” in Berlin, *The Proper Study of Mankind: An Anthology of Essays*, ed. Henry Hardy and Roger Hausheer (New York: Farrar, Straus and Giroux, 1998), 236; Michael Oakeshott, “The Rule of Law,” in *On History and Other Essays* (Indianapolis, IN: Liberty Fund, 1999), 129–78.

27 Liberals self-righteously cling to the status quo: Representative Keith Ellison (D-MN) in 2013 claimed that President Obama’s attempts to alter Social Security payment metrics represent an attempt “to take apart everything that helps make American lives better.” See Lloyd Grove, “Pelosi Joins Obama as Target of Liberals’ Anger over Budget,” *Daily Beast*, April 11, 2013.

28 “starving the beast”: See Bruce Bartlett, “‘Starve the Beast’: Origins and Development of a Budgetary Metaphor,” *Independent Review* 12, no. 1 (Summer 2007): 5–26.

29 “wise legal policy to use rules”: Joseph Raz, “Legal Principles and the Limits of Law,” *Yale Law Journal* 81, no. 5 (April 1972): 841.

29 “peace of mind is promoted”: Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (London: UCL, 2004), 36.

29 “This step has enormous virtues”: Cass R. Sunstein, “Problems with Rules,” *California Law Review* 83, no. 4 (July 1995): 1022.

29 “rationalized completeness”: Louis L. Jaffe, “The Effective Limits of the Administrative Process: A Reevaluation,” *Harvard Law Review* 67, no. 7 (May 1954): 1135.

29 nursing homes in America: See Anita Bercovitz et al., “End-of-Life Care in Nursing Homes: 2004 National Nursing Home Survey,” *National Health Statistics Reports* no. 9 (October 8, 2008), <http://www.cdc.gov/nchs/data/nhsr/nhsr009.pdf>.

30 [nursing home regulations]: All of the state nursing home regulations for Kansas can be viewed online: Kansas Department on Aging, “Statutes and Regulations for the Licensure and Operation of Nursing Facilities,” http://www.hpm.umn.edu/nhregsplus/NHRegs_by_State/Kansas/KS%20Complete%20Regs.pdf, accessed June 2013. Regulations from other states can also be viewed online, through the University of Minnesota School of Public Health’s website: “NH Regulations Plus,” <http://www.hpm.umn.edu/nhregsplus>, accessed June 2013. In the case of Kansas, none of the regulations can be waived.

31 “either natural or artificial illumination”: Occupational Safety & Health Administration, “Safety and Health Regulations for Construction,” § 1926.26, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=10612, accessed June 2013.

31 [Medicare reimbursement categories]: Anna Wilde Mathews, “Walked into a Lamppost? Hurt While Crocheting? Help Is on the Way,” *Wall Street Journal*, September 13, 2011, <http://online.wsj.com/article/SB10001424053111904103404576560742746021106.html>. See also

- the *Wall Street Journal's* interactive web page “A Code for What Ails You”: <http://graphicsweb.wsj.com/documents/MEDICALCODES0911/#term=Bitten>.
- 32 [day care center rules]: Tim Hoover, “Early State Proposal Would Ramp Up Rules for Child Care Centers to Earn License,” *Denver Post*, July 12, 2011.
- 32 thirty-seven pages of regulatory fine print: See *Rules Regulating Child-Care Centers (Less than 24-Hour Care)* (Denver: Colorado Department of Human Services, Division of Child Care, 2012), 29, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%227.702+Center.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251820002192&ssbinary=true>.
- 33 [Maryland school rules]: Eric Owens, “Maryland School District Outlaws Hugging, Homemade Food, Pushing Kids on Swings,” *Daily Caller*, March 19, 2013, <http://dailycaller.com/2013/03/19/maryland-school-district-outlaws-hugging-homemade-food-pushing-kids-on-swings>.
- 33 “eliminate[d] the human element”: David Kairys, “Searching for the Rule of Law,” *Suffolk University Law Review* 36, no. 2 (2003): 319.
- 34 “if the laws be so voluminous”: James Madison, “No. 62,” in Hamilton, Madison, and Jay, *Federalist*, 304.
- 34 Modern law is too detailed: The logic of rationalized completeness drives rules light-years away from information that might be useful to a real person or problems. The worker safety regulations require thick volumes of “material safety data sheets,” known as MSDS, to be accessible to all workers for all products that might be hazardous in any way, without distinguishing remote from realistic dangers. An MSDS sheet on bricks (mandatory for construction sites) helps workers identify a brick (a “hard ceramic body . . . with no odor”) and provides its boiling point (above 3500 degrees Fahrenheit), among other useless information. See Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (New York: Random House, 1994), 12–15, 36–38.
- 34 “Some of the standards are completely forgotten”: John Braithwaite and Valerie Braithwaite, “The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation,” *Social & Legal Studies* 4, no. 3 (1995): 320.
- 35 “I run a lot of decisions by legal counsel”: Frederick M. Hess, “Cages of Their Own Design,” *Educational Leadership* 67, no. 2 (October 2009), <http://m.ascd.org/EL/Article/859b4bbf20eb3210VgnVCM100000250210acRCRD>.
- 35 “culture of can’t”: Frederick M. Hess and Whitney Downs, “The Culture of ‘Can’t’ in American Schools,” *Atlantic*, April 12, 2012, <http://www.theatlantic.com/national/archive/2012/04/the-culture-of-cant-in-american-schools/255757>. See also Chester E. Finn, Jr., “Why School Principals Need More Authority,” *Atlantic*, April 4, 2012.
- 35 When California allowed schools to apply for waivers: Levin, H. M. (2006). “Why Is This So Difficult?” in *Educational Entrepreneurship: Realities, Challenges, Possibilities*, ed. F. M. Hess (Cambridge, MA: Harvard Education Press, 2006), 173–74.
- 35 [disorder in schools]: See generally Richard Arum, *Judging School Discipline: The Crisis of Moral Authority* (Cambridge, MA: Harvard University Press, 2003), 169: “It is this hesitation, doubt and weakening of conviction . . . that has undermined the effectiveness of school discipline.” See also David L. Kirp, “Proceduralism and Bureaucracy: Due Process in the School Setting,” *Stanford Law Review* 28, no. 5 (May 1976), 841–76. For a vivid description of the decline in school culture at one school, see Gerald Grant, *The World We Created at Hamilton High* (Cambridge, MA: Harvard University Press, 1988).
- 35 [girl rejecting pill]: Connie Leonard, “Jeffersonville Middle School Student Suspended for Touching Pill,” *Wave 3 News*, February 25, 2010, <http://www.wave3.com/Global/story.asp?S=12047295>.
- 36 cheese slice: Stephen Goldsmith (former New York City deputy mayor), interview by author, 2011.
- 36 large legal staffs can’t keep it all straight: See J. B. Ruhl and James Salzman, “Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State,” *Georgetown Law Journal* 91 (2003): 792. See also the following comparative study of environmental regulation in Japan and the US: Kazumasu Aoki, Lee Axelrad, and Robert A. Kagan, “Industrial Effluent Control in the United States and Japan,” in Axelrad and Kagan, *Regulatory Encounters*, 64–95. See also

- Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982).
- 36 “enforced or invoked selectively”: Lipsky, *Street-Level Bureaucracy*, *supra* note for page 22, p. 14. See also “The Dodd-Frank Act: Too Big Not to Fail,” *Economist*, February 18, 2012, discussing the complexity of the 848-page Dodd-Frank law: “Officials are being given the power to . . . make arbitrary or capricious rulings. The lack of clarity which follows from the sheer complexity of the scheme will sometimes, perhaps often, provide cover for such capriciousness.”
- 37 “habit of citing the same ones”: Braithwaite, “Rules and Principles,” *supra* note for page 15, p. 63.
- 37 at the mercy of any official: In his critique of the American criminal justice system, William Stuntz concluded that “too much law amounts to no law at all: when legal doctrine makes everyone an offender, the relevant offenses have no meaning independent of law enforcers’ will. The formal rule of law yields the functional rule of official discretion.” William J. Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press, 2011), 3. See also Aharon Barak (former president of the Israel Supreme Court), *Judicial Discretion*, trans. Yadin Kaufmann (New Haven, CT: Yale University Press, 1989), 261: “Law without discretion ultimately yields arbitrariness.”
- 37 “bankrupt, morally as well as financially”: Peter F. Drucker, “Really Reinventing Government,” *Atlantic Monthly*, February 1995.
- 37 “merely a puzzle to be solved”: Vaclav Havel, *The Art of the Impossible: Politics as Morality in Practice* (New York: Knopf, 1994), 91s.
- 38 “effective government”: Drucker, “Really Reinventing,” *supra* note for page 37.
- 39 Observers tell horror stories: Interview with former manager of a nursing home, by author, 2012.
- 39 “NCLB’s fixation on testing”: Randi Weingarten, “Picking Up the Pieces of No Child Left Behind,” *Atlantic*, April 9, 2012. See also Andy Hargreaves and Dennis Shirley, “Beyond Standardization: Powerful New Principles for Improvement,” *Phi Delta Kappan* 90, no. 2 (October 2008): 135–43. Finland, which has top-ranked schools, has more or less the opposite approach from NCLB, hiring highly qualified teachers and giving them substantial autonomy. See Pasi Sahlberg and Andy Hargreaves, *Finnish Lessons: What Can the World Learn from Educational Change in Finland?* (New York: Teachers College Press, 2011). See generally Amanda Ripley, *The Smartest Kids in the World* (New York: Simon & Schuster, 2013).
- 39 Focusing on compliance actually impairs: Polanyi, *Personal Knowledge*, *supra* note for page 22, pp. 18–24, 49–65, 212–45, 299–324.
- 39 Focus on A, and you cannot see B: Robert K. Merton, “Bureaucratic Structure and Personality,” *Social Forces* 18, no. 4 (May 1940): 562.
- 39 “tacit knowledge”: Polanyi, *Personal Knowledge*, *supra* note for page 22, p. 92.
- 39 shuts the mental door: See *Ibid.*, 56: “Subsidiary awareness and focal awareness are mutually exclusive. If a pianist shifts his attention from the piece he is playing to the observation of what he is doing with his fingers while playing it, he gets confused and may have to stop.”
- 40 “Once regulations become as voluminous”: John G. Kemeny, *Report of the President’s Commission on the Accident at Three Mile Island* (New York: Pergamon, 1979), 9. See discussion in Joseph V. Rees, *Hostages of Each Other: The Transformation of Nuclear Safety since Three Mile Island* (Chicago: University of Chicago Press, 1994), 192.
- 40 [Appalachian children]: Nicholas D. Kristof, “Profiting from a Child’s Illiteracy,” *New York Times*, December 7, 2012. Undermining purpose is a common effect of metric-driven accountability. See Dennis F. Thompson, “Moral Responsibility of Public Officials: The Problem of Many Hands,” *American Political Science Review* 74, no. 4 (December 1980), 905, 914, recounting a study about how the metrics of a Job Corps program gave officials an incentive to discriminate against applicants whom the program was designed to help: “Because the performance of officials in the Job Corps program was measured by the number of trainees who received a job after completing the program, officials tended to recruit those youths who already seemed disposed to succeed in a job; these turned out to be youths with a more middle-class than lower-class orientations.”
- 40 [agencies wasting money at year’s end]: See Charles Peters, *How Washington Really Works* (New York: Basic Books, 1992), 45: “One of the notorious results of the fear of budget cuts is the end-of-the-year spending spree.”
- 41 Law truly rules: “In summary, it is exactly a rule’s rigidity, even in the face of applications that would ill suit its purpose, that renders it a rule.” Fredrick Schauer, “Formalism,” *Yale Law Journal* 97, no. 4 (March 1998): 509, 510.

- 41 “frozen decisions”: See Herbert Simon, “Decision-Making and Organizational Design: Man-Machine Systems for Decision-Making,” in *Organizational Theory: Selected Readings*, ed. D. S. Pugh (Baltimore: Penguin, 1971), 189–212. See also discussion in Ralph P. Hummel, *The Bureaucratic Experience: The Post-modern Challenge*, 5th ed. (Armonk, NY: M. E. Sharpe, 2008), 141.
- 41 [Chris Christie quip]: This aside was overheard by a senior executive involved in the train tunnel project.
- 41 [*Deepwater Horizon*]: Tim Harford, *Adapt: Why Success Always Starts with Failure* (New York: Farrar, Straus and Giroux, 2011), 187, 218.
- 42 “die with their rights on”: Lloyd I. Sederer, “Dying with Your Rights On: Mental Illness, Civil Rights, and Saving Lives,” *Huffington Post*, June 7, 2011. Widespread confusion concerning the scope of privacy rights of mass murderer Seung-Hui Cho was cited as a contributing factor in the massacre at Virginia Tech in 2007; Virginia Tech Review Panel, “Mass Shootings at Virginia Tech, April 16, 2007: Report of the Virginia Tech Review Panel, Presented to Timothy M. Kaine, Governor, Commonwealth of Virginia,” August 2007, <http://www.governor.virginia.gov/tempcontent/techPanelReport-docs/FullReport.pdf>.
- 42 “over-complex regulation”: Niall Ferguson, *The Great Degeneration: How Institutions Decay and Economies Die* (New York: Penguin, 2013), p. 54.
- 42 [Kalid al-Mihdhar]: Thomas H. Kean and Lee H. Hamilton, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (New York: W. W. Norton, 2004), 271. See discussion in William D. Eggers and John O’Leary, *If We Can Put a Man on the Moon . . . : Getting Big Things Done in Government* (Boston: Harvard Business Press, 2009), 174–75.
- 43 [pruning dumb regulations]: Barack Obama, “Toward a 21st-Century Regulatory System,” *Wall Street Journal*, January 18, 2011. The head of the Office of Information and Regulatory Affairs during President Obama’s first term, Cass Sunstein, initiated thoughtful reforms, which are described in his book *Simpler: The Future of Government* (New York: Simon & Schuster, 2013). These reforms, however, do not take on the broad paralysis caused by a regulatory system based on an assumption of rationalized completeness. As liberal commentator Joe Klein notes, “His people can tell you the number of unnecessary regulations they’ve eliminated. It barely scratches the surface of what needs to be done—there is no creative destruction in government, regulations pile up on top of each other like silt, generation after generation.” Joe Klein, “More Brill, More Obamacare Incompetence,” *In the Arena* (blog), April 4, 2013, <http://swampland.time.com/2013/04/04/more-brill-more-obamacare-incompetence>. The underlying flaws of America’s regulatory system remain unaddressed. See William H. Simon, “The Republic of Choosing: A Behaviorist Goes to Washington” (review of *Simpler: The Future of Government*), *Boston Review*, July 8, 2013, <http://bostonreview.net/us-books-ideas/cass-sunstein-simpler-future-government-republic-choosing>.
- 43 treated a milk spill the same as an oil spill: Andrew Restuccia, “Obama Touts EPA Effort to Exempt Milk from Oil-Spill Rules,” *Hill*, January 24, 2012, <http://thehill.com/blogs/e2-wire/e2-wire/206337-obama-touts-epa-effort-to-exempt-milk-from-oil-spill-rules>.
- 43 “to bundle up yesterday in neat packages”: Peter F. Drucker, *The Age of Discontinuity: Guidelines to Our Changing Society*, 2nd ed. (New Brunswick, NJ: Transaction, 1992), 222.
- 44 “highest possible degree of responsibility”: James Madison, “Speech in Congress on Presidential Removal Power,” in Madison, *Writings*, 435.
- 45 no longer were willing to give people authority: David Brooks, “The Follower Problem,” *New York Times*, June 11, 2012.
- 45 [criticism of Brooks]: See, for example, Matt Welch, “David Brooks Authoritarianism Watch,” *Hit & Run* (blog), Reason.com, June 13, 2012, <http://reason.com/blog/2012/06/13/david-brooks-authoritarianism-watch>; and Radley Balko, “David Brooks: Know Your Betters,” *Agitator*, June 13, 2012.
- 46 “The flight from the individual”: George F. Kennan, “America’s Administrative Response to Its World Problems,” *Daedalus* 87, no. 2 (Spring 1958): 17.

Regulating by Personal Responsibility

- 47 Australia radically overhauled its regulation: Braithwaite and Braithwaite, “Politics of Legalism,” *supra* note for page 34, pp. 310–25.

- 47 “could be checked with a ruler”: Braithwaite and Braithwaite, “Politics of Legalism,” *supra* note for page 34, p. 310.
- 47 “Rather embarrassed”: *Ibid.*, 311.
- 48 mired in a bureaucratic rut: Professor Braithwaite, often together with his wife (psychology professor Valerie Braithwaite) and other collaborators, has written numerous articles on nursing homes—American, Australian, and English—over the years. Most of his conclusions are distilled in a more recent book: John Braithwaite, Toni Makkai, and Valerie A. Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Cheltenham, UK: Edward Elgar, 2007).
- 48 sleeping residents degraded the enjoyment: Braithwaite, Makkai, and Braithwaite, *Regulating Aged Care*, *supra* note for page 48, p. 228.
- 48 “a great deal of falsification of records”: *Ibid.*, 47.
- 48 “Principles do not work that way”: Ronald M. Dworkin, “The Model of Rules,” *University of Chicago Law Review* 35, no. 1 (Autumn 1967): 36.
- 49 not on paperwork compliance: Studies of US nursing homes repeatedly show that overbearing regulation is counterproductive. See Marshall B. Kapp, “Resident Safety and Medical Errors in Nursing Homes,” *Journal of Legal Medicine* 24, no. 1 (2003): 52. “Nearly half or more of nursing homes also cited regulations (56%) . . . as barriers to adoption [of culture change].” Michelle M. Doty, Mary Jane Koren, and Elizabeth L. Sturla, *Culture Change in Nursing Homes: How Far Have We Come?* (New York: Commonwealth Fund, 2007), 17. See also discussion in Marshall B. Kapp, “Nursing Home Culture Change: Legal Apprehensions and Opportunities,” *Gerontologist*, October 24, 2012 [Epub ahead of print], 3.
- 50 the principal “protects his faculty”: Sara Lawrence-Lightfoot, *The Good High School: Portraits of Character and Culture* (New York: Basic Books, 1983), 68.
- 50 Doing what’s right . . . requires trade-offs: See discussion and sources in notes for pages 39–45, *supra*.
- 50 Within minutes of walking into a school: John Chubb, interview by author, 2007.
- 51 [no specific rules for airworthiness]: Paul M. Romer, “Process, Responsibility, and Myron’s Law,” in *In the Wake of the Crisis: Leading Economists Reassess Economic Policy*, ed. Olivier J. Blanchard et al. (Cambridge, MA: MIT Press, 2012), 116–17.
- 51 the child was electrocuted: Jane Golden (Children’s Aid Society), interview by author, 2011.
- 51 Utah child welfare law: See Kathleen G. Noonan, Charles F. Sabel, and William H. Simon, “Legal Accountability in the Service-Based Welfare State,” *Law & Social Inquiry* 34, no. 3 (Summer 2009): 537–38. Central administration gives “frontline offices and workers relatively broad discretion in applying the principles,” Professors Sabel, Simon, and Noonan report, allowing it to “monitor [their] success in achieving the goals” and “learn from local practice while correcting its mistakes.”
- 52 main source of American exceptionalism: See Evans, *They Made America*, *supra* note for page 23.
- 52 “Trust thyself”: Ralph Waldo Emerson, “Self-Reliance,” in Emerson, *Essays & Lectures*, 260.
- 52 “fit only to enervate”: Tocqueville, *Democracy in America*, *supra* note for page 24, vol. 1, p. 87.
- 52 “it must be free in its gait”: *Ibid.*, 90.
- 52 A study of good nursing homes in the US: See Sarah Forbes-Thompson, Tona Leiker, and Michael R. Bleich, “High-Performing and Low-Performing Nursing Homes: A View from Complexity Science,” *Health Care Management Review* 32, no. 4 (October 2007): 341–51. The study found that “high performing homes suggest that fewer, more flexible rules when grounded in trusting relationships and a clear mission, will empower staff and allow greater creativity in meeting resident needs.” The key to a good nursing home was the culture in which people focused on being helpful, not compliant: “The seemingly small gestures in high-performing homes, such as acknowledging a person by name, giving tokens of appreciation, or helping out on the unit, were foundational to creating positive relationships and a healthy work environment.” Interviews of personnel in good nursing homes were characterized by quotations such as these: “We listen to each other. We help each other out.”
- 53 [study on parental participation]: Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000), 304, describing a study by James P. Comer: *School Power: Implications of an Intervention Project* (New York: Free Press, 1980), 126–28.
- 53 key ingredient of civic culture: See Tocqueville, *Democracy in America*, *supra* note for page 24, vol. 1, pp. 84–94. “The most powerful and perhaps the only means that we still possess of interesting men in the welfare of their country is to make them partakers in the government” (*ibid.*, 243). “It is

incontestable that the people frequently conduct public business very badly . . . The humblest individual who cooperates in the government of society acquires a certain degree of self-respect; and as he possesses authority, he can command the services of minds more enlightened than his own” (ibid., 251).

- 53 “take pride in their common project”: Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Belknap Press, 1996), 206.
- 53 “[she] likes being where she is”: Philip W. Jackson, Robert E. Boostrom, and David T. Hansen, *The Moral Life of Schools* (San Francisco: Jossey-Bass, 1993), 115.
- 53 Most regulatory detail is aimed: See Kansas Department on Aging, “Statutes and Regulations,” *supra* note for page 30.
- 54 “Facilities and equipment should be reasonably suited”: The American National Standards Institute (<http://www.ansi.org>) promulgates standards of design and labeling for tools, equipment, and materials—ranging from, say, the design of power-driven brushing tools to the proper warning labels to use on packages containing radioactive materials.
- 54 OSHA “tries to do the impossible”: Drucker, *Management*, *supra* note for page 23, p. 164. “The most effective way to produce safety,” Drucker concluded, “is to eliminate unsafe behavior.” Ibid. The danger in furniture factories, for example, comes from fumes of “glue guns,” which over time destroy the nerve endings of workers. The workers often look like “upright cadavers,” according to a 2013 exposé by the *New York Times*, and are permanently disabled. But OSHA has done little to protect them, because it’s hard to constantly monitor ventilation in the factories and use of protective masks. Ian Urbina, “As OSHA Emphasizes Safety, Long-Term Health Risks Fester,” *New York Times*, March 30, 2013. OSHA’s regulations can be found at <http://www.osha.gov/law-regs.html>. Instead, OSHA “constantly nips at firms with flea-bite fines.” Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992), 49.
- 54 [Alcoa]: William H. Simon, “Optimization and Its Discontents in Regulatory Design,” *Regulation & Governance* 4, no. 1 (2010): 7.
- 54 Safety in nuclear submarines: Drucker, “Really Reinventing Government,” *supra* note for page 37.
- 54 “usual process of unconscious trial and error”: Polanyi, *Personal Knowledge*, *supra* note for page 22, p. 65.
- 54 “The simpler the better”: Nassim Nicholas Taleb, *Antifragile: Things That Gain from Disorder* (New York: Random House, 2012), 11.
- 55 Accountability all around: See Russell Hardin, “The Street-Level Epistemology of Trust,” *Politics & Society* 21 (1993): 152–53: “First, you trust someone if you have adequate reason to believe it will be in that person’s interest to be trustworthy in the relevant way at the relevant time.” See discussion in Mark E. Warren, “Democratic Theory and Trust,” in *Democracy and Trust*, ed. Mark E. Warren (Cambridge: Cambridge University Press, 1999), 310–45. See also Tocqueville, *Democracy in America*, *supra* note for page 24, vol. 1, p. 209: As long as the citizens in a democracy can remove officials, there is “no reason to fear any abuse of their authority.”
- 55 That’s what power is: Robert E. Goodin, *Political Theory and Public Policy* (Chicago: University of Chicago Press, 1982), 71: “Power is the essence of politics, and the essence of power lies in restricting the choices available to others.”
- 55 A rules-based system centralizes decisions: Nonet and Selznick observe that a “regime of rules limits the discretion of lower echelons, thereby concentrating authority at the top.” Nonet and Selznick, *Law and Society in Transition*, *supra* note for page 20, 14. Michael Lerner discusses how rules can provide an “aroma of fairness” while in fact they “legitimize domination.” See Michael Lerner, *Surplus Powerlessness: The Psychodynamics of Everyday Life . . . and the Psychology of Individual and Social Transformation* (Amherst, NY: Humanity Books, 1991), 54–58.
- 56 Special interests are also control freaks: See Adam Smith, *The Theory of Moral Sentiments* (London: A. Millar, 1790), part 6, sec. 2, chap. 1: “The man of system . . . seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse to impress upon it.” See also discussion in Samuel Fleischacker, *A Third Concept of Liberty: Judgment and Freedom in Kant and Adam Smith* (Princeton, NJ: Princeton University Press, 1999), 163.

- 56 “cannot be left to their own devices”: Marcia Lowry, as quoted in Noonan, Sabel, and Simon, “Legal Accountability,” *supra* note for page 51, p. 531. See also Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (New Haven, CT: Yale University Press, 2003), describing how advocates for special-needs students use a decades-old court decree to control the minute details of special education in New York City. Special education in New York, Sandler and Schoenbrod conclude, has become “a huge, gold-plated dysfunctional cog in a rusty educational machine,” consuming almost 30 percent of the total city school budget for a small fraction of students who are actually learning-disabled (*ibid.*, 92).
- 56 “unintelligible any way you read it”: “The Dodd-Frank Act,” *supra* note for page 36. The *Economist* also quotes Professor Jonathan Macey: “Laws classically provide people with rules. Dodd-Frank is not directed at people. It is an outline directed at bureaucrats and it instructs them to make still more regulations and to create more bureaucracies . . . Officials are being given the power to . . . make arbitrary or capricious rulings. The lack of clarity which follows from the sheer complexity of the scheme will sometimes, perhaps often, provide cover for such capriciousness.”
- 56 as rigid and porous as the tax code: The entire 848-page Dodd-Frank Wall Street Reform and Consumer Protection Act can be found at <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>.
- 58 agreed to put aside sanctions for rule noncompliance: See US Department of Labor, Occupational Safety and Health Administration, *Reflections on OSHA’s History*, OSHA 3360 (Washington, DC: OSHA, 2009), 39–41, https://www.osha.gov/history/OSHA_HISTORY_3360s.pdf.
- 58 “less hierarchical in nature”: Grainne de Burca and Joanne Scott, *Law and New Governance in the EU and the US* (Oxford: Hart, 2006), 2.
- 58 escalating toward sanctions: In *Responsive Regulation*, Professors Ian Ayres and John Braithwaite recommend a pyramid of regulatory enforcement with six levels of intervention, starting with persuasion, moving to a warning letter and eventually to harder sanctions, such as fines, and ultimately, shuttering a business. Ayres and Braithwaite, *Responsive Regulation*, *supra* note for page 54, p. 35.
- 59 rewards the innovator: See John Mikler, *Greening the Car Industry: Varieties of Capitalism and Climate Change* (Cheltenham, UK: Edward Elgar, 2009), 105–7; and Osamu Kimura, “Japanese Top Runner Approach for Energy Efficiency Standards,” SERC Discussion Paper SERC09035 (CRIEPI, 2010), <http://www.climatepolicy.jp/thesis/pdf/09035dp.pdf>. See also Aoki, Axelrad, and Kagan, “Industrial Effluent Control,” *supra* note for page 36. The study concluded that Japanese environmental regulation, based on principles and ongoing dialogue, was more certain and effective than rules-based US regulation. It was also much simpler: “The book of effluent control regulations in Japan is ‘this thin,’ [an] environmental manager told us, holding two fingers an inch apart. The material she had to master in the United States, in contrast, filled a four foot bookshelf in her office” (*ibid.*, 82).
- 59 [Bavarian statutes]: For the rest-home statute, see article 3, principles 3, 6, and 4, respectively, of the “Gesetz zur Regelung der Pflege-, Betreuungs- und Wohnqualität im Alter und bei Behinderung,” July 8, 2008, <http://www.gesetze-bayern.de/jportal/portal/page/bsbayprod.psml?showdoccase=1&doc.id=jlr-PflWoQualGBY2008rahmen&doc.part=X>. All German laws are formally promulgated in federal or state law gazettes and are generally available online at the website of the pertinent state or federal ministry. For the section of the school statute allowing principals, under broad principles, to “work together in trust” with other participants in the “school community,” see article 2, section 4, of the “Bayerisches Gesetz über das Erziehungs- und Unterrichtswesen (BayEUG),” May 31, 2000, <http://www.gesetze-bayern.de/jportal/portal/page/bsbayprod.psml?showdoccase=1&doc.id=jlr-EUGBY2000rahmen&doc.part=X>. For the section of the school statute authorizing each school to create its own “house law,” see article 3, section 4, of the house law (*Hausordnung*) of the 450-year-old Wilhelm’s Academic School (*Wilhelmsgymnasium*) in Munich, <http://www.wilhelmsgymnasium.de/hausordnung>, accessed May 2013.
- 59 [FSA principles]: For a summary of the FSA’s principles-based initiative, see Julia Black, Martyn Hopper, and Christa Band, “Making a Success of Principles-Based Regulation,” *Law and Financial Markets Review* 1, no. 3 (April 2007).
- 59 “people who have no principles”: Hector Sants, “Delivering Intensive Supervision and Credible Deterrence” (speech, Reuters Newsmakers, London, March 12, 2009).

- 60 “rebalancing away from prescriptive rules”: Andrew Haldane, “The Dog and the Frisbee” (paper presented at the Federal Reserve Bank of Kansas City’s 36th Economic Policy Symposium, Jackson Hole, WY, August 31, 2012), <http://www.kansascityfed.org/publicat/sympos/2012/ah.pdf>. Similarly, Professor Julia Black, of the London School of Economics, emphasizes the imperative of regulatory flexibility, as well as the constant questioning of assumptions: “The final insight that we can take from the experience . . . is that regulators need to observe and adapt, to engage in self-critical learning . . . in short, to be reflexive.” Julia Black, “Paradoxes and Failures: ‘New Governance’ Techniques and the Financial Crisis,” *Modern Law Review* 75, no. 2 (2012): 1062.
- 60 “institutionalizing systems that pursue”: Braithwaite, Makkai, and Braithwaite, *Regulating Aged Care*, *supra* note for page for page 48, p. 176.

The Framework of Law, Properly Understood

- 62 “frontiers, not artificially drawn”: Berlin, “Two Concepts,” *supra* note for page 27, p. 236. John Locke emphasized that the goal of law is to preserve an open field of freedom, not tell people what to do: “The end of law is not to abolish or restrain, but to preserve and enlarge freedom.” John Locke, *The Second Treatise on Civil Government* (Amherst, MA: Prometheus, 1986), 33.
- 62 “a negative, rather than a positive, determination”: George F. Kennan, “On American Principles,” *Foreign Affairs* 74, no. 2 (March/April 1995): 119. See also Eugene J. McCarthy, “Freedom and Political Authority,” *ALA Bulletin* 47, no. 10 (November 1953): 466: “It is the responsibility of government to defend the outer walls.”
- 63 Spontaneity . . . disappeared: Hannah Arendt, “What Is Authority?” in Arendt, *Between Past and Future*, 96.
- 65 carries legal weight: Someone with authority typically is free to make a choice, within legal boundaries, on the basis of what he thinks is right, not what he can prove. “Authority,” Hannah Arendt observes, “is incompatible . . . with a process of argumentation.” *Ibid.*, 93. The wisdom or fairness of the decision can still be checked up the line, but the basis for review is not objective proof and argument, but what the higher authority believes is right or fair under applicable legal standards.
- 65 “Discretion, like the hole in a doughnut”: Ronald M. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), 31.
- 65 “standards of sense and fairness”: *Ibid.*, 33.
- 65 “The first requirement”: Oliver Wendell Holmes, *The Common Law* (Clark, NJ: Lawbook Exchange, 2005), 41. If the job of judges is to be sensitive to “prevailing standards of right conduct,” as Cardozo put it, then it’s doubly true that officials engaged in regulatory oversight and public services should be guided and held accountable by social norms of reasonableness. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921), 63.
- 66 Law will deter officials: See Jean Hampton, “Democracy and the Rule of Law,” in *The Rule of Law*, ed. Ian Shapiro, *Nomos* 36 (New York: New York University Press, 1994), 24.
- 66 “authoritative grounds”: Nonet and Selznick, *Law and Society in Transition*, *supra* note for page 20, p. 81, note 12. Thomas Hobbes, the consummate pragmatist, understood that a law unavoidably hinges on human judgment; Thomas Hobbes, *Leviathan*, ed. E. M. Curley (Indianapolis, IN: Hackett, 1994), 180: “All laws, written, and unwritten, have need of interpretation.” He therefore leapt to the conclusion that law was just putty in the hands of whoever was in charge. Better, Hobbes concluded in *Leviathan*, just to cede authority to a monarch. But law constrains officials more than Hobbes gave it credit for. The main constraint is cultural. Officials can’t get away with unreasonable or abusive interpretations of law if other judges and officials—and ultimately the public—believe in the importance of law and have a different view of the underlying purpose of the law in question.
- 66 “departs from the reason of law”: Timothy A. O. Endicott, “The Impossibility of the Rule of Law,” *Oxford Journal of Legal Studies* 19, no. 1 (Spring 1999): 1–18.
- 66 Social norms achieve validity: Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press, 1998), 3–5. For this summary description I am indebted to the introduction by the editors, Ciaran Cronin and Pablo de Grieff.
- 66 “infused with the glow of principle”: Cardozo, *Nature of the Judicial Process*, *supra* note for page 65, p. 93.
- 67 The “principle becomes fully manifest”: Hannah Arendt, “What Is Freedom?” in Arendt, *Between Past and Future*, 152.

- 67 “conduct that the rule was intended to avoid”: Richard A. Posner, *Economic Analysis of Law* (Austin: Wolters Kluwer, 2007), 587. See also Michel de Montaigne, “Of Experience,” in De Montaigne, *Complete Works*, 993: “Therefore I do not much like the opinion of the man who thought by a multiplicity of laws to bridle the authority of judges, cutting up their meat for them. He did not realize that there is as much freedom and latitude in the interpretation of laws as in their creation.” In a recent book, Ralph Nader waits less than three pages before lashing out against precise rules in the tax code: “The more complex the laws are, the more shenanigans the corporations are likely to attempt.” Ralph Nader, *The Seventeen Solutions: Bold Ideas for Our American Future* (New York: Harper, 2012), 3. In addition, see Doreen McBarnet and Christopher Whelan, “The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control,” *Modern Law Review* 54, no. 6 (December 1991).
- 68 The frailty of human judgment: The authoritative book on the flaws in human reasoning is Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011). For books on the mystery of human accomplishment, see Gary Klein, *Intuition at Work: Why Developing Your Gut Instinct Will Make You Better at What You Do* (New York: Doubleday, 2003); Mike Rose, *The Mind at Work: Valuing the Intelligence of the American Worker* (New York: Viking, 2004); Hubert Dreyfus, *Mind over Machine* (New York: Free Press, 1986); and Polanyi, *Personal Knowledge*, *supra* note for page 22. See also Kenneth R. Hammond, *Human Judgment and Social Policy* (Oxford: Oxford University Press 1996).
- 68 There’s a wisdom in crowds: See generally James Surowiecki, *The Wisdom of Crowds* (New York: Anchor, 2005). See also Tracey L. Meares, “It’s a Question of Connections,” *Valparaiso Law Review* 31 (1997): 594: “Social norms are better and more effective constraints on behavior than law ever could hope to be.”
- 69 “windowsill height shall not exceed”: Kansas Department on Aging, “Statutes and Regulations,” *supra* note for page 30.
- 69 *minimize uncertainty*: See Endicott, “Impossibility,” *supra* note for page 66 (arguing that law should aim to minimize arbitrariness, not maximize certainty).
- 69 “Standards that capture lay intuitions”: Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990), 48.
- 69 A study of juvenile justice in Britain: See Nicola Lacey, “Jurisprudence of Discretion,” in *The Uses of Discretion*, ed. Keith Hawkins, Oxford Socio-Legal Studies (Oxford: Clarendon, 1992), 380.
- 69 American judges and German bank regulators: For the American example, see Orley Ashenfelter, Theodore Eisenberg, and Stewart J. Schwab, “Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes,” *Journal of Legal Studies* 24 (1995): 257–81. See also Cass Sunstein et al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Washington, DC: Brookings Institution Press, 2006). For the German example, see Edward L. Rubin, “Discretion and Its Discontents,” *Chicago-Kent Law Review* 72 (1997), 1299–366.
- 69 “more precision than the subject matter admits”: Aristotle, *The Nicomachean Ethics*, trans. W. D. Ross (Oxford: Oxford University Press, 1940). See discussion in Ken Kress, “Legal Indeterminacy,” *California Law Review* 77, no. 2 (March 1989): 283.
- 69 officials can predictably enforce: Aristotle, *Politics*, Book III, 16: “Where it seems that the law cannot draw a boundary, it would seem impossible for a human being to identify one. Yet the law trains officials for that very purpose, and appoints them to judge and to regulate that which it leaves undetermined, as rightly they can” (quoted from Endicott, “Impossibility,” *supra* note for page 66, p. 13). Professor Ofer Raban explains that “indeterminate legal standards often produce more certainty and predictability than any alternative bright-line rule because they replicate, one for one, the social, moral, economic or political norm that already prevails, and which . . . cannot be reduced to clear and unambiguous language.” Ofer Raban, “The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism,” *Boston University Public Interest Law Journal* 19, no. 2 (Spring 2010): 175–91.
- 70 “some things that the process cannot do reliably”: Braithwaite and Braithwaite, “Politics of Legalism,” *supra* note for page 34, 326.
- 70 “it would soon be bankrupt”: *Ibid.* John Braithwaite and Valerie Braithwaite posit a “reliability paradox: reliability is more likely to be achieved when reliability is not the central objective.” Focusing on substance will have the effect of better reliability. Australia is more reliable than the US because it is “broad, vague, subjective and undefined with regard to protocols.” *Ibid.*, 310–11.

- 70 “already in ethical difficulty”: Jeremy Waldron, “Vagueness in Law and Language: Some Philosophical Issues,” *California Law Review* 82, no. 3 (May 1994): 535.
- 71 “can go scot free”: John Dewey, “Logical Method and Law,” *Cornell Law Quarterly* 10 (1924): 17, 26.
- 71 “guided discretion”: See Tracey L. Meares and Dan M. Kahan, “When Rights Are Wrong: The Paradox of Unwanted Rights,” in Meares and Kahan, *Urgent Times*, 27–29. See discussion in William H. Simon, “Solving Problems vs. Claiming Rights,” *William and Mary Law Review* 46, no. 1 (2004): 149.
- 71 federal criminal sentencing guidelines: Until the Supreme Court in 2005 declared rigid guidelines unconstitutional, judges from every ideological perspective had attacked the sentencing rules as being contrary to basic principles of justice because they did not permit “the saving grace of humane discretion.” Adam Gopnick, “The Caging of America,” *New Yorker*, January 30, 2012, reviewing Stuntz, *Collapse of American Criminal Justice*, *supra* note for page 37. See also John S. Martin Jr., “Why Mandatory Minimums Make No Sense,” *Notre Dame Journal of Law, Ethics & Public Policy* 18, no. 2 (2004): 311–12: “Judges no longer have to take moral responsibility for the sentence they impose.” See generally Kate Stith and Jose A. Cabranes, *Fear of Judging* (Chicago: University of Chicago Press, 1998), 5: “Judges, prosecutors, defense attorneys, and probation officers find themselves operating in a labyrinthine system of rules devised by distant and alien administrative agency. The rules themselves, which generally ignore the individual characteristics of defendants, often seem to sacrifice comprehensibility and common sense on the altar of pseudo-scientific uniformity.”
- 72 retirement of commercial airline pilots: Colin S. Diver, “The Optimal Precision of Administrative Rules,” *Yale Law Journal* 93, no. 1 (November 1983): 65–109.
- 73 [B-17 crash]: Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (New York: Metropolitan, 2010), 32–34. Dr. Gawande has made significant contributions to our understanding of the opportunities and problems of medical protocols, and also of skewed incentives that drive up health care costs, especially in his revelatory essay on the self-interested variations in health care costs in nearby communities in Texas: Atul Gawande, “The Cost Conundrum,” *New Yorker*, June 1, 2009.
- 73 [complicated versus complex]: “To run a system that’s complex. . .” comes from Brenda Zimmerman, as quoted in David Segal, “It’s Complicated: Making Sense of Complexity,” *New York Times*, May 1, 2010. See also Frances Westley, Brenda Zimmerman, and Michael Patton, *Getting to Maybe: How the World Is Changed* (Toronto: Vintage Canada, 2007). Professor Zimmerman’s distinction reveals why Dr. Gawande overshoots the mark in his enthusiasm for checklists. Checklists can be lifesaving in “complicated” situations and deadly in “complex” situations, such as, say, the *Deepwater Horizon* or Three Mile Island incidents. Dr. Gawande cites, as a success of checklists, the January 2009 crash landing on the Hudson River of a US Airways plane that had lost its power in both engines. He is correct that disciplined training and protocols kept order in the cockpit; the purpose of training is to internalize choices so that they become automatic. But the “miracle on the Hudson” happened because Captain “Sully” Sullenberger focused on flying the plane, not on a checklist for how to fly the plane. As William Langewiesche put it in his account of the incident: “There was no time for the ditching checklist . . . Across a lifetime of flying, Sullenberger had developed an intimacy with these machines that is difficult to convey. He did not sit in airplanes so much as put them on. He flew them in a profoundly integrated way, as an expression of himself.” William Langewiesche, *Fly by Wire: The Geese, the Glide, the Miracle on the Hudson* (New York: Farrar, Straus and Giroux, 2009), 177. Captain Sullenberger himself described the final moments this way: “The earth and the river were rushing towards us. I was judging our descent rate and our altitude visually. At that instant, I judged it was the right time. I began the flare for landing. I pulled the side-stick back, farther back, finally full aft, and held it there as we touched the water.” This was not someone dutifully checking the boxes, but a skilled professional drawing on all his experience to avoid a disaster. See Philip K. Howard, “Problems with Protocols” (review of *The Checklist Manifesto*), *Wall Street Journal*, January 20, 2010.
- 73 Most government oversight: There’s a theory of complexity that arose out of computer science, known as “fuzzy thinking” or “fuzzy logic,” which posits that precision and relevance are mutually exclusive in complex activities. A precise rule, by this theory, will rarely accomplish what most people would consider appropriate with complex choices. See Bart Kosko, *Fuzzy Thinking* (New York: Hyperion, 1993). Professor Kenneth Hammond addresses a similar point by distinguishing between highly

controlled situations, such as an assembly line or a rail line, and complex situations in which variables are often uncertain. “Rigorous systems” can be highly efficient in the appropriate situation but can lead to a train wreck (literally and figuratively) when one small thing goes wrong. Human systems are sloppier, but less dangerous. Hammond, *Human Judgment*, *supra* note for page 68, p. 175.

- 74 nonbinding rules can often be useful: See Braithwaite, “Rules and Principles,” *supra* note for page 15. Like judges with the sentencing guidelines, physicians are passionate about the inappropriateness of rigid medical practice guidelines. See David Gelber, “Rigid Regulation Can Become Detrimental to Patient Care,” *KevinMD.com* (blog), December 2, 2011, <http://www.kevinmd.com/blog/2011/12/rigid-regulation-detrimental-patient-care.html>. Dr. Gelber describes common situations in which the guidelines hurt patients, such as when a thirteen-year-old boy was dehydrated going into surgery because the guideline required a 500-cc pediatric IV fluid bag and the hospital had only 1,000-cc bags. Dr. Gelber pleaded with the nurse that the boy was larger than many adults, but the nurse refused to use the regular-sized bag. Dr. Gelber concludes, “Rigid regulation can become detrimental to healthcare . . . Clinical guidelines may be helpful but it must be remembered that they are guidelines only.”

Ending Bureaucratic Amorality

- 74 “an act of intellectual probity”: Polanyi, *Personal Knowledge*, *supra* note for page 22, p. 271.
- 75 “Each citizen will rationally pursue”: Donald J. Black, “The Mobilization of Law,” *Journal of Legal Studies* 2, no. 1 (1973): 138.
- 75 the many ways teachers can be fair or unfair: Jackson, Boostrom, and Hansen, *Moral Life of Schools*, *supra* note for page 53.
- 76 “Laws on paper are meaningless”: Lawrence M. Friedman, “Legal Rules and the Process of Social Change,” *Stanford Law Review* 19, no. 4 (April 1967): 786.
- 76 “can never be knowable in advance”: Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, 2nd ed. (New York: Continuum, 1998), 317.
- 77 institutions are inherently less moral: Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics*, rev. ed. (New York: Scribner, 1960). See discussion in Robert Heineman, *Authority and the Liberal Tradition: From Hobbes to Rorty*, 2nd ed. (New Brunswick, NJ: Transaction, 1994), 143–47. See generally Thompson, “Moral Responsibility,” *supra* note 89, describing the causes of a famous mining disaster in 1947, known as the blast at Centralia No. 5. “As one strives to fix responsibility for the disaster, again and again one is confronted, as were the miners, not with any individual but with a host of individuals fused into a vast, unapproachable, insensate organism. Perhaps this immovable juggernaut is the true villain of the piece.” John Bartlow Martin, “The Blast at Centralia No. 5,” in Richard Stillman, *Public Administration: Concepts and Cases*, 9th ed. (Belmont, CA: Wadsworth Cengage Learning, 2009), 43. See also David Luban, Alan Strudler, and David Wasserman, “Moral Responsibility in the Age of Bureaucracy,” *Michigan Law Review* 90, no. 8 (July 1992): 2356.
- 78 “helping them hold on to memories of the past”: Timothy Diamond, “Social Policy and Everyday Life in Nursing Homes,” in *The Worth of Women’s Work*, ed. Anne Statham, Eleanor M. Miller, and Hans O. Mauksch (Albany: State University of New York Press, 1988), 48. See Marshall B. Kapp, “Quality of Care and Quality of Life in Nursing Facilities: What’s Regulation Got to Do with It?” *McGeorge Law Review* 31, no. 3 (2000): 731: “Regulatory requirements may be essential to inspire, but can never substitute for, the sense of moral obligation that, in the final analysis, must lie at the heart of protecting and promoting the well-being of our most vulnerable citizens.”
- 78 [Foner’s nursing home study]: Nancy Foner, “The Hidden Injuries of Bureaucracy: Work in an American Nursing Home,” *Human Organization* 54, no. 3 (1995): 229–37.
- 80 “banality of evil”: Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006).
- 80 “Most evil is done”: Hannah Arendt, *The Life of the Mind*, ed. Mary McCarthy (New York: Mariner, 1981), 180. See also Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, trans. Eden and Cedar Paul (New York: Free Press, 1962), 189: “Bureaucracy is the sworn enemy of individual liberty . . . The bureaucratic spirit corrupts character and engenders moral poverty.”
- 80 “bureaucratic virtuoso”: Merton, “Bureaucratic Structure,” *supra* note for page 39.

- 80 these destructive values are increasingly embraced: See Marshall B. Kapp, “Resident Safety and Medical Errors in Nursing Homes,” *Journal of Legal Medicine* 24, no. 1 (2003): 52. When I interviewed Professor Kapp in 2012, he discussed how a budding “culture movement” in nursing home management has trouble getting off the ground because caregivers find themselves constantly pulled back by the rules into a compliance mind-set. See Doty et al., *Culture Change*, *supra* note page 49, p. 17: “Nearly half or more of nursing homes also cited regulations (56%) . . . as barriers to adoption [of culture change].”
- 80 federal procurement practices: Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (Washington, DC : AEI Press, 1990).
- 81 “We will not hesitate to sue”: Amy Goldsmith, as quoted in Strunsky, “Attempt to Raise,” *supra* note for page 10. The lawsuit to stop the Bayonne Bridge project was filed on July 31, 2013. See “Lawsuit Challenges Bayonne Bridge Project,” *Journal of Commerce*, August 1, 2013, http://www.joc.com/port-news/us-ports/port-new-york-new-jersey/lawsuit-challenges-bayonne-bridge-project_20130801.html.
- 81 [suing the dry cleaner]: See Henri E. Cauvin, “Court Rules for Cleaners in \$54 Million Pants Suit,” *Washington Post*, June 26, 2007. For the arc of the two-year saga to win the case, see Philip K. Howard, *Life without Lawyers* (New York: W. W. Norton, 2009), 72–73.
- 82 “lack of good”: Aquinas, *St. Thomas Aquinas: Philosophical Texts*, ed. Thomas Gilby (London: Oxford University Press, 1951), 167.
- 82 [fired St. Louis cafeteria worker]: Ryan Sullivan, “Mo. Cafeteria Worker Loses Job After Giving Meals to Students in Need,” *MyFox8.com*, December 14, 2012, <http://myfox8.com/2012/12/14/mo-cafeteria-worker-loses-job-after-giving-meals-to-student-in-need>.
- 82 [fired Florida lifeguard]: Ihosvani Rodriguez, “Hallandale Beach Lifeguard Fired after Participating in Beach Rescue,” *Sun Sentinel* (Fort Lauderdale), July 3, 2012.
- 83 “to alienate the worker”: William H. Simon, “Legality, Bureaucracy, and Class in the Welfare System,” *Yale Law Journal* 92, no. 7 (June 1983): 1204.
- 83 “indifference, impersonality, and irresponsibility”: *Ibid.*, 1198.
- 83 “There is nothing I can do”: *Ibid.*, 1199.
- 84 “never . . . to give a straightforward answer”: Charles Dickens, *Little Dorrit*, ed. Harvey Peter Sucksmith and Dennis Walder, *Oxford World’s Classics* (Oxford: Oxford University Press, 2012), 120.
- 84 [Omar in Iraq]: “Taking Names,” *This American Life*, NPR, June 28, 2013, <http://www.thisamericanlife.org/radio-archives/episode/499/transcript>. See Kirk Johnson, *To Be a Friend Is Fatal* (New York: Scribner, 2013).
- 85 “paper errors”: Simon, “Legality, Bureaucracy, and Class,” *supra* note for page 83, p. 1209.
- 85 there’s a “moral force to immorality”: Polanyi, *Personal Knowledge*, *supra* note for page 22, pp. 227–28.
- 86 The moral vacuum is now filled with opportunists: “Fundamentalists rush in,” Michael Sandel observes, “where liberals fear to tread.” Sandel, *Democracy’s Discontent*, *supra* note for page 53, p. 322. See also Leszek Kolakowski, *Modernity on Endless Trial* (Chicago: University of Chicago Press, 1990), 162–74 (discussing “the self-poisoning of open society”).
- 86 “People feel their only public duty”: Stanley Hauerwas, *A Community of Character: Toward a Constructive Christian Social Ethic* (Notre Dame, IN: University of Notre Dame Press, 1991), 79. See also Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, IN: University of Notre Dame Press, 1984). See Alasdair MacIntyre, “Regulation: A Substitute for Morality,” *Hastings Center Report* 10, no. 1 (February 1980): 31–33: “When there is continuous resort to the law, it is generally a sign that moral relations have to some large degree broken down. It is a sign that the motives which make us invoke the law are those of fear and self-interest. And when fear and self-interest have to be brought into play, law itself tends to be morally discredited.”
- 86 not even a vocabulary for public virtue: See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 14: “Lacking a grammar of cooperative living, we are like a traveler who can say a few words to get a meal and a room in a foreign city, but cannot converse with its inhabitants.”
- 86 either “a totalitarian strategy”: Hauerwas, *Community of Character*, *supra* note for page 86, p. 86. Reinhold Niebuhr makes a similar point: “A consistent pessimism in regard to men’s rational capacity

- for justice invariably leads to absolutist political theories.” Reinhold Niebuhr, “The Children of Light and the Children of Darkness,” in Niebuhr, *Essential Reinhold Niebuhr*, 160.
- 87 “That is the protocol we followed”: “Bakersfield Police Investigating Glenwood Gardens After Woman Refused CPR, Died,” *23ABC News*, March 4, 2013, <http://www.turnto23.com/news/local-news/bakersfield-police-investigating-glenwood-gardens-after-woman-refused-cpr-died>.
- 87 Americans are abandoning our values: See Robert B. Denhardt, *In the Shadow of Organization* (Lawrence: Regents Press of Kansas, 1981), 32: “We originally sought to construct social institutions that would reflect our beliefs and values; now there is a danger that our values may reflect our institutions. Here we encounter a most serious problem: as we continue to permit organizations to structure our lives, rather than vice-versa, we may become locked in their grasp.”
- 87 [Alameda firefighters]: Angela Hill, “Man Drowns After Walking Fully Clothed into Bay off Alameda Beach,” *Oakland Tribune*, May 29, 2011, http://www.insidebayarea.com/news/ci_18172320. See also Alan Wang, “Alameda Police, Firefighters Watch as Man Drowns,” KGO-TV (San Francisco, CA), May 30, 2011, http://abclocal.go.com/kgo/story?section=news%2Flocal%2Ffeast_bay&id=8161285; CNN, “Authorities Make Changes After First Responders Watch Man Drown,” CNN.com, June 1, 2011, <http://www.cnn.com/2011/US/06/01/california.drowning/index.html>; and Associated Press, “Firefighters Watch Man Drown Himself in San Francisco Bay,” *New York Post*, June 1, 2011, http://www.nypost.com/p/news/national/firefighters_watch_man_drown_himself_COyFnjoaSEctUKIvgha1yL (“The incident yesterday was deeply regrettable,” [interim Alameda (CA) Fire Chief Mike D’Orazi] said. ‘But I can also see it from our firefighters’ perspective. They’re standing there wanting to do something, but they are handcuffed by policy at that point.’”).
- 87 “Well, if I was off duty”: Wang, “Alameda Police,” *supra* note for page 87.
- 88 moral tapestry of a strong culture: See Lord John Fletcher Moulton, “Law and Manners,” *Atlantic Monthly*, July 1924. A British minister during the First World War, Lord Moulton described the vital role of the “domain of Manners,” a world of public values that exists between conduct that is legally mandated and conduct that is merely a matter of personal preference: “Between ‘can do’ and ‘may do’ ought to exist the whole realm which recognizes the sway of duty, fairness, sympathy, taste, and all the other things that make life beautiful and society possible.”
- 88 “Above all, laws work best”: Amitai Etzioni, “Social Norms: Internalization, Persuasion, and History,” *Law & Society Review* 34, no. 1 (2000): 165.
- 88 “law floats in a sea of ethics”: Earl Warren, address at the Jewish Theological Seminary of America Annual Awards Dinner (November 11, 1962), quoted in Fred J. Cook, “The Corrupt Society,” *Nation* 196 (1963): 453, 454.
- 89 The only purpose of government: Brian Z. Tamanaha, “How an Instrumental Rule of Law Corrodes the Rule of Law,” *DePaul Law Review* 56 (2007): 14: “A constant refrain in the history of the rule of law ideal is that the law is, and should be, for the common good.” See Cardozo, *Nature of the Judicial Process*, *supra* note for page 65, p. 66: “The final cause of law is the welfare of society.” See also Tocqueville, *Democracy in America*, *supra* note for page 24, vol. 1, p. 91 footnote: “The end of good government is to ensure the welfare of a people and not merely to establish order in the midst of its misery.”
- 89 The touchstone of every public choice: The validity of any claimed right, philosopher Joseph Raz observes, hinges on whether “by protecting the right of the individual one protects the common good.” Raz, “Rights and Individual Well-Being,” in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon, 1995), 53. See also John Stuart Mill, *On Liberty*, ed. David Bromwich and George Kateb (New York: Penguin, 2007), 16: “The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good . . . is not sufficient warrant.” For a discussion of the moral validity of assertions of individual rights, see Howard, *Life without Lawyers*, *supra* note for page 81, 49–67. For a discussion of the moral validity of laws, see Part II herein.
- 89 “a veil of ignorance”: John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971).
- 90 profoundly anti-majoritarian: Brian Z. Tamanaha, “The Dark Side of the Relationship between the Rule of Law and Liberalism,” *New York University Journal of Law & Liberty* 3, no. 3 (2008): 516–47.
- 90 dissuade rational people from acting badly: See Hardin, “Street-Level Epistemology,” *supra* note for page 55. See also Jean Cohen, “Trust, Voluntary Association and Workable Democracy,” in *Democracy and Trust*, ed. Mark Warren (Cambridge: Cambridge University Press, 1999), 222: “If one knows one can expect impartiality from a judge, care and concern from a doctor, protection from

police, concern for the common good from the legislatures, and so on, then one can develop confidence (instead of cynicism) that shared norms and cultural values will orient the actions of powerful others.”

- 91 Even when disputes have metastasized: Oliver Wendell Holmes, “Codes, and the Arrangement of the Law,” *American Law Review* 5, no. 1 (October 1870): 1.
- 91 “designed to alleviate individual need”: Simon, “Legality, Bureaucracy, and Class,” *supra* note for page 83, p. 1269. *Ibid.*, p. 1242: “The answer to the question of trust is that public officials can be trusted to adhere to applicable standards when they are socialized through professional training to do so, when they are active participants in a vital professional culture, when they are subject to pressure from peers to do so, when they have a duty to justify their decisions to citizens affected by them, and when they receive relatively high status and reward.” See also Edward S. Corwin, as quoted in John A. Rohr, “Professionalism, Legitimacy, and the Constitution,” *Public Administration Quarterly* 8, no. 4 (Winter 1985): 401: “The world of administration . . . reposes in great measure on the loyalty and competence of individual bureaucrats, qualities that thrive best in conditions making for independence of judgment and pride in a job well done.” *Ibid.*, 416: “Without some sort of principled autonomy, professionalism in Public Administration is no profession at all.”
- 92 remarkably consistent job: See M. P. Baumgartner, “The Myth of Discretion,” in *The Uses of Discretion*, ed. Keith Hawkins, Oxford Socio-Legal Studies (Oxford: Clarendon, 1992), 129: Leaving aside a few hot-button issues, American judges of different ideological bent generally rule in ways, as one study found, that are “remarkably patterned and consistent.”
- 92 forest rangers: Herbert Kaufman, *The Forest Ranger: A Study in Administrative Behavior*, 2nd ed. (Washington, DC: RFF Press, 2006; originally published 1960 by Johns Hopkins Press).
- 92 the importance of professionalism: Edmund L. Andrews, “Former Bush Aide Isn’t Keeping to the Script,” *New York Times*, August 23, 2004, <http://www.nytimes.com/2004/08/23/politics/23budget.html>, quoting Douglas Holtz-Eakin. This story, and the role of professionals, is set forth in Michael Schudson, “The Trouble with Experts—And Why Democracies Need Them,” *Theory and Society* 35, no. 5/6 (December 2006): 491–506.
- 93 “unique potential of children”: Lipsky, *Street-Level Bureaucracy*, *supra* note for page 22, p. 15.
- 93 [social challenges require active participation]: See Havel, *Art of the Impossible*, *supra* note for page 37, pp. 147–48: “A modern democratic state cannot consist merely of civil service, political parties, and private enterprises. It must offer citizens a colorful array of ways to become involved, both privately and publicly, and must develop very different types of civic coexistence, solidarity, and participation. In a richly layered civil society, a vital and inimitable role is played not only by the organs of administration and nonprofit organizations, but also by the churches, the trade unions, the widest possible array of civic associations, groups, and clubs. A genuine civil society is, moreover, the best insurance against various types of social tension and political or social upheavals: it makes it possible for various problems to be solved immediately, when and where they arise, before they can turn septic somewhere under the skin of society.”
- 93 Reducing bullying in schools: Jessie Klein, “Opinion: Victim or Bully? Schools Need to Create More Choices,” *Newsday*, April 18, 2010, <http://www.newsday.com/opinion/oped/opinion-victim-or-bully-schools-need-to-create-more-choices-1.1866593>.
- 93 “subsidiarity”: See generally Domènec Melé, “Exploring the Principle of Subsidiarity in Organisational Forms,” *Journal of Business Ethics* 60, no. 3 (September 2005): 293–305. See also Pope John Paul II (pope), “*Centesimus Annus*”: Encyclical Letter . . . ,” May 1, 1991, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html: “A community of a higher order should not interfere in the internal life a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.” In addition, see Adam Smith, “Book IV, Chapter V,” in *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (Chicago: University of Chicago Press, 1976), 38: “But the law ought always to trust people with the care of their own interest, as in their local situations they must generally be able to judge better of it than the legislator can do.” See also discussion in Fleischacker, *Third Concept of Liberty*, *supra* note for page 56, p. 131.
- 93 It is now a core tenet: Subsidiarity has been formally adopted as a governing principle of the European Union. See Article 5(3) of the Maastricht Treaty, which established the EU in 1992, as amended by the 2007 Treaty of Lisbon. For a discussion of Cameron’s “Big Society,” see Matt Chorley, “The Pub

- Society: Cameron Relaunches Big Society with £250million Fund to Help Locals Rescue Bars, Shops and Swimming Pools,” *Daily Mail*, June 6, 2013, <http://www.dailymail.co.uk/news/article-2336913/David-Cameron-relaunches-Big-Society-250m-fund-let-locals-rescue-bars-shops-swimming-pools.html>. For the communitarian movement, see the Institute for Communitarian Policy Studies’ website: <http://www.gwu.edu/~ccps>. A more detailed discussion of this idea can be found in Amitai Etzioni, *The New Golden Rule* (New York: Basic Books, 1996); Benjamin R. Barber, *A Place for Us* (New York: Hill and Wand, 1998), 70: “The true enemy of civil society is, in fact, neither government nor corporations per se, but bureaucracy, dogmatism, unresponsiveness, totalism, bloat, unaccountability, absolutism, and inertia wherever they are found.”
- 93 “fresh thinking and flexible action”: Lipsky, *Street-Level Bureaucracy*, *supra* note for page 22, p. 161. See also Jeremy Waldron, “The Concept and the Rule of Law,” *Georgia Law Review* 43, no. 1 (Fall 2008): 23: “A mode of governing people that treats them with respect,” legal philosopher Jeremy Waldron explains, requires allowing them to present “a view or perspective of their own to present on the application of the norm to their conduct and situation.”
- 94 The overt paternalism of the welfare system: Simon, “Legality, Bureaucracy, and Class,” *supra* note for page 83, pp. 1198, 1202, 1207.
- 94 “Just give us responsibility”: Richard Buery, interview by author, 2013.
- 95 Subsidiarity should be a core value: See Peter F. Drucker, “Individual Freedom and Effective Government in a Society of Super-powers,” in Drucker et al., *Power and Democracy in America* (Notre Dame, IN: University of Notre Dame Press, 1961), 13: “Effective national government . . . demands that local tasks be done locally; today they fall by default to the national government where they can only be done badly, but also where their very existence inhibits true policy, true government and national leadership.” See also Charles F. Sabel and William H. Simon, “Minimalism and Experimentalism in the Administrative State,” *Georgetown Law Journal* 100, no. 1 (2011): 90: “Tailoring also requires an understanding of local context. A child welfare worker putting together a plan for an obese child may be able to include a bicycle in the plan if she knows that the family’s church can be persuaded to come up with one if credibly assured that it will fill an important need. Police dealing with a high-crime neighborhood can be more effective if they learn from local residents that a poorly maintained house from which drugs are sold is a magnet for nonresident deviants.”
- 95 “moderating effect of community involvement”: Nonet and Selznick, *Law and Society in Transition*, *supra* note for page 20, p. 15.
- 95 because people inevitably disagree: Isaiah Berlin, “The Pursuit of the Ideal,” in Berlin, *Proper Study of Mankind*, *supra* note for page 27, p. 15.

History of Human Choice in American Law

- 96 judges “do not make law”: See Harlan F. Stone, *Law and Its Administration* (New York: Columbia University Press, 1915), 22–23; and Zechariah Chafee Jr., “Do Judges Make or Discover Law?” *Proceedings of the American Philosophical Society* 91, no. 5 (1947): 405–20.
- 97 “play any tune upon it they pleased”: William Manning, as quoted in Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828* (Chapel Hill: University of North Carolina Press, 1999), 229.
- 97 “abolish all inferior governments”: Brutus, “Letter XI,” in Hamilton, Madison, and Jay, *Federalist*, 504–5.
- 98 “to the public detriment”: James Madison, “No. 41,” in Hamilton, Madison, and Jay, *Federalist*, 195.
- 98 [anti-federalist quotations]: See Howe, *Language and Political Meaning*, *supra* note for page 16, pp. 206–7.
- 98 “unavoidable inaccuracy”: James Madison, “No. 37,” in Hamilton, Madison, and Jay, *Federalist*, 172.
- 99 “It is a great mistake”: John Francis Mercer, as quoted in Howe, *Language and Political Meaning*, *supra* note for page 16, p. 218.
- 99 “a mere machine”: Thomas Jefferson, as quoted in Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (Oxford: Oxford University Press, 2009), 403.
- 99 “the parent of new perplexities”: St. George Tucker, as quoted in Wood, *Empire of Liberty*, *supra* note for page 99, p. 405.
- 99 [Mather]: These quotations come from Wood, *Empire of Liberty*, *supra* note for page 99, p. 405.

- 100 The legal philosophy of laissez-faire: For a discussion of philosophy and Supreme Court rulings, see Heineman, *Authority*, *supra* note for page 77, pp. 91–107.
- 100 “the great objection”: James Kent, Chancellor of New York, as quoted in Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, MA: Belknap Press, 1977), 347.
- 100 “All barrels”: William J. Novak, “Common Regulation: Legal Origins of State Power in America,” *Hastings Law Journal* 45 (1994): note 48.
- 101 A 1911 Wisconsin law: Friedman, “Legal Rules,” *supra* note for page 76, pp. 794–95.
- 101 Sherman Antitrust Act: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”
- 101 “mechanical jurisprudence” and “traffic officers”: Roscoe Pound, “Mechanical Jurisprudence,” *Columbia Law Review* 8 (1908): 605; Roscoe Pound, “Law and Social Change,” *Indiana Law Journal* 3, no. 3 (1927): article 1.
- 101 “No discretion as to scope”: Ernst Freund, “The Law of Administration in America,” *Political Science Quarterly* 9, no. 3 (September 1894): 403, 410.
- 102 “faithless administrators”: Daniel R. Ernst, “Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932,” *Georgetown Law Faculty Publications and Other Works* 18, p. 34, <http://scholarship.law.georgetown.edu/facpub/18>.
- 102 “The bestowal of administrative discretion”: *Ibid.*, 29, quoting John Henry Wigmore.
- 102 “opened the doors to arbitrariness”: *Ibid.*, 30, quoting Felix Frankfurter.
- 102 “‘men bred to the facts’”: *Ibid.*, 36, quoting James Landis.
- 102 Brownlow report: *Report of the President’s Committee on Administrative Management* (Washington, DC: US Government Printing Office, 1937), 65.
- 103 The old guard kept pushing back: Reuel E. Schiller, “‘Saint George and the Dragon’: Courts and the Development of the Administrative State in Twentieth-Century America,” *Journal of Policy History* 17, no. 1 (2005): 113. In a 1938 report, the American Bar Association characterized administrative discretion as “a Marxian idea much in vogue now among a type of American writers”; *Report of the Special Committee on Administrative Law*, ABA Reports, publication no. 63 (Washington, DC: American Bar Association, 1938), 339–40. See discussion in George B. Shepherd, “Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics,” *Northwestern University Law Review* 90 (1996): 1591.
- 103 [1946 Administrative Procedure Act]: See Shepherd, “Fierce Compromise,” *supra* note for page 103; and Reuel E. Schiller, “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law,” *Michigan Law Review* 106 (2007): 399–440.
- 104 [Landis report to JFK]: James M. Landis, *Report on Regulatory Agencies to the President-Elect* (Washington, DC: US Government Printing Office, 1960).
- 104 “Nothing is impossible”: The official was James H. Boren, founder of the National Association of Professional Bureaucrats, which I believe is meant to be a parody of such an organization. James H. Boren, “Arcane and Proud of It,” *New York Times*, June 4, 1998, <http://www.nytimes.com/1998/06/04/opinion/arcane-and-proud-of-it.html>. Almost as apt is “the Peters Principle,” invented by *Washington Monthly* founder Charles Peters: “The Peters Principle—take care to distinguish it from the less persuasive Peter Principle—provides that organizations cease to function effectively when employees spend more than 15.8 percent of their time attending meetings or writing memoranda.” Peters, *How Washington Really Works*, *supra* note for page 40, p. 50.
- 104 “‘the most intelligent cannot disturb’”: Kennan, “America’s Administrative Response,” *supra* note for page 46, p. 12. For a history of legal changes since the 1960s, see, for example, Philip K. Howard, “History of American Law since 1968,” in *Oxford Companion to American Law*, ed. Kermit L. Hall (New York: Oxford University Press, 2002), 392–96; John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Harvard University Press, 2004).
- 105 “new property”: Charles A. Reich, “The New Property,” *Yale Law Journal* 73, no. 5 (April 1964): 733–87.
- 105 [Supreme Court expansion of due process]: Howard, “History of American Law,” *supra* note for page 104.
- 105 “an inclusiveness that divides”: Hugh Hecllo, “Sixties Civics,” in *The Great Society and the Hightide of Liberalism*, ed. Sidney M. Milkis and Jerome M. Mileur, *Political Development of the American Nation: Studies in Politics & History* (Amherst: University of Massachusetts Press, 2005), 65.

- 106 [taking over Kansas City schools]: Charles Chieppo, “School Reform That Money Can’t Buy,” *Governing.com*, September 27, 2011, <http://www.governing.com/blogs/bfc/kansas-city-desegregation-school-reform-accountability-performance.html>.
- 106 [Boston busing]: Eggers and O’Leary, *If We Can Put*, *supra* note for page 42, pp. 82–85. See also Katherine Q. Seelye, “Decades after Clashes, Boston Again Debates Busing,” *New York Times*, October 4, 2012.
- 106 “Choosing among values”: Charles Wyzanski, “Equal Justice through Law,” *Tulane Law Review* 47 (1973): 951–960.
- 107 “legal process movement”: The book that articulated the new approach was Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge and Philip P. Frickey (Westbury, NY: Foundation Press, 1994).
- 107 “greatest inventions of modern government”: Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Urbana: University of Illinois Press, 1979), 65.
- 107 *Federal Register* nearly quadrupled in length: Ten Thousand Commandments (<http://www.tenthousandcommandments.com>) has compiled a historical table of the size of the *Federal Register*: Clyde Wayne Crews Jr., *An Annual Snapshot of the Federal Regulatory State*, 20th Anniversary Edition, 2013, <http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202013.pdf>.
- 107 Forest rangers used to have: See, for example, Kaufman, *Forest Ranger*, *supra* note for page 92. See also Al Gore, *Common Sense Government* (New York: Random House, 1995) (introduction by Philip K. Howard).
- 108 “contrast[ing] legality with discretion”: Simon, “Legality, Bureaucracy, and Class,” *supra* note for page 83, p. 1223.
- 108 Lawsuits exploded: George Priest, “The Modern Transformation of Civil Law,” *Buffalo Law Review* 54 (2006): 957; Philip K. Howard, *The Collapse of the Common Good* (New York: Ballantine, 2002), 3–70; Walter Olson, *The Litigation Explosion* (New York: Truman Talley, 1992).
- 109 *Chevron* decision: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
- 109 rulings encouraging federal judges: See discussion in Philip K. Howard, “Making Civil Justice Sane,” *City Journal*, Spring 2006.
- 109 “distrust of motive”: Hecló, “Sixties Civics,” *supra* note for page 105, p. 64. *Ibid.*, 70: “In the latter years of Ronald Reagan’s presidency, negotiations with the Soviet Union popularized the motto ‘trust but verify.’ Sixties civics represented the mirror image of that idea: distrust but demand. On reflection, the former appears a hopeful view, the latter a rather resigned morbidity.”
- 109 One high-ranking . . . official: See Howard, *Death of Common Sense*, *supra* note for page 34, pp. 71–73 (discussing the resignation of Budget Director Philip Michael).
- 109 prohibition on “direct dealing”: Stephen Goldsmith, interview by author, 2011.
- 109 [definitions in the Affordable Care Act]: “High school” is from 42 USC § 18201(4) (2010); see “42 USC § 18201—Definitions,” Legal Information Institute, Cornell University Law School, <http://www.law.cornell.edu/uscode/text/42/18201>, accessed June 2013. The “didactic” language comes from Affordable Care Act, Pub. L. No. 111-148, § 5505, 124 Stat. 119, 591 (2010); see “Compilation of Patient Protection and Affordable Care Act,” Office of Legislative Council, May 2010, <http://housedocs.house.gov/energycommerce/ppacacon.pdf>. The X-ray language is at 42 USC § 1395w-4 (b)(4)(B) (2010); see “42 USC § 1395w-4—Payment for Physicians’ Services,” Legal Information Institute, Cornell University Law School, <http://www.law.cornell.edu/uscode/text/42/1395w-4>, accessed June 2013.

Government by Real People, Not Theories

- 110 everyone follows a theory slavishly: Jonathan Swift, *Gulliver’s Travels*, ed. Albert Rivero (New York: W. W. Norton, 2002), 146–63.
- 111 “rules announced and fixed beforehand”: Hayek, *Road to Serfdom*, *supra* note for page 15.
- 112 recertified for land-based rescue: Wang, “Alameda Police,” *supra* note for page 87.
- 112 “Keep your government hands off my Medicare”: Philip Rucker, “Sen. DeMint of S.C. Is Voice of Opposition to Health Care Reform,” *Washington Post*, July 28, 2009.

- 112 “Does anybody govern?”: Samuel P. Huntington, “The United States,” in Crozier et al., *Crisis of Democracy*, 92.
- 113 rarely provable: See Tamanaha, *On the Rule of Law*, *supra* note for page 26, p. 123: “The idea of ‘the rule of law, not man,’ powerful as it is, has been forever dogged by the fact that laws are not self-interpreting or applying.”
- 113 “mere obedience to a rule”: Benjamin N. Cardozo, *The Growth of the Law* (New Haven, CT: Yale University Press, 1924), 87.
- 113 “No scientist”: Jacques Barzun, *A Stroll with William James* (Chicago: University of Chicago Press, 1983), 162. In *The Moral Life of Schools*, Professor Philip Jackson and colleagues emphasized the intangible factors that distinguished good from bad teachers; Jackson, Boostrom, and Hansen, *Moral Life of Schools*, *supra* note for page 53, p. 48: “What we reject about the words objective and subjective is the implication that one refers to something real and the other does not.”
- 113 “look to custom”: Cardozo, *Nature of the Judicial Process*, *supra* note for page 65, p. 60.
- 113 “moral risk cannot be avoided”: Isaiah Berlin, “The Pursuit of the Ideal,” in Berlin, *Proper Study of Mankind*, *supra* note for page 27, p. 15.
- 114 Authority “is lost when a person betrays”: Havel, *Art of the Impossible*, *supra* note for page 37, p. 201.
- 114 But authority is also essential in a crowded society: See Yves Simon, *Philosophy of Democratic Government* (Notre Dame, IN: University of Notre Dame Press, 1993), 71: “Autonomy renders authority necessary and authority renders autonomy possible.” See also William A. Frank, “Authority and the Common Good in Democratic Governance,” *Review of Metaphysics* 60, no. 4 (June 2007): 823–24: “The need for authority responds as much to the plenitude of human genius and undeterminable richness of possibilities for action,” Professor Frank observes, as to deficiencies in human behavior. “Not every defeat of authority,” Justice Robert H. Jackson observed, “is a gain for individual freedom.” Jackson, “The Task of Maintaining Our Liberties,” *American Bar Association Journal* 39 (November 1953): 961–65.
- 114 individual freedom is weak tea: John H. Schar, “Liberty/Authority/Community in the Political Thought of John Winthrop,” *Political Theory* 19, no. 4 (November 1991): 512: “Those who think that deliverance from all authority means full human emancipation have not, perhaps, thought the matter through, for to be without authority in this world is to be insignificant in this world. It means you do not matter to anyone.” See also Tocqueville, *Democracy in America*, *supra* note for page 24, vol. 1, p. 250: “If an American were condemned to confine his activity to his own affairs, he would be robbed of one half of his existence.”
- 115 But joint endeavors: See Niebuhr, “Children of Light,” *supra* note for page 86, p. 162: “The community requires liberty as much as does the individual, and the individual requires community more than bourgeois thought comprehended.” David Hume discussed the need for authority to make common choices this way: “Two neighbors may agree to drain a meadow which they possess in common . . . But ’tis very difficult and, indeed, impossible, that a thousand persons shou’d agree in any such action; it being difficult for them to concert so complicated a design, and still more difficult for them to execute it; while each seeks a pretext to free himself of the trouble and expence; and wou’d lay the whole burden on others. Political society easily remedies both these inconveniences . . . Thus bridges are built; harbours open’d; ramparts rais’d; canals form’d; fleets equip’d; and armies disciplin’d.” David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge and P. H. Nidditch, 2nd ed. (Oxford: Clarendon, 1978), 538–39.
- 115 “simultaneous recession of both freedom and authority”: Arendt, “What Is Authority?” *supra* note for page 63, p. 100. See also *Ibid.*, 97: “The liberal writer is apt to pay little attention” to the “distinction between legitimate and illegitimate power . . . because of his conviction that all power corrupts and that the constancy of progress requires constant loss of power, no matter what it’s origin may be.”
- 115 No authority “means to be confronted anew”: *Ibid.*, 141. The classic study of a culture without authority or public morality is Edward Banfield, *The Moral Basis of a Backward Society* (New York: Free Press, 1958). Professor Banfield studies a village in southern Italy in which community norms have all but disappeared, and there is no mechanism for action in the common good. It is a community in which there are “no leaders and no followers,” and no one gets what they view as their “fair share” (*ibid.*, 97–98).
- 115 a kind of marketplace for good ideas: “The rule that functions,” as Justice Cardozo put it, “will produce a title deed to recognition.” Cardozo, *Nature of the Judicial Process*, *supra* note for page 65, pp. 102–3.

- 115 “Authority implies an obedience”: Arendt, “What Is Authority?” *supra* note for page 63, p. 474.
- 115 “the hierarchy itself”: *Ibid.*, 463. See Cardozo, *Nature of the Judicial Process*, *supra* note for page 65, p. 135: “You may say there is no assurance that judges will interpret the mores of the day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere.”
- 116 the Sovern Commission: State-City Commission on Integrity in Government. *Report and Recommendations Relating to City Procurement and Contracts* (November 19, 1986), 67.
- 116 The safest system: See generally Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (Chicago: University of Chicago Press, 1996).
- 116 “escaping from the old ones”: John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (New York: Harcourt, Brace & World, 1965), viii. John Schaar describes the problem of old ideas this way: “Perhaps we really are in crisis, but mistake its true nature. The crisis may be in our whole way of seeing and being in the world. But if that is so, in the very nature of things we would be the last to know it, for we are the crisis.” John H. Schaar, *Legitimacy in the Modern State* (New Brunswick, NJ: Transaction, 1981), 333.
- 116 Wittgenstein: For a discussion of Wittgenstein and legal indeterminacy, see Margaret Jane Radin, “Reconsidering the Rule of Law,” *Boston University Law Review* 69 (July 1989): 1–31; and Daniel G. Stroup, “Law and Language: Cardozo’s Jurisprudence and Wittgenstein’s Philosophy,” *Valparaiso University Law Review* 18, no. 2 (Winter 1984): 371.
- 116 “Words do not determine meaning”: Waldron, “Vagueness in Law,” *supra* note for page 70, p. 510.
- 117 “all other goals are useless”: Drucker, “Individual Freedom and Effective Government,” *supra* note for page 95, p. 11.
- 117 “not a magic that somehow absolves us”: Jeremy Waldron, “The Rule of Law and the Importance of Procedure,” in *Getting to the Rule of Law*, ed. James E. Fleming, Nomos: Yearbook of the American Society for Political and Legal Philosophy 50 (New York: New York University Press, 2011), 25.
- 118 “unreasonable searches and seizures”: U.S. Const. amend. IV.
- 118 Hayek recanted: Friedrich A. Hayek, *Law, Legislation and Liberty*, vol. 1 (Chicago: University of Chicago Press, 1973), 116: “Although legislation can certainly increase the certainty of the law on particular points, I am now persuaded that this advantage is more than offset if its recognition leads to the requirement that *only* what has thus been expressed in statutes should have the force of law. It seems to me that judicial decision may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law.”
- 118 society without responsibility: The classic book on how freedom from responsibility might be more attractive than freedom itself is Erich Fromm’s *Escape from Freedom* (New York: Henry Holt, 1994). Management expert Warren Bennis has also written about the self-destructive attractions of bureaucracy; see Warren Bennis, *The Essential Bennis* (San Francisco: Jossey-Bass, 2009), 162: “Bureaucracies are beautiful mechanisms for the evasion of responsibility and guilt.”
- 119 “government is the shepherd”: Tocqueville, *Democracy in America*, *supra* note for page 24, vol. 2, p. 319.

Part II: Restoring Human Control of Democracy

Democracy without Leaders

- 123 cotton subsidies: Cotton farmers received \$23,905,227,930 in subsidies between 2001 and 2010, for an average of \$2.39 billion a year. See Environmental Working Group <http://farm.ewg.org/progdetail.php?fips=00000&progcode=cotton>.
- 123–25 dispute with Brazil: See Chana Joffe-Walt, “Why U.S. Taxpayers Are Paying Brazilian Cotton Growers,” NPR, November 9, 2010, <http://www.npr.org/blogs/money/2011/01/26/131192182/cotton>; Burleigh Leonard, “Farm bill delay is exacerbating Brazil-U.S. cotton dispute,” *The Hill*, October 17, 2012, <http://thehill.com/blogs/congress-blog/foreign-policy/262577-farm-bill-delay-is-exacerbating-brazil-us-cotton-dispute>; Michael Grunwald, “Why the U.S. Is Also Giving Brazilians Farm Subsidies,” *Time*, April 9, 2010, <http://www.time.com/time/nation/article/0,8599,1978963,00.html>. See presentation by Jonathan Rauch at Common Good’s “Ending Government Paralysis” forum at the

- National Constitution Center, Philadelphia, PA, June 15, 2010: <http://vimeo.com/15410114>. See also Robert Samuelson, “Why (sigh!) farm subsidies survive,” *Washington Post*, June 13, 2013, http://www.washingtonpost.com/opinions/robert-j-samuelson-farm-subsidies-survive-in-any-weather/2013/06/13/e849d392-d445-11e2-8cbe-1bcbee06f8f8_story.html.
- 126 Special education as an open-ended right: See Philip K. Howard, *Life Without Lawyers*, supra page 80, pp. 49–55.
- 126 “almost like reverse discrimination”: Romesh Ratnesar, “Lost in the Middle,” *Time Magazine*, June 24, 2001, <http://content.time.com/time/magazine/article/0,9171,139938,00.html>.
- 127 Special ed now consumes over 25 percent: There is no government data on total national special ed costs, but 25 percent is a conservative estimate based on data points and interviews with special ed experts. Budgets of individual school districts suggest the number is often much higher. For example, in the mid-1990s, New York City was spending over 25 percent. See Ross Sandler and David Schoenbrod, *Democracy by Decree*, supra page 55, pp. 88–89, and costs have only increased since then. For example, six percent of the total New York City school budget is now spent on a new category of special ed, for pre-kindergarten students. See David M. Halbfinger, “Cost of Prekindergarten Special Education is Soaring,” *New York Times*, June 5, 2012, <http://www.nytimes.com/2012/06/06/education/prekindergarten-costs-in-new-york-city-have-doubled-in-6-years.html?pagewanted=all>. An illuminating 2013 exposé of special ed in Minnesota suggested that the total was about 30 percent (\$22,144 per student for about 14% of students in special ed, and \$8,486 per student for the other 86% of students). See Jeffrey Meitrodt and Kim McGuire, “Minnesota’s Loose Rules Boost Enrollment in Special Ed,” *Star Tribune*, October 13, 2013, <http://www.startribune.com/local/west/227532921.html?page=1&c=y>; Christopher Magan, “Special Education Gets Fresh Look in Minnesota Schools,” *Pioneer Press*, February 11, 2012, http://www.twincities.com/ci_19939411. A 2010 retrospective study of nine school districts from nine different states (including only one large urban area, Los Angeles) found the average special ed expenditure to be 21 percent, with one district’s special ed expenditures at 30 percent for one year. See Juan Diego Alonso and Richard Rothstein, “Where Has the Money Been Going?: A Preliminary Update,” Economic Policy Institute Briefing Paper #281, October 28, 2010, pp. 5, 11, <http://files.eric.ed.gov/fulltext/ED516801.pdf>. This study only includes resources dedicated to special ed and not all costs associated with providing special ed services. Education experts I’ve talked to also believe that this and other limited studies of special education costs generally undercount the true costs.
- 127 “EPA is hobbled”: National Academy of Public Administration, *Setting Priorities, Getting Results: A New Direction for the Environmental Protection Agency* (Washington, DC: The Academy, 1995), 1. See discussion in OECD, *Regulatory Reform in the United States* (Paris: OECD, 1999), 48.
- 127 “excessive detail, legalism, and rigidity”: OECD, *Regulatory Reform*, supra note for page 127, p. 128.
- 128 There are eighty-two teacher training programs: US Government Accountability Office, *Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars, and Enhance Revenue*, GAO-11-318SP (Washington, DC: GAO, 2011), 144–50, <http://www.gao.gov/new.items/d11318sp.pdf>. See also Ed O’Keefe, “GAO: Overlapping Government Programs Cost Billions,” *Washington Post*, February 28, 2012, http://www.washingtonpost.com/blogs/federal-eye/post/gao-overlapping-government-programs-cost-billions/2012/02/27/gIQAnSPdeR_blog.html.
- 128 The US ranks behind sixteen other countries: International Finance Corporation, “Making a Difference for Entrepreneurs,” *Doing Business* 2011, http://www.doingbusiness.org/~/_/media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf. See discussion in Ferguson, *Great Degeneration*, supra note for page 42, pp. 101–2.
- 128 required forty-seven approvals: “Bayonne Bridge Navigation Clearance Project—Updated Permit/Approvals List,” revised April 16, 2012. See also references at page 11.
- 128 small businesses . . . find themselves whipsawed: According to a 2010 report from the Small Business Administration, regulation is 80 percent more costly to small employers than to large employers: Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, SBAHQ-08-M-0466 (SBA Office of Advocacy, 2010), [http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\).pdf](http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf).
- 128 wrap her home in red tape: “Exclusive: Long Beach Woman ‘Fed Up’ with Feds Wraps Storm-Damaged Home in Red Tape,” *CBS New York*, February 5, 2013,

- <http://newyork.cbslocal.com/2013/02/05/exclusive-long-beach-woman-fed-up-with-feds-wraps-storm-damaged-home-in-red-tape>.
- 129 “a large and needless deterrent”: Matthew Yglesias, “Starting a Business Is a Huge Pain,” *Slate*, February 1, 2013, http://www.slate.com/articles/business/small_business/2013/02/starting_my_small_business_cities_make_it_incredibly_hard_to_get_a_business.sin_gle.html. Blackstone weighed in on the evil of regulation for its own sake: “Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty.” William Blackstone, *Commentaries on the Laws of England in Four Books* (Philadelphia: Robert Bell, 1771), 126.
- 129 “We’ve got fifty state regulators”: Amy Friend, as quoted in Robert G. Kaiser, *Act of Congress: How America’s Essential Institution Works, and How It Doesn’t* (New York: Knopf, 2013), 193.
- 129 “one-stop shopping”: See OECD, “Implementing Administrative Simplification in OECD Countries,” <http://www.oecd.org/mena/governance/37026688.pdf>, accessed May 2013.
- 129 [Germany’s administrative code]: “Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*),” § 75 (1). English translation (“Section 75: Legal Effects of Planning Approval”) available at <http://www.iuscomp.org/gla/statutes/VwVfG.htm>, accessed July 2013.
- 129 [India’s bureaucracy]: Nandita Bose, “Held Up by Red Tape and Graft,” *New York Times*, May 6, 2013, <http://www.nytimes.com/2013/05/07/business/global/07iht-inside07.html?pagewanted=all&r=0>.
- 130 “an 18-foot chart”: See discussion in OECD, *Regulatory Reform*, *supra* note for page 127, p. 42.
- 130 [Common Good inventory of school bureaucracy]: Danielle Rhoades, “New Study Reveals How the Burden of Law Is Paralyzing America’s Schools” (press release), *Common Good*, November 29, 2004; David Andretta, “Regs Stifle Schools, Study Says,” *New York Post*, November 30, 2004, http://www.nypost.com/p/news/item_OrHlysXVYvje1KNTrTwopM. See also Melissa Junge and Sheara Krvaric, “Federal Compliance Works against Education Policy Goals,” *Education Outlook* no. 6 (July 2011): 4, <http://www.aei.org/files/2011/07/28/EDU-2011-06-g.pdf>. “Title I alone contained 588 discrete compliance requirements.”
- 130 [New York City civil service]: Stephen Goldsmith and Stephen Dobrowsky, separate interviews by author, 2011; and review of union contracts. The clerical workers union contract, for example, contains this language: “Where new equipment . . . is installed . . . the Employer agrees to reopen this Agreement for the sole purpose of negotiating with the Union on the practical effect, if any, such equipment has on the affected employees.” The culture in many public offices is divorced from the idea of public duty. Charlie Peters tells the story of the regional head of FEMA who went on holiday the day following the 1989 California earthquake because, as he explained, he had nonrefundable plane tickets. Charles Peters, *How Washington Really Works*, *supra* note for page 40, p. 59. An acquaintance who ran a humanitarian emergency relief department in the Pentagon was surprised when, soon after a large bombing in Kosovo, most of her staff walked off the job. When she asked how they could leave at such a time, they responded matter-of-factly that their workday ended at five o’clock. The absence of accountability, whether formal or informal, inevitably corrodes the culture of any joint endeavor. See sources cited in Philip K. Howard, “The Freedom to Judge Others,” in Howard, *Life without Lawyers*, *supra* note for page 81, pp. 122–49. See also Marshall Dimock, “Bureaucracy Self-examined,” in *Reader in Bureaucracy*, ed. Robert K. Merton (New York: Macmillan, 1952), 400: “When an individual in an organization feels utterly secure, the sense of struggle which produces much of the world’s best effort is lost. Lassitude results. Laziness gradually translates itself into managerial slothfulness, one of bureaucracy’s worst faults.”
- 131 sweetheart pensions: See Daniel DiSalvo, “The Trouble with Public Sector Unions,” *National Affairs*, Fall 2010, <http://www.nationalaffairs.com/publications/detail/the-trouble-with-public-sector-unions>; and Philip K. Howard, “The Public-Union Albatross,” *Wall Street Journal*, November 9, 2011, <http://online.wsj.com/article/SB10001424052970204190704577024321510926692.html>. See also Marc Lacey, “School Official Finds Retirement Is Just a Higher Pay Grade,” *New York Times*, April 1, 2011, <http://www.nytimes.com/2011/04/02/us/02superintendent.html> (a school superintendent in Phoenix retires with a \$100,000 pension and is rehired the next day with his \$150,000 salary).
- 131 [public service in other countries]: See John Halligan, ed., *Civil Service Systems in Anglo-American Countries* (London: Edward Elgar, 2004). For a summary of civil service rules in European countries, see DGAFP (Direction Générale de l’Administration et de la Fonction Publique),

- “Administration and the Civil Service in the EU 27 Member States,” 2008, http://www.fonction-publique.gouv.fr/files/files/publications/etudes_perspectives/Administration_and_the_Civil_service_in_the_27_EU_Member_states.pdf.
- 131 “expulsion of the fittest”: Sam Schwartz, interview by author, 2008.
- 131 “Think of city government as a big bus”: Los Angeles Deputy Mayor Michael Keeley, as quoted in William D. Eggers and John O’Leary, *Revolution at the Roots: Making Our Government Smaller, Better, and Closer to Home* (New York: Free Press, 1995), 150.
- 132 “Is it still the right mission?”: Drucker, *Management*, *supra* note for page 23, p. 164.
- 132 would emerge unscathed: See Richard B. Stewart, “Madison’s Nightmare,” *University of Chicago Law Review* 57, no. 2 (Spring 1990): 342–46.
- 132 “almost lawless passion for lawmaking”: Henry Steele Commager, *The American Mind: An Interpretation of American Thought and Character since the 1880’s* (New Haven, CT: Yale University Press, 1950), 363.
- 132 “will increasingly penalise the United States”: OECD, *Regulatory Reform*, *supra* note for page 127, p. 94.
- 133 “Members of Congress don’t ‘do’ law”: Congressman Jim Cooper, interview by author, 2013.
- 133 “They don’t really understand the issues”: Kaiser, *Act of Congress*, *supra* note for page 129, p. 112.
- 133 [Pelosi’s statement about ACA]: “Pelosi: We Have to Pass Health Care So You Can Find Out What Is in It,” *Real Clear Politics*, March 9, 2010, http://www.realclearpolitics.com/video/2010/03/09/pelosi_we_have_to_pass_health_care_so_you_can_find_out_what_is_in_it.html.
- 133 “an enormous shift in responsibility”: Edward M. Kennedy, *True Compass: A Memoir* (New York: Twelve, 2009), 486. See discussion in Kaiser, *Act of Congress*, *supra* note for page 129, p. 112.
- 134 The internal rules of Congress: See Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (Oxford: Oxford University Press, 2006).
- 134 Campaign finance rules act as mortar: See Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Twelve, 2011); Robert G. Kaiser, *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* (New York: Knopf, 2009).
- 134 Nearly nine out of ten Americans: In January 2013, Gallup found 91 percent of Americans in favor of background checks for firearms purchases: Lydia Saad, “Americans Back Obama’s Proposals to Address Gun Violence,” *Gallup Politics*, January 23, 2013, <http://www.gallup.com/poll/160085/americans-back-obama-proposals-address-gun-violence.aspx>. Sixty-five percent of Americans favored the actual bill proposed: Frank Newport, “Americans Wanted Gun Background Checks to Pass Senate,” *Gallup Politics*, April 29, 2013, <http://www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx>.
- 135 On litigation reform: Meeting by author with a senior Democratic congressman, 2005.
- 135 The power of a small group: See generally Jonathan Rauch, *Government’s End: Why Washington Stopped Working* (New York: PublicAffairs, 1999).
- 135 to protest discrimination against large cars: Peters, *How Washington Really Works*, *supra* note for page 40, p. 36.
- 135 anchored in the status quo: Political leaders are lagging indicators, but they, too, are starting to comprehend the reality of no forward movement. Former Speaker of the House Nancy Pelosi, in 2013, remarked, “This is an environment that is almost rigged, intentionally or not, wittingly or not, rigged so that the status quo just goes on.” Laura Bassett, “Nancy Pelosi: Congress Is ‘Rigged’ to Maintain the Status Quo,” *Huffington Post*, June 5, 2013, http://www.huffingtonpost.com/2013/06/05/nancy-pelosi-congress-rigged_n_3391936.html.
- 137 “A political system that expects failure”: Gerald F. Seib, “Oil Woes Fail to Stir Leadership,” *Wall Street Journal*, June 24, 2008.
- 137 the other side “on the ropes”: Jeffrey Leeds, conversation with author, 2013.
- 137 “they wanted to score political points”: Kaiser, *Act of Congress*, *supra* note for page 129, p. 381.
- 138 the White House could blame Democrats: Interview by author with staffer who wished to remain anonymous, 2005.
- 138 EPA should be a cabinet-level department: E. Donald Elliott (former EPA general counsel), interview by author, 2009.

- 138 “We need to keep the issue for our side”: Ronald Faucheux (former chief of staff to a Democratic senator), interview by author, 2011.
- 138 The shocking humiliations: Philip G. Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007), 324–443.
- 138 Reacting to . . . Simpson-Bowles: Jordan Fabian, “Pelosi: Fiscal Panel Proposal ‘Is Simply Unacceptable,’” *Hill*, November 10, 2010, <http://thehill.com/blogs/blog-briefing-room/news/128701-pelosi-fiscal-panel-proposal-simply-unacceptable>; Philip K. Howard, “One Nation, under Too Many Laws,” *Washington Post*, December 12, 2010.
- 139 “bipartisan conspiracy”: Marshall made this remark in a presentation at a Common Good forum, “Is Leadership Possible,” held at the New York Times Building in New York City, October 20, 2010.
- 139 “an end in itself”: See Kaiser, *Act of Congress*, *supra* note for page 129, p. 51.
- 139 \$1.6 million job: Congressman Jim Cooper, interview by author, 2013. See also Drew Griffin and David Fitzpatrick, “Retiring Congresswoman Leads 2013 Lobbying Revolving Door,” CNN.com, January 22, 2013, <http://ac360.blogs.cnn.com/2013/01/22/retiring-congresswoman-leads-2013-lobbying-revolving-door>.
- 140 “deviant subculture”: Anthony Giddens and Philip W. Sutton define a deviant subculture as one “whose members have values which differ substantially from those of the majority in a society.” Giddens and Sutton, *Sociology*, 7th ed. (Cambridge: Polity Press, 2013), glossary, <http://www.polity.co.uk/giddens7/studentresource/glossary/default.asp#d>.
- 140 The values of government are not congruent with: See Theda Skocpol, *The Missing Middle: Working Families and the Future of American Social Policy* (New York: W. W. Norton, 2000), 141: “Nothing they do there,” a friend of Professor Skocpol’s from Maine said about Washington, “ever makes any difference for people like me.”
- 140 “vetocracy”: Francis Fukuyama, “Oh for a Democratic Dictatorship and Not a Vetocracy,” *Financial Times* (London), November 22, 2011.
- 140 [Affordable Care Act giveaways]: See “42 USC § 280g-15: State Demonstration Programs to Evaluate Alternatives to Current Medical Tort Litigation,” Legal Information Institute, Cornell University Law School, <http://www.law.cornell.edu/uscode/text/42/280g-15>, accessed July 2013.
- 141 “Most members like to duck tough issues”: Congressman Barney Frank, as quoted in Kaiser, *Act of Congress*, *supra* note for page 129, p. 170.
- 142 bad cultures generally must first collapse: See Joseph A. Tainter, *The Collapse of Complex Societies* (Cambridge: Cambridge University Press, 1988). See also Hugh Trevor-Roper, introduction, in Edward Gibbon, *The Decline and Fall of the Roman Empire*, Everyman’s Library (New York: Knopf, 1993), 1:xciv: “Once active virtue is lost in a society it is hard to recover, perhaps impossible without radical social change; and the survival of nations may sometimes depend on the life of one man.”

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- 144 Institutions tend to take a life of their own: The larger an organization, the more resistant it is to change. Michael T. Hannan and John Freeman, “Structural Inertia and Organizational Change,” *Sociological Review* 49, no. 2 (April 1984), 1949–64. See also Paul C. Light, *A Government Ill Executed: The Decline of the Federal Service and How to Reverse It* (Cambridge, MA: Harvard University Press, 2008).
- 144 “All experience hath shewn”: The text of the Declaration of Independence can be found at http://www.archives.gov/exhibits/charters/declaration_transcript.html.
- 144 governments rarely reform themselves: Gibbon attributed Rome’s collapse mainly to the deadening effects of central control. See Hugh Trevor-Roper, introduction, in Gibbon, *Decline and Fall*, *supra* note for page 142, vol. 1, p. xci: “The centralization, the immobility, the monopoly of the Roman Empire had gradually destroyed the pluralism, stifled those ideas, and so progress had been retarded, public virtue had declined, and in the end an inert, top heavy political structure had fallen to external blows which a healthier organism could have survived.” For a survey of social collapse, see Tainter, *Collapse of Complex Societies*, *supra* note for page 142.
- 144 stick-slip phenomenon: Frank M. Baumgartner and Bryan D. Jones, “From There to Here: Punctuated Equilibrium to the General Punctuation Thesis to a Theory of Government Information Processing,” *Journal of Policy Studies* 40, no. 1 (2012); Frank R. Baumgartner and Bryan D.

- Jones, *Agendas and Instability in American Politics*, 2nd ed. (Chicago: University of Chicago Press, 2009).
- 145 “I have a dream”: Martin Luther King Jr., “I Have a Dream” (speech, March on Washington, Lincoln Memorial, Washington, DC, August 28, 1963), <http://www.archives.gov/press/exhibits/dream-speech.pdf>.
- 146 The shift from democracy toward dictatorship: Polybius, *The Histories*, ed. Robin Waterfield and B. C. McGing, Oxford World’s Classics (Oxford: Oxford University Press, 2010), 376, 378. Hannah Arendt viewed bureaucracy, not democracy, as the last stage of the government before it reverted to monarchy. See Arendt, *Human Condition*, *supra* note for page 14, p. 40, describing bureaucracy, or “no-man rule,” as “the last stage of government in the nation state just as one-man rule . . . was its first.”
- 147 School bureaucracy is a fortress: See notes for pages 35–36, *supra*. See also, for example, Bonacorsi, “Union Has Issues,” *supra* note for page 22 (public union files grievance to bar volunteer school crossing guard).
- 147 too expensive to operate small nursing homes: Braithwaite, Makkai, and Braithwaite, *Regulating Aged Care*, *supra* note for page 48, pp. 20–22.
- 147 [development of the Uniform Commercial Code]: See, for example, Lawrence M. Friedman, “Business Law in an Age of Change,” in *American Law in the 20th Century* (New Haven, CT: Yale University Press, 2002), 377–98.
- 148 *Corpus Juris Civilis*: D. J. Osler, “Budaeus and Roman Law,” *Ius Commune* 13 (1985): 195, 201, http://data.rg.mpg.de/iuscommune/ic13_osler.pdf.
- 148 “a kind of cancer”: *Justinian’s Institutes*, trans. Peter Birks and Grant McLeod (Ithaca, NY: Cornell University Press, 1987), 11.
- 148 [Portalis’s recodification of French law]: James R. Maxeiner, “Costs of No Codes,” *Mississippi College Law Review* 31 (2013): 363, 379–80. See *Preliminary Address on the First Draft of the Civil Code*, Canada Department of Justice, <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/code/index.html>, accessed July 2013. Inspired by the success of France’s recodification, many other European countries embarked on similar efforts. See, for example, Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd ed., trans. Tony Weir (Oxford: Clarendon, 1998), 98; and Xavier Blanc-Jouvan, *Worldwide Influence of the French Civil Code, on the Occasion of Its Bicentennial Celebration*, Cornell Law School Berger International Speaker Papers 3, September 27, 2004, http://scholarship.law.cornell.edu/biss_papers/3.
- 148 presided over by Napoleon himself: H. A. L. Fisher, “The Codes,” in *Cambridge Modern History* (New York: MacMillan, 1906), 9:151.
- 148 “It is for the judge and the jurist”: Portalis, quoted in Jean Louis Bergel, “Principal Features and Methods of Codification,” *Louisiana Law Review* 48 (1988): 1073. Napoleon considered the new code his greatest accomplishment. See also *Ibid.*, 1078–79: “While in exile in Saint Helena, Napoleon said, ‘My true glory is not that I have won forty battles. Waterloo will blow away the memory of these victories. What nothing can blow away, what will live eternally is my Civil Code.’”
- 148 [nineteenth-century codification movement]: See, for example, Lawrence M. Friedman, “Procedure and Practice: An Age of Reform,” in Friedman, *A History of American Law*, 3rd ed. (New York: Touchstone, 2005), 293–308; and Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, CT: Greenwood Press, 1981).
- 150 [infrastructure project approvals in Germany]: The Independent Institute for Environmental Issues (Unabhängiges Institut für Umweltfragen, or UfU) reports that in Germany, most proceedings are concluded within twelve months, and even complicated infrastructure projects rarely take more than two years. See “Ablauf des Planfeststellungsverfahrens,” UfU, <http://www.aarhus-konvention.de/einmischen/oeffentlichkeitsbeteiligung/planfeststellungsverfahren/ablauf-planfeststellungsverfahren.html>, accessed May 2013.
- 150 “whole of Government”: See OECD, “Recommendation of the Council on Regulatory Policy and Governance,” 2012, <http://www.oecd.org/gov/regulatory-policy/49990817.pdf>. Governments should “ensure that regulation serves whole-of-government policy.”
- 151 “slough off from government”: Peter F. Drucker, William V. D’Antonio, and Howard J. Ehrlich, *Power and Democracy in America* (Notre Dame, IN: University of Notre Dame Press, 1961), 13.

- 151 The problem of obsolete law: The British legal historian F. W. Maitland observed that “one of the primary functions of a Legislature is . . . to sweep into the dustbin that rubbish that inevitably accumulates in the course of legal history.” Maitland, as quoted in Frank Gahan, “The Codification of Law,” *Transactions of the Grotius Society* 8 (1922): 112. See also Paul H. Kocher, “Francis Bacon on the Science of Jurisprudence,” *Journal of the History of Ideas* 18, no. 1 (January 1957). Bacon wanted to recodify laws “being so many in number that neither common people can half practice them, nor the lawyer sufficiently understand them” (ibid., 4). He continued, “purge out multiplicity of laws, clear the uncertainty of them . . . define the jurisdiction of your courts” (ibid.).
- 151 “A little rebellion now and then”: Thomas Jefferson, “Letter to James Madison,” in Jefferson, *Writings* (New York: Library of America, 1984), 882. Judge Guido Calabresi identified the growing pile of obsolete law as a threat to governance in his 1982 book, *A Common Law for the Age of Statutes* (Boston: Harvard University Press, 1985), proposing that federal courts could take it upon themselves to eliminate obsolete laws. I doubt that judges would feel comfortable discarding statutes except in the most obvious cases—say, a statute dealing with horses and buggies. See discussion between Judge Calabresi and the author at Philip K. Howard, “Should the Courts Be Allowed to Repeal Obsolete Law?” *Atlantic*, March 20, 2012, <http://www.theatlantic.com/national/archive/2012/03/should-the-courts-be-allowed-to-repeal-obsolete-law/254454>.
- 152 “the infirmities most besetting”: James Madison, “Letter to John Cartwright,” in *Selections from the Private Correspondence of James Madison: From 1813 to 1836* (Washington: J. C. McGuire, 1824), 53. See also John Jay, in *The Speeches of the Different Governors, to the Legislature of the State of New York* (Albany, NY: J. B. van Steenberg, 1825), 48: “Laws and regulations, however carefully devised, frequently prove defective in practice.”
- 152 [states circumventing sunset laws]: Chris Mooney, “A Short History of Sunsets,” *Legal Affairs*, January/February 2004, http://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp: “In 1978, *The New York Times* reported that under Colorado’s sunset law \$212,000 in state funding was spent to review 13 agencies. This led to the termination of just three small agencies, a savings of \$6,810. Colorado wasn’t unique: In Nebraska and Louisiana, every agency scheduled to expire was re-established by the legislature. “In Alabama, even the process was an utter embarrassment: ‘The House of Representatives ran through the nearly 300 separate sunset resolutions in quick succession,’ noted *The Washington Monthly* at the time. ‘Many representatives left the chamber, giving their young pages instructions on how to vote for them.’”
- 152 Texas Sunset Advisory Commission: Sunset Advisory Commission, *Sunset in Texas*, January 2012, <http://www.sunset.state.tx.us/suntx.pdf>.
- 152 certified only four nurses in the state: Eggers and O’Leary, *If We Can Put, supra* note for page 42, p. 176.
- 153 regulations . . . 7 feet high: Matt Nesto, “Obamacare: 3-Years-Old and Still Growing,” *Yahoo! Finance*, March 22, 2013, <http://finance.yahoo.com/blogs/breakout/obamacare-3-years-old-still-growing-134029965.html>.
- 153 One proposal on the table: This proposal is known as the REINS bill. Regulations from the Executive in Need of Scrutiny (REINS) Act, H.R. 10, 112th Cong. (2011). See Jonathan R. Siegel, “The REINS Act and the Struggle to Control Agency Rulemaking,” *New York University Journal of Legislation and Public Policy* 16 (2013): 131 (arguing that the REINS Act would be “hopelessly impractical,” given to gamesmanship and partisan excess).
- 154 [legislative veto]: The legislative veto was invalidated in *INS v. Chadha*, 462 U.S. 919 (1983), on the basis, among others, that all legislative acts must be “presented” to the president for his signature or veto.
- 154 could incarcerate terrorist suspects: Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006).
- 154 There is a comparable controversy: See Robert J. Delahunty and John Yoo, “Dream On: The Obama Administration’s Non-enforcement of Immigration Laws, the DREAM Act, and the Take Care Clause,” *Texas Law Review* 91, no. 4 (2013): 781–857.
- 154 power to do the rudimentary tasks: Most debate is on the terms of history and theory, not practicality of modern governing. For different views, compare Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, CT: Yale University Press, 2008), with Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010).

- 154 The President lacks the ability: See Terry M. Moe and Scott A. Wilson, "Presidents and the Politics of Structure," *Law and Contemporary Problems*, Regulating Regulation: The Political Economy of Administrative Procedures and Regulatory Instruments: Part 2, 57, no. 2 (Spring 1994): 19: "The continuing problem for presidents, though, is that they have too little control, not too much, and they need to build an institution that helps them do a better job of overcoming the tremendous obstacles to leadership the system places in their way."
- 155 other public officials existed only because: George Washington, "Letter to Count de Moustier, May 25, 1789," Gilder Lehrman Collection Documents, http://www.pbs.org/georgewashington/collection/pres_1789may25.html.
- 155 "If any power whatsoever": Madison, "Speech in Congress," *supra* note for page 44, p. 456. See also Peters, *How Washington Really Works*, *supra* note for page 40, p. 159: "If elections are going to mean anything . . . the administration must be given the authority to hire and fire not just cabinet members and agency heads, but also enough other officials, high and low, to allow the president to move the machinery of government." In addition, see Commager, *American Mind*, *supra* note for page 132, pp. 310–35.
- 156 "Poor Ike": Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1990), 10.
- 156 Civil Works Administration: Harold Meyerson, "Work History," *The American Prospect*, May 2, 2010, <http://prospect.org/article/work-history-0>: "Putting millions of people to work in a space of two months was an amazing achievement. The 4.26 million Americans employed by the CWA constituted roughly 3.5 percent of the nation's population of 125 million people. Today, the Census Bureau estimates that America is home to 309 million. If a modern-day public-works program were employed on the same scale, it would employ 10.8 million Americans." See also Charles Peters and Timothy Noah, "Wrong Harry: Four Million Jobs in Two Years? FDR Did It in Two Months," *Slate*, January 26, 2009, http://www.slate.com/articles/news_and_politics/chatterbox/2009/01/wrong_harry.html.
- 157 "the imperial presidency": See Arthur M. Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).
- 157 One by one Congress removed: For a history of presidential efforts to reform the executive branch in the twentieth century, see Brian Balogh, Joanna Grisinger, and Philip Zelikow, *Making Democracy Work: A Brief History of Twentieth-Century Federal Executive Reorganization*, Miller Center Working Paper in American Political Development (Charlottesville, VA: Miller Center for Public Affairs, University of Virginia, 2002), http://www.hennessyaward.org/images/Hoover%20Commission/main_content.pdf.
- 157 known as FACA: Jay S. Bybee, "Advising the President: Separation of Powers and the Federal Advisory Committee Act," *Yale Law Journal* 104 (1994): 51.
- 157 Ares I rocket program: Mark K. Matthews, "NASA's Ares Rocket Dead, but Congress Lets You Pay \$500 Million More for It," *Orlando Sentinel*, December 26, 2010, http://articles.orlandosentinel.com/2010-12-26/news/os-nasa-ares-rocket-constellation-20101227_1_constellation-moon-program-nasa-s-ares-new-nasa-plan.
- 157 "line-item veto": Clinton v. City of New York, 524 U.S. 417 (1998).
- 158 [1883 civil service law]: Paul P. van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), 105–9.
- 159 "unites all power in the same hands": Alexander Hamilton, "No. 71," in Hamilton, Madison, and Jay, *Federalist*, 350. See William Paley, *The Works of William Paley in Five Volumes* (Boston: Joshua Belcher, 1811), 3:400, as quoted in Hayek, *Constitution of Liberty*, *supra* note for page 15, p. 173: "The first maxim of a free state is, that the laws be made by one set of men, and administered by another: in other words, that the legislative and judicial characters be kept separate."
- 159 "executive power in his hands": Locke, *Second Treatise of Government*, 89.
- 159 "no right to diminish or modify his executive authority": Madison, "Speech in Congress," *supra* note for page 44, p. 456.
- 159 "partial intermixture": Alexander Hamilton, "No. 66," in Hamilton, Madison, and Jay, *Federalist*, 322.
- 160 Never, ever, give . . . honest feedback: See Walter Olson, *The Excuse Factory* (New York: Free Press, 1997). See also Howard, *Collapse of the Common Good*, *supra* note for page 108, pp. 173–98.
- 160 legal minefield: See Simon, "Solving Problems," *supra* note for page 71, p. 151: "The American tort system has radical deficiencies that one would expect liberals to decry. The system provides no benefits at all to most injured people . . . The awards that the system does make are staggeringly

- arbitrary, depending on the actual or anticipated judgments . . . of panels of lay decisionmakers . . . operating under vague instructions and without any knowledge of decisions in other cases. The system's effect in deterring bad conduct seems weak, and in some respects, perverse . . . Less than fifty percent of the total payments by defendants go to claimants, in some categories, much less . . . 'Close to two-thirds of insurance company expenditures in asbestos suits (including cases settled before trial) ended up in the pockets of lawyers and experts for both sides rather than in those of asbestos victims and their families.'" See James R. Maxeiner, *Failures of American Civil Justice in International Perspective* (Cambridge: Cambridge University Press, 2011), comparing American justice with justice in Germany and South Korea.
- 160 Fear of lawsuits: "I should dread a lawsuit beyond almost anything except sickness and death." Learned Hand, "Deficiencies of Trials to Reach to the Heart of the Matter," in *Lectures on Legal Topics, 1921–1922* (New York: Macmillan, 1926).
- 160 90 percent of the time expended: Gail Charnley and E. Donald Elliott, "Risk Versus Precaution: Environmental Law and Public Health Protection," *Environmental Law Reporter* 32 (March 2002): 10363, 10364.
- 161 Letting any self-interested party: See Jeremy Rabkin, "The Secret Life of the Private Attorney General," *Law and Contemporary Problems* 61, no. 1 (Winter 1998): 179: One of the new legal concepts to emerge from the 1970s is the notion that a citizen can act as a "private attorney general," which Professor Rabkin describes as "someone who is understood to be suing on behalf of the public, but doing so on his own initiative, with no accountability to the government or the electorate." The court at least is impartial, but it, too, has no democratic accountability. See Sandler and Schoenbrod, *Democracy by Decree, supra* note for page 56. See generally Joanna Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal* (Cambridge: Cambridge University Press, 2012).
- 161 nowhere suggests a judicial role: The National Environmental Policy Act of 1969 (NEPA) can be found at http://www.cr.nps.gov/local-law/fhpl_ntlenvirnpolcy.pdf. See Richard Lazarus, "The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek behind the Curtains," *Georgetown Law Journal* 100, no. 5 (2012): 1507, 1515.
- 161 "These cases are only the beginning": Judge J. Skelly Wright, *Calvert Cliffs Coordinating Council, Inc. v. Atomic Energy Commission* 449 F.2d 1109 (D.C. Cir. 1971).
- 162 The drafters of NEPA were shocked: The enthusiastic rhetoric of the court also led the Council on Environmental Quality (CEQ) to write regulations that altered the public goal of the National Environmental Policy Act. The statute states that it seeks to "achieve a balance between population and resource use which will permit high standards of living and wide sharing of life's amenities." To that end, Congress required "a detailed statement by the responsible official . . . on the environmental impact" of major federal actions. See note for page 161, *supra*. After the *Calvert Cliffs* case, the CEQ wrote regulations that basically codified the judicial declarations. The statute's repeated statements about balancing economic considerations were replaced by more one-sided regulations, requiring environmental review to "state . . . all practicable means to avoid or minimize environmental harm." 40 C.F.R. 1505.2(c).
- 162 160 countries have since mandated: See Lazarus, "National Environmental Policy Act, *supra* note for page 161, 1510.
- 162 [German environmental review]: See note for page 150, *supra*.
- 163 all civil claims should undergo judicial scrutiny: E. Donald Elliott, "Twombly in Context: Why Federal Rule of Civil Procedure 4(b) is Unconstitutional," *Florida Law Review* 64, no. 4 (2012): 895. "A timid judge, like a biased judge, is intrinsically a lawless judge." Justice Felix Frankfurter, concurring in *Wilkerson v. McCarthy* (January 31, 1949).
- 164 "An equal right to oppress or interfere": Berlin, "Two Concepts," *supra* note for page 27, p. 234.

Citizen Supervision of Government

- 164 There's no fresh air . . . to purge the toxins: For a vivid portrait of mutant culture of Washington, see Daniel Leibovich, *This Town* (New York: Blue Rider Press, 2013).
- 164 "a republic, if you can keep it": Quote attributed to Benjamin Franklin in the "Papers of Dr. James McHenry on the Federal Convention of 1787," *American Historical Review* 11 (1906): 618: "A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy. A republic replied the

- Doctor if you can keep it.” See also Benjamin Franklin, “Letter to Messrs. The Abbes Chalut and Arnaud,” in *The Works of Benjamin Franklin* (London: Benjamin Franklin Stevens, 1882), 10:297: “Let me add that only a virtuous people are capable of freedom.”
- 165 “led by no permanent motive”: Madison, “No. 62,” *supra* note for page 34, pp. 302–3.
- 165 self-awareness requires the help of others: See, for example, Chris Argyris, *Integrating the Individual and the Organization* (Piscataway, NJ: Transaction, 1990), 25.
- 166 “The sovereign may confer power”: Gibbon, *Decline and Fall*, *supra* note for page 142, vol. 1, p. 276.
- 166 There are plenty of interest groups: There’s a lot of material here. See Kaiser, *So Damn Much Money*, *supra* note for page 134; Rauch, *Government’s End*, *supra* note for page 135; Lessig, *Republic, Lost*, *supra* note for page 134. For a conservative perspective, see James V. DeLong, *Ending Big ‘SIS’ (the Special Interest State) and Renewing the American Republic* (North Charleston, SC: CreateSpace, 2012).
- 167 But each of these goals, if pushed too far: See Michel de Montaigne, *The Complete Works: Essays, Travel Journal, Letters* (New York: Knopf, 2003), 615: “It is ordinary to see good intentions, if they are carried out without moderation, push men to very vicious acts.”
- 167 [German National Regulatory Control Council]: This advisory council (Normenkontrollrat, or NKR) is described in OECD, “Better Regulation in Europe: Germany,” 54, 65–67, 116, 119, <http://www.oecd.org/gov/regulatory-policy/betterregulationineuropegermany.htm>, accessed July 2013. See also the NKR website (in German): <http://www.normenkontrollrat.bund.de/Webs/NKR/DE>.
- 168 a way of introducing fresh thinking: The Organisation for Economic Cooperation and Development (OECD) recommended in 2012 to all members that “a standing body charged with regulatory oversight should be established close to the centre of government to ensure that regulation serves whole-of-government policy. The specific institutional solution must be adapted to each system of governance.” OECD, “Recommendation,” *supra* note for page 150.
- 168 [Kennan’s Council of State]: See George F. Kennan, “What Is to Be Done?” in Kennan, *Around the Cragged Hill*, 232–49.
- 168 “To meet the unprecedented challenges”: *Ibid.*, 248.
- 169 *euthyna*: Deirdre von Dornum, “The Straight and the Crooked: Legal Accountability in Ancient Greece,” *Columbia Law Review* 97 (1997): 1483.
- 169 “Council of Censors”: See “Constitution of Pennsylvania, September 28, 1776,” Avalon Project, http://avalon.law.yale.edu/18th_century/pa08.asp, accessed May 2013.
- 169 Brownlow Committee: *Report of the President’s Committee*, *supra* note for page 102, p. 21.
- 169 “liability to the watchful criticism”: Mill, *On Liberty*, *supra* note for page 89, p. 173.
- 169 Plato’s . . . “nocturnal council”: Plato, “The Nocturnal Council,” in Plato, *Laws*, 475–89.
- 169 its influence vanishes: E. Donald Elliott, “Portage Strategies for Adapting Environmental Law and Policy during a Logjam Era,” *New York University Environmental Law Journal* 17 (2008): 24, 26–27, 50–53.
- 169 independent oversight committees: Canada has an independent quality control body, the Special Committee of Council, that reviews new regulations before they are adopted to ensure harmony with existing law and has the authority to reject them if they are deemed unsatisfactory. See <http://www.oecd.org/mena/governance/38403668.pdf>.
- 169 less likely to be suspicious: Officials are empowered when independent groups support their initiatives. Civic and advisory groups thus help solve the problem of legitimacy that plagues leaders in the modern world. See Nonet and Selznick, *Law and Society in Transition*, *supra* note for page 20, p. 57: “He who exercises power to legitimate has his own problems of legitimacy” and needs “to convince the world . . . that his judgments are untainted by compromising associations.”
- 170 incessant demands of self-interest: Self-interest is a reality of human nature, but democratic government is supposed to resist it. The game is lost when we capitulate to self-interest as the operating frame of reference for public choices. “Corruption can be held in check as long as it pays homage to the virtue of hiding itself.” Jon Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989), 271. As Reinhold Niebuhr put it, “Evil is . . . the assertion of some self-interest without regard to the whole.” Niebuhr, “Children of Light,” *supra* note for page 86, p. 162.
- 170 “What manner of life there would be”: Hobbes, *Leviathan*, *supra* note for page 66, p. 77.

171 many respected thinkers have tried to warn us: I have a fantasy about those wise jurists and philosophers, up there in some celestial metaphysical club, rolling their eyes as we burrow ever more deeply into bureaucracies instead of letting people take responsibility. I've asked them each to post a message taken from their actual writings. Here is a sampling:

Isaiah Berlin: "Systems are mere prisons of the spirit, and they lead not only to distortion in the sphere of knowledge, but to the erection of monstrous bureaucratic machines, built in accordance with the rules that ignore the teeming variety of the living world, the untidy and asymmetrical inner lives of men, and crush them into conformity." Berlin, *Proper Study of Mankind*, *supra* note for page 27, pp. 250–51.

Justice William Brandeis: "Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . they believed that the greatest menace to freedom is an inert people." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. Concurring).

Peter Drucker: "Freedom from the abuse of power is not enough for a free society. A free society rests on the freedom to make responsible decisions . . . Modern government has become ungovernable . . . Government agencies are all becoming autonomous ends in themselves and directed by their own desire for power." Drucker, *Age of Discontinuity*, *supra* note for page 43, pp. 258, 220.

Vaclav Havel: "Politicians seem to have turned into puppets that only look human and move in a giant rather inhuman theatre; they appear to have become merely cogs in a huge machine, objects of a major automation of civilization which has gotten out of control and for which nobody is responsible." Havel, *Art of the Impossible*, *supra* note for page 37, p. 126.

Friedrich Hayek: "The use of reason aims at control and predictability . . . We are not far from the point where the deliberate organized forces of society may destroy those spontaneous forces which have made advance possible." Hayek, *Constitution of Liberty*, *supra* note for page 15, p. 38.

Aldous Huxley: "'Don't you wish you were free, Lenina?' 'I don't know what you mean. I am free. Free to have the most wonderful time.'" Huxley, *Brave New World* (New York: Harper Perennial, 2010; originally published 1946 by Harper & Brothers), 99.

William James: "Refuse to believe, and you shall indeed be right, for you shall irretrievably perish. But believe, and again you shall be right, for you shall save yourself. You make one or the other of two possible universes true by your trust or mistrust—both universes having been only maybes, in this particular, before you contributed your act." James, *The Will to Believe and Other Essays in Popular Philosophy* (Cambridge, MA: Harvard University Press, 1979), 54.

George Kennan: "The basic assumption underlying this fear . . . of responsibility is surely the belief that such allotment lends itself to dictatorship and to curtailment of the liberties and rights of others. There is a feeling that concentration of authority is in some way 'undemocratic,' that the allotment to a single individual of the power to decide something is in some way incompatible with the spirit of the American political system. Ignored, of course, is the fact that authority is required to protect freedom just as it is required to assail freedom." Kennan, "America's Administrative Response," *supra* note for page 46, p. 17.

Michael Polanyi: "Human greatness . . . exists only for those committed to [it]. All manner of excellence that we accept for our guidance, and all obligations to which we grant jurisdiction over us, can be defined by our respect for human greatness." Polanyi, *Personal Knowledge*, *supra* note for page 22, p. 380.

They're all saying the same thing. No system will save us. Only real people, starting with the person in the mirror, have that power.

172 "A society based on the letter of the law": Aleksandr Solzhenitsyn, *Solzhenitsyn at Harvard: The Address, Twelve Early Responses, and Six Later Reflections*, ed. Ronald Berman (Washington, DC: Ethics and Public Policy Center, 1980), 8, 14.

172 Most Americans seem to be in a trance: See Lerner, *Surplus Powerlessness*, *supra* note for page 55, p. 2: "When people become powerless for any extended length of time, we become more willing to accept parts of the world we would otherwise reject . . . Powerlessness corrupts."

173 the force of movements grounded in moral arguments: See Anthony Appiah, *The Honor Code: How Moral Revolutions Happen* (New York: W. W. Norton, 2010), 53–100.

174 "If any action carries moral significance": Raz, *Ethics in the Public Domain*, *supra* note for page 89, 103.

- 174 “how the coming generation is to live”: Dietrich Bonhoeffer, *Letters and Papers from Prison* (New York: Macmillan, 1972), 7. Bonhoeffer was executed in 1945 for participating in a plot to assassinate Hitler. Frederick Douglass has the same view of our moral obligation to the next generation: “You have no right to enjoy a child’s share in the labor of your fathers, unless your children are to be blest by your labors. You have no right to wear out and waste the hard-earned fame of your fathers to cover your indolence.” Douglass, as quoted in Jacob Needleman, *The American Soul: Rediscovering the Wisdom of the Founders* (New York: Tarcher, 2002), 247. Historian Niall Ferguson concludes that “the biggest challenge facing mature democracies is how to restore the social contract between the generations.” Ferguson, *Great Degeneration*, *supra* note for page 42, pp. 43–44.
- 175 “worship the statue and forget the deity”: Tocqueville, *Democracy in America*, *supra* note for page 24, vol. 1, p. 90.
- 176 “an absent or inattentive crowd”: *Ibid.*, 2:142.
- 176 “its force deserts it”: *Ibid.*, 1:90.
- 176 “Just powers”: Declaration of Independence, http://www.archives.gov/exhibits/charters/declaration_transcript.html. Jefferson’s opening words are worth reading again, with our present predicament in mind: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

Appendix: Bill of Responsibilities— Proposed Amendments to the Constitution

- 181 Historians of public service believe: See, for example, Commager, *American Mind*, *supra* note for page 132, pp. 310–35. *Ibid.*, 318–19: “The remedy for corruption was so obvious that it scarcely requisitioned political theory—the purification of politics, more commonly called civil service reform . . . Good government . . . would follow axiomatically from the merit system . . . They had no real faith in democracy . . . They were, in short, incapable of understanding the real nature of the fight that was going on around them . . . An aura of unreality hangs over their history.” Commager concludes that the “approach of the civil service reformers was clearly bankrupt” and quotes Walter Lippmann for the proposition that mechanical bureaucratic systems were hopeless, and that public choices must be made by real people, asserting their values in the political and cultural context of the time: “Because we have insisted on looking at . . . governing as a routine . . . politics has such a unreal relation to actual conditions . . . We have hoped for machine regularity when we needed human initiative and leadership.” *Ibid.*, 320. See also Van Riper, *History of the United States Civil Service*, *supra* note for page 158, pp. 533–64: “In any evaluation of the American civil bureaucracy it is crucial to understand that it is a *political* institution” (p. 562); “the great institutional curses of the federal service at the present time are over-centralization, over-proceduralization, over-departmentalization, and a much too rigid position classification system” (pp. 557–58); “neutrality and professionalism are extremely useful types of internal as opposed to external controls, but they are frail reeds in times of crisis and only modestly helpful during the ordinary course of events” (p. 551). Van Riper calls for a “representative bureaucracy . . . in which there is a minimum distinction between the bureaucrats . . . and the community . . . and [its] expectations of government” (p.552). For democracy to function, Van Riper concludes, we must develop an effective way of attracting, inspiring, and managing public employees: “He who administers the law is often more important than the law itself” (p. 533).