MINNOWBROOK III: A SPECIAL ISSUE

Management, Law, and the Pursuit of the Public Good in Public Administration

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ABSTRACT

The tension between managerialism and legalism in public administration has been a recurring theme at Minnowbrook conferences. This tension, increasingly evident in the literature, is couched in the often-conflicting values of efficiency and performance, on one hand, and legal and democratic values such as accountability, equality, and transparency, on the other hand. Building on conversations we began at Minnowbrook III, we specify a three-part proposal through which the legal and managerial approaches to US public administration might be better integrated. At a time when public administrative reforms potentially exacerbate the law management tension, our proposal’s primary implication is the simultaneous achievement of public service delivery that is efficient, effective, and defendable in the US constitutional democracy.

INTRODUCTION

Legalism and managerialism are distinct, often conflicting, intellectual approaches to public administration (Rosenbloom 1983b). A legalistic approach to public administration relies on law-based priorities and processes to balance discretion/innovation and accountability. A managerialistic approach relies on innovation and efficiency to do the same. In public administration, the dynamic relationship between law and management has been the subject of much research over time in the United States, and scholars have often suggested that law and management represent fundamentally different values in the administrative process (Rosenbloom 1983a) and even American liberal thought (Kravchuk 1992). For nearly a century, theorists have debated whether the managerialism advocated by White (1926) or the legalism suggested by Goodnow (1886) provide the legitimate basis for public administration (e.g., Bertelli and Lynn 2006; Cooper and Newland 1997; Dickinson 1927; Dimock 1933; Pfiffner 1935; Rosenbloom and O’Leary 1997).

The tension between law and management has grown significantly more visible in recent decades as market-based reforms of new public management have favored values of efficiency and performance to an even greater degree relative to legal and democratic...
mores such as accountability, equality, transparency, representativeness, and value plurality. It is important to note the dynamic administrative environment of the present financial crisis may alter this tension as government plays an expanding role in regulating and sustaining failing markets and shifts in administrative paradigms influence the contested ground between legalism and managerialism (e.g., Moe and Gilmour 1995). Nonetheless, at present, it is not clear to us whether current administrative changes will detract from (revival of expanded government entrenchment/ regulation, on the one hand) or augment (using government as a catalyst to prop up and prioritize markets in unprecedented ways, on the other) the importance of market models in the public sector. At the time of Minnowbrook III, we found ample evidence (e.g., Bertelli and Lynn 2006; Hays & Sowa 2006; Kettl 2009; Moynihan 2008) that market-based reforms continue to highlight the enduring relevance of the law/management tension in public administration research and practice.

Opposing spokespersons argue to varying degrees that law is either a hindrance to managerial reforms or that it is being neglected as the legitimate guiding force in management. Both camps concede, however, that the schism between the two is dangerous to the legitimacy of public administration—the way in which approaches to administration affect actual support for the regime. Many who have debated the question at hand are concerned primarily, if not initially, with legitimacy as a concept. The theoretical/conceptual discussions of legitimacy are varied and well developed. Although the present article constitutes a conceptual synthesis, we hope more empirically driven studies will follow.

Many understand the source of power and legitimacy for the administrative state in the US democratic system, but some see that source as constitutional, with public administrators constraining the power of elected officials as the document intended (Spicer and Terry 1993). Others see legitimacy springing from the rule of law as bounded by the Constitution, dictated by Congress and arbitrated by the courts (Rosenbloom 1983a), whereas still others suggest it must be more than legalistic, arising from the “confidence and respect and at times warmth and affection” of the populace (Rohr 1986, x).

Depending on which view of legitimacy they adopt, and which approach they believe best accords with that definition, recent authors suggest that law should adapt to complex realities of modern administration or should be reasserted as a necessary check on growing managerial discretion. Kettl’s (2009) Gaus lecture at this year’s meeting of the American Political Science Association underscores that tensions between law and management remain salient among prominent scholars. In this sense, the legal approach encompasses much more (e.g., how broadly is due process defined and defended) than whether basic institutions ensuring rule of law exist and function. Nevertheless, although few would argue that the contemporary focus on managerialism has threatened the fundamental rule of law in the United States, such concerns are not too distant in history of the law/management tension. Bertelli and Lynn (2006, 86) observed that Roscoe Pound’s 1936 committee worried, in the face of growing executive power, that “‘administrative absolutism’ would, over time, completely undermine the rule of law.”

As noted above, few would cast the battle in such stark terms now, but our reading of the literature on public law and public management suggests to us that these concepts are

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2 For example, the political economy framework by Wamsley and Zald (1973) may offer a heretofore-underutilized approach for understanding how public organizations gain legitimacy through political and economic bargaining.
still considered independent or, at worst, conflicting approaches to public administration and sources of administrative legitimacy. To date there have been relatively few explicitly synthetic approaches detailing ways in which these intellectual positions can and should be integrated in public administration.

In order to put our work in intellectual context, we review previous calls for legal/managerial synthesis. For example, just as Wilson sought to segregate politics and administration, he appeared to favor the integration of law and administration. Whereas scholarly attention on the politics-administration dichotomy has been fairly broad and remarkably prolific, far less attention has been granted to Wilson’s (1887, 212) observation that the public administrative function is primarily the “detailed and systematic execution of the public law.” This observation is deeply rooted in Wilson’s regard for public law as a reflection of the political will of citizens at the time, which today may be contested on a number of grounds. Nonetheless, it was a prominent rationale for legitimizing public administration within a representative democracy.

Additionally, although White’s work is often regarded as favoring a managerial over legal approach to public administration, we see within it an early call for the integration of law and management. Specifically he writes:

Law provides the immediate framework within which public administration operates: defining its tasks, establishing its major structures, providing it with funds, and setting forth rules or procedures . . . Legality therefore becomes a primary consideration of administrators, and legal advisers acquire an importance, which far outweighs their strictly administrative contribution . . . Public administration is embedded in law, and the student of the subject will often be with the statutes” (Storing, 1965, citing White’s 2nd ed., 11, 32).

More recent work has also hinted at the possibility of the integration of law and management. For example, the work by Moe and Gilmour (1995) might be read as an attempt to integrate legal values into the dominant ethos of New Public Management. Rosenbloom (1983a) suggests that a synthesis of what he identifies as the three mainstays of administration—politics, law, and managerialism—might be possible, though he concludes that it will be difficult because these forces are insulated by the Constitutional separation of powers within the federal government. Finally, Cooper (1985) argues that the relationship between law and administration, or more precisely between judges and administrators, could be constructive despite the fact it is most often marked by animosity.

Consequently, we are not arguing for the first time that law and management can have complimentary roles or can be integrated in the administrative process. Previous arguments have not, however, offered a particularly positive outlook on the likelihood of integration and, regardless of their position, have not quelled the long-running debate over the appropriate role of these approaches public administration. Our proposal accounts for the conflict or tension between law and management but draws attention to how the two can profitably work together to improve program implementation as well as protect democratic values. In accomplishing those two goals, we hope an integrative approach can accommodate (and perhaps foster) a more expansive view of the legitimacy of public administration, similar to the one offered by Wise (1993, 261), who suggests the administrative state gains its legitimacy by facilitating the balancing of “popular demands filtered through representative processes, effective executive power, and the protection of civil rights,” demanded by the US Constitution.
LAW AND MANAGEMENT AT PAST MINNOWBROOK GATHERINGS

In many ways, the tension between law and management has been visible at all Minnowbrook meetings. What has changed over the past 40 years is the degree to which the values assumed to be represented by each approach, as well as their contribution to the administrative enterprise, have been favored by the participants.

Minnowbrook I was dominated by Waldonian perspectives on the democratic and moral grounding of public administration, as well as social equity in addressing problems of the day. Social unrest and racial injustices gave rise to general distrust in government, evidenced by an unpopular war in Vietnam, campus violence and destruction, urban rioting, assassinations of social movement leadership, and widespread repression of dissenting voices on a number of human welfare issues (Frederickson 1989). In this context, the relationship between public administration and law was discussed in mostly restrictive terms: public administration was viewed an institutional offender of individual rights and civil liberties, requiring litigation and judicial oversight to ensure enforcement of protections provided during the rights revolution of the 60s (Epp 1998; Frederickson 1989), as well as statutory controls to defend against abuses of managerial discretion.

Minnowbrook II reflected themes advanced at the time of the conference and seemed to be framed more within Simon’s perspective on the rationalization of administrative behavior. Thus, more attention was given to productivity and performance, which made conventional values of efficiency and effectiveness paramount. Legislative and judicial involvement in public administration affairs were seen as inefficient because of resulting red tape, interference, and litigiousness. The relationship between public administration and the law in this context was seen in largely negative terms as public laws and statutes were viewed as mostly incompatible with administration guided by market logic and values.

Finally, the Minnowbrook III gathering occurred within a context of political and societal turbulence, as well as dissatisfaction with market mechanisms many felt had come to dominate public administration. Although these crises were not discussed in detail, there was a general, and persistent, call for an administrative “scorecard” based on values beyond those of rational efficiency and performance. Public administration on these terms has an obligation to gauge its effects on society based on democratic-constitutionalism as well as on values such as efficiency. Participants suggested that democratic values such as equality, transparency, and representativeness—values traditionally associated with the aims of public law—needed to be reasserted into public administration.

There were also parallel discussions about the changing nature of program administration in the 21st century and the importance of managerial innovations and autonomy in dealing with those changes. Many participants were supportive of entrepreneurial managerialism in pursuit of a more ethical and democratic administration. There was also widespread support for the growth of collaborative and participatory administrative regimes, as well as acknowledgement of the inherently networked and multisectoral nature of today’s implementation environment.

Of course, the emphasis on the exercise of discretion by managers, however well intentioned, runs counter to a public law perspective, which sees statutes, rules, and judicial precedent as the legitimate guiding forces for administration, especially for administrators that would behave arbitrarily or capriciously, in democratic systems. Thus, the discussions at Minnowbrook III largely reflected, either directly or indirectly, the notion that law and
management are somehow working at cross purposes in pursuit of the public good in the administrative process. Those discussions also sparked; however, some early musings about ways in which these intellectual approaches to public administration might be brought together. The final section of this essay grows these initial thoughts into a coherent argument for the integration of law and management in modern public administration. Essential to that argument are the underpinnings of discord in the literature concerning the long and growing tension between law and management perspectives.

**LONG AND GROWING TENSION BETWEEN LEGALISM AND MANAGERIALISM**

Scholars have long recognized public law and management as foundational intellectual approaches to public administration but approaches that represent different values in the administrative process. Not surprisingly, the normative character of the portrayals of legalism or managerialism in the literature depends heavily on the camp with which the authors allies herself. Illustrating extremes of these views, public law is seen as either the champion of democratic values in the administrative process or as an unwarranted constraint on the effective implementation of public programs. Likewise, management is viewed either as the paramount basis of the study and practice of public administration (e.g., White 1926, vii–viii) or as an offender, indifferent to constitutional values, of legitimate public bureaucracy. Although these differing portrayals highlight the persistent theme of “tension” (see, e.g., Rosenbloom 1983b; Rosenbloom and Naff 2008; Zinke 1992), we preface our review by noting that normative conceptions of law and management are subject to the influence of temporal context. An observer of the bureaucratic landscape in 1933 might think, as White did, that managerial capacity was the primary challenge but that the administrative sprawl of 1946 might reasonably evidence that control and accountability were the main challenges. An observer in 1986, on the other hand, after six decades of legal evolution might understandably wonder whether managerial flexibility was the key issue. In short, the amount of attention paid to either the managerial or legal approach depends somewhat on the expediencies of public management at a particular time.

This section reviews major arguments for a public administration grounded in the foundation of public law, or alternatively, in the evolving practices of public management. This is not intended to be a comprehensive review of these camps but rather offers a window to view long-running disagreements regarding the most legitimate basis of administration in this country.

Literature emphasizing the legitimate grounding of public administration in law highlights the potential implications of management reforms on democratic norms of equality, accountability, and transparency in governance. For example, democratic values imposed on public administration by the Constitution and the Administrative Procedure Act provide administration with legitimacy, whereas also impressing a democratic logic of decision making during implementation that is distinct from economic efficiency or political expediency (Freedman 1978; Mashaw 1985). In this context, whenever management reforms are analyzed for their effectiveness, standards of democracy are among important indicators of success or failure. For example, many have observed that contracting out public services

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3 As noted above, the stark contrasts drawn between these concepts by authors may reflect the desire for rhetorical clarity, rather than a true belief that they are irreconcilable. Nonetheless, there are sharp distinctions drawn in the literature between the normative values of these competing intellectual approaches to public administration.
through the private sector raises the possibility that democratic values will either be ignored altogether or deemphasized when public agencies feel pressure to emphasize efficiency above all other criteria in the implementation process (Brown, Potoski, and Van Slyke 2006; Diller 2002; Domberger and Jensen 1997).

Indeed, some observe that much of contemporary privatization lies beyond the reach of mechanisms of administrative law designed to limit discretion, ensure accountability, and facilitate citizen input in the implementation process (Freeman 2000; Warren 2004). Therefore, when public agencies, or the political principals to which they answer, choose to outsource key elements of programs to nongovernmental actors, critics suggest those actors will use this insulation to pursue profit over the public good. Studies of welfare, and the contracting out of case management, job training, and other key services after the reforms of the mid-1990s, have provided evidence that program recipients enjoy fewer due process protections and that accountability problems have worsened under privatized delivery (Bedzek 2001; Diller 2002).

In addition to scholars focused on the importance of public law in ensuring democratic norms in an age of increased privatization, a chorus of scholars has specifically argued that law must be the guiding approach for administration in a variety of implementation scenarios (Gilmour and Jensen 1998; Moe and Gilmour 1995). Rosenbloom and O’Leary (1997, 2) warn, for example, that “defining public administration as management gives primacy to the values of efficiency, economy, and effectiveness. Political responsiveness, representativeness, and accountability become subordinate concerns.” Others suggest that prioritizing management over law in public administration is fundamentally wrong because the responsibilities of, the discretion for, and the very enterprise of “public management” are determined by legal authority (Kettl and Fesler 2005; Bertelli and Lynn 2006).

In the other camp are those who suggest the time for strict legalism is past and that modern restrictions on managerial discretion limit not only government performance but also accountability (e.g., Anechiaro and Jacobs 1996; Behn 2001; Dicke and Ott 1999). Jos and Tompkins (2004, 276) even note that efforts to legally prevent abuse of managerial discretion can be counterproductive, undermining a manager’s very “capacity to take one’s obligations seriously and apply them sensitively as a matter of habit and principle.”

Although few propose a “law-less” public administration, some contend that rules and statutes form legal thickets that distract and impede administrators in pursuit of efficient and effective performance. Under this negative conception of “rules-based management” (Kassell 2008, 241), public law unduly restricts administrative discretion in a way that makes it difficult to successfully engage in the complex realities of intersectoral and intergovernmental implementation. This might be attributed to spillover or chilling effects on nonarbitrary discretion that comes from regulation leveled at penalizing capricious exercise of discretion (see “accountability paradox,” Jos and Tompkins, 2004). The managerialist’s concern with a law-founded public administration also focuses on law’s perceived role in creating waste as a result of “foolish overregulation” and spawning risk averse organizational cultures (Osborne and Gaebler 1992, 23). Ironically, some authors also suggest that restrictive laws governing managerial behavior actually impede democratic values in the administrative process by hindering the “formation of firm commitments to ethical ideals” among managers (Jos and Tompkins 2004, 264). Despite these potential disadvantages, it should not be assumed that laws are solely detrimental. Whereas the law can arbitrarily constrain and cause administrative hardship in some instances, it can also enable effective
public management in other instances, thereby serving cross purposes for administration, intended or otherwise.\footnote{To this point, a reviewer further commented that scholars should be careful to overly equate law with democratic mores, and as in opposition to efficiency and performance.}

Our review of the preceding scholarship underscores the tension possible between law and management in public administration. In the following section, we propose a solution to this tension that is attentive to the practice of public administration and focuses on how each perspective can best reinforce the values inherent in the other in a variety of implementation situations.\footnote{The distinction between the tension in the literature versus in practice is important because the literature has traditionally argued for more stark differences between management and law perspectives than are apparent to some in the practitioner community.}

**INTEGRATING LAW AND MANAGEMENT IN PUBLIC ADMINISTRATION**

We hope this proposal can allow the discipline to speak with a more unified voice about the appropriate place of public administration in a democratic system, as well as spark new ideas for research. Our solution turns on three elements. First, we take as a guiding principle that public law can be used to direct and facilitate, rather than simply constrain or impede, administrative behavior. Second, we demonstrate how policy implementation reflects democratic values enshrined in public law, rather than accepting the heretofore incomplete picture of public management as having abandoned democratic values in favor of pragmatism. Finally, we argue that integrating law and management in a productive fashion can be accelerated dramatically if public managers are able to engage in crafting the former.

**Law Not Only Constrains but Also Enables**

During a time when many advocates of new public management were clamoring to “free” public administrators to behave entrepreneurially by ridding them of constraining laws and regulations, Cooper (1997) emphasized the potentially positive relationship between public law and effective program management. He argued that conscientious managers could improve the delivery of public goods to citizens by instrumentally using rulemaking, administrative adjudication, interjurisdictional agreements, and contracts (Cooper 1997).

In contemporary scholarship, the concept of reconciliation between law and management can be detected in surprising places. For example, in their criticism of new public management, deLeon and Denhardt (2000, 96) explain these reforms often bring administrators face to face with “aspects of democratic governance they are rejecting—democratic citizenship, civic engagement, and the public interest . . . [and that] many will be uneasy to realize they are moving away from such fundamental values.”\footnote{See Box et al. (2001) for another example of how managerial reforms threaten substantive aspects of democracy.} The goal is then to envision how administrators can reassert these values in the practice of administration, vis-à-vis legal mechanisms such as agency rulemaking, contesting statutes or procedures of operation, or judicial review.

Further discussion of reconciliation is found within work on privatization and contracting out. Freeman (2000, 1289) argues that a narrow or overly legalistic conception of public law is likely to underestimate the potential noneconomic benefits of privatization:
“instead of simply constraining the private role in public governance . . .” public law should “aim to facilitate and direct it.” Freeman (2003) later suggests that privatization can be viewed as an opportunity for “publicization,” where the process of contracting can bring numerous firms who might otherwise operate primarily within markets under the purview of public law and subject to its norms.

Beermann (2002) further argues that private firms carrying out public purposes are often more heavily regulated than traditional government providers of the same service. The author supports this claim specifically citing the federal extension of nondiscrimination norms to private contractors before the Civil Rights Act demanded the same standards of government actors, as well as the stringent regulation of charter versus public schools in some states.7 Thus, he suggests that privatization within sectors of heightened regulation can increase in some cases, rather than decrease, political accountability and the link between public programs and democratic values.

Describing Management More Fully: Implementation Can Reflect Democratic Values Enshrined in Public Law

We believe the scholarship discussed above suggests that public law and some modern tools of public management work together to enhance public values, such as accountability, in the implementation process. Furthermore, we believe that concerns about the abandonment of other democratic norms, such as citizen participation and pluralism, in the pursuit of program efficiency or effectiveness stem largely from an incomplete understanding of the modern enterprise of public management. More specifically, it grows from a somewhat myopic focus on those elements associated with the “public administration orthodoxy” (Rosenbloom 1993), such as technical rationality and process efficiencies, as well as those associated with a market logic of management.

Modern public management is significantly more, however, than the combination of these elements. Management is, in fact, focused on furthering many of the same values and norms that proponents of a law-based administration have argued are most clearly enshrined in and protected by public law.8 Increasing representation, facilitating citizen participation, and building collaborative relationships that ensure value plurality in the administrative process are all vital elements of what many public managers already do. Perhaps nowhere are these roles more evident than in the routines of city and local government managers. Scholars have argued for more democracy in city governance, where citizens are intimately involved in the development and administration of programs (Lappe and DuBois 1994; Mathews 1994). Frederickson (1997) goes one step further, suggesting that local government managers have the capacity to not only increase government effectiveness but also to enhance civil society and build social capital.9

7 One could also find support in the Court decisions demanding that private corrections facilities are obligated to meet the same standards as their state-run counterparts (e.g., Correction Services Corporation v. Malesko [2001]; Richardson v. McKnight [1997]).
8 Some would argue that management and management reforms have always been couched in important ways in democratic values, such as accountability (Moe 1994).
9 This can be accomplished when managers facilitate citizen participation and adopt what he terms a “community paradigm” for decision making. Nalbandian’s (1999) interviews with managers also confirm that the roles of professional administrators have evolved to include significant community building activities, facilitation of citizen participation in policy development, and knowledgeable representation of citizens’ needs in the work of government.
Local government is not the only place to observe the facilitation of democratic values, such as participation, by public managers. As early as 1979, the Advisory Council on Intergovernmental Relations noted that changing professional values among managers had legitimized citizen roles in areas as diverse as community development, crime prevention, mass transportation, and hazardous waste disposal (US Advisory Council on Intergovernmental Relations 1979). Since that time, the growth in collaboration among citizens and government managers has become a consistent focus of, and in many cases prescription by, public administration scholars (e.g., Etzioni 1994; Vigoda 2002).10

We note that the close relationship between government and citizens is only one of many democratic values inherent in modern public management. Scholars have long observed that policy implementation increasingly takes place within networks of government, nonprofit, and private entities, rather than within singular hierarchically structured public agencies (Gage and Mandell 1990; O’Toole and Montjoy 1984). Some of these arrangements are mandated in statute (Hall and O’Toole 2000), but many are voluntarily organized by managers and other participants (see Agranoff 2007). Public managers within these arrangements identify, activate, and manage organizations from different sectors, as well as other relevant stakeholders, to solve problems and effectively deliver public services, even in periods of limited government investment (e.g., Provan and Milward 1995; McGuire 2002). Thus, this literature suggests the nature of networked policy implementation means that modern public management is inherently more pluralistic and, therefore, potentially more democratic than in previous periods. However, it remains unclear how public managers will further reinforce democratic values within networks as they address challenges associated with pluralism and decision making, such as value conflict, standards of fairness and equity, dissent, and mutual commitment (O’Leary and Bingham 2008; Ostrom 1989).

Finally, scholars have recognized other valuable contributions of public management in promoting democratic values. For example, there is evidence across service delivery sectors that public agencies are able to effectively represent the interests of different groupings of citizens in the implementation process (Keiser et al. 2002; Riccuci and Meyers 2004; Rourke 1984; Selden 1997; Wilkins 2006). Public organizations are improving their ability to mobilize citizens around relevant policy issues and, more importantly, connect citizens to institutional arenas of decision making. These actions are significant since they often give a “voice” to segments of the public otherwise disenfranchised from political processes. More specifically, public managers and staff are educating the public on participation in public hearings, serving on policy advisory panels, engaging administrative rulemaking, and communicating with key policy actors via multiple media (Andrews and Edwards 2004; Leroux and Goerdel, 2009).

Overall then, there is evidence that modern public management is concerned with democratic values such as citizen participation, pluralism, and representation. There are also those in the legal community who argue that public law could and should be used to facilitate rather than constrain these activities. It seems to us the next logical step is to determine the best method for accelerating the productive union of law and management in the production of a more democratic administration. Whereas there are obviously

10 Scholars have also taken the general prescription of “more involvement” a step further and identified which types of participation, such as public meetings versus citizen advisory groups, are desirable in different decision making contexts (Thomas 1990).
numerous ways to approach this process, we believe one of the most promising is the role that public administrators play in the formulation of statutory law.

**Public Managers Can Shape the Legal Foundation of Administration**

Scholars have long asserted that administrators play an important role in policy formulation. Friedrich (1940, 6), for example, argued “politics and administration play a continuous role in both the formulation and execution of policy.” Fisher (1997, 63) later observed that “administrators and practitioners play a vital, creative, and continuing role in defining public law.” Modern theories of administration and management have continued to suggest that public managers are not only shaped by but also have an important role in shaping both the institutional and policy context in which their organizations exist (see especially Moore 1995, but also Lynn, Heinrich, and Hill 2001; O’Toole and Meier 1999). Obviously, there have also been a significant choir of voices who have warned against an intertwining of politics and administration and some of the most significant reforms of the last two centuries were designed explicitly to insulate these governmental functions from one another (see, e.g., Finer 1941). Nonetheless, there are conditions under which administrative influence in the policy process is both legitimate and desirable (see Meier 2000) and most modern theories of public management include some type of feedback mechanism whereby administrator expertise and experience inform future policy decisions (e.g., Lynn, Heinrich, and Hill 2001).

There is evidence that program administrators can influence law, both statutory and judicial, in ways that enhance rather than impede democratic values. Beginning with the first, Arnold (1979) argues that program administrators are often able to assemble coalitions in support of new programs and are even better positioned to advocate statutory changes to existing policies. The advantages arise from the relative expertise and legitimacy of these actors in the policy debate, and examples of their influence abound. It was mid-level managers in the US Postal Service that promoted rural free delivery as a means to better connect citizens to one another and their government (Carpenter 2001). As noted earlier, there is significant evidence that, at least in local government, managers have been for some time promulgating regulations and ordinances that further democratize administration through increased participation and representativeness (Nalbandian 1999, 1991). In many localities, police chiefs are credited with taking an entrepreneurial role in the development of community policing practices and winning from city councils the statutory and budgetary changes necessary for the transition from traditional policing. Chiefs also act as powerful opponents of changes in policing regimes when they have a preference for more traditional strategies (Lyons 1999; Reed 1999). In an example from yet another programmatic area, school superintendents were an important and supportive voice in the debate on open enrollment statutes in several of the states that adopted such policies (Nathan 1989; Pearson 1989).

Although a legislative approach can allow administrators very detailed and nuanced influence over the legal environment within which their programs operate, the strategy also has significant pitfalls. Ultimately, most members of the coalitions that administrators build in pursuit of statutory change are constrained by electoral motivation. As such, shifting public opinion or political circumstances can quickly erase hard won statutory gains. Trojanowicz and Bucqueroux (1990) describe one locality where the chief spent months winning support from the City Council to reallocate police resources to more serious
crimes, only to have the mayor, who had been a staunch ally, publicly champion a mandatory maximum response time policy for all crimes when the public became dissatisfied with what it perceived to be an inattentive police force. The lesson from this and other examples is that legislative victories for administrators are but the first step in what can be an almost continual process to maintain hard won changes to the legal environment.

The second avenue that administrators can pursue when they seek to change the legal environment is litigation. This is an important component of the growing relationship between Judges and managers in the administration of public programs that some refer to as the “new partnership” (Bazelon 1976; Rosenbloom 1983; Christensen and Wise 2009). According to O’Leary and Wise (1991) public managers can interface with the law through litigation to shape their operating context by either resisting legal remedies, capitalizing on legal decisions to secure additional budgetary (and other) resources, and mobilizing public opinion for or against legal remedies to support or disable their implementation. O’Leary and Wise (1991) focus their analysis on the use of litigation by school officials in Missouri v. Jenkins, but O’Leary (2006) provides numerous additional examples in the areas of natural resources and environmental policy of administrators who sued for legal changes when they felt the policy status quo ran counter to popular will, impeded accountability, or failed to produce a realistic mission for the organization.

As in the case of legislative strategies, litigious approaches to altering the policy environment offer both advantages and disadvantages to administrators. The key advantage of such strategies is that, when they are successful, the courts ultimately act to legitimize and codify the preferences of public managers. The downsides of such strategies are significant, however, and should give managers pause before they rush to use the courts as a means for shaping the legal context in which programs are administered. Legal decisions often mean a significant loss of discretion for managers in future administrative decisions. Additionally, mandated reforms may produce significant negative and unforeseen externalities that ultimately detract from the original gains won by managers (O’Leary and Wise 1991) or result in long-term partnerships that are not easily dissolved (Wise and O’Leary, 2003). In more extreme cases, judges, for example, may displace managers in public administration’s ruling triumvirate.

The suggestion that public managers bring their expertise in administration to bear on the crafting of the law that guides that administration will surely sound to many like letting the fox roam free in the henhouse.11 Obviously, we are not arguing that administrators always use their influence in the policy process to enhance democratic values. There are numerous examples of managers advocating for policies that benefit narrow constituencies or that increase their own discretionary authority.12 Thus, we are not naively suggesting that managerial influence in policymaking can either unilaterally or automatically enhance democratic values. However, we are suggesting that at times it can and that recognizing this potential is a key part of integrating law and management in the administration of public programs.

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11 This is particularly true for those that see the difference between managerial values and legal values as the difference between individual rights and administrative utilitarianism (Rosenbloom and O’Leary 1997). It is also true for those who emphasize the delegated relationship between administrators and elected officials and in keeping with principal-agent theory, assume divergent preferences between the two (e.g., Lynn and Bertelli 2006).

12 Such examples can be found in water policy (Maass 1951), defense policy (Armacost 1969), illicit drug policy (Baum 1996), energy policy (Jenkins-Smith, St. Clair, Woods 1991), and myriad others.
CONCLUSION

The tension between a public administration grounded in law and one grounded in management has been historically persistent and increasingly evident in contemporary scholarship. The substantive effects of the tension between legalism and managerialism range from marginal spill-over and chilling effects on managerial discretion, to more significant hostilities leading to crises of accountability, legitimacy, and even harm to those most vulnerable in society. This is particularly unfortunate at a time when rapid changes in the economic, social, and political environment are stimulating an equally rapid evolution of public management strategies and when adopting market and private sector tools threatens to erode much of the democratic-constitutional foundation upon which government rests.

As with preceding Minnowbrook gatherings, Minnowbrook III did little to resolve the relationship of law and management in public administration in the United States. Our general discussions reflected a view of law ill at ease in a public administration still actively pursuing market-based management reforms, evidencing the notion that law and management are somehow working at cross-purposes in the pursuit of the public good. Although administrative changes during the current financial crisis may actually somewhat deemphasize reliance on market-based mechanisms, our view is that the tension between law and management has and will endure until scholars and practitioners pursue a more integrated approach.

Minnowbrook III participants did generally agree on the merit of an approach to public accountability that includes market-based efficiency, program performance, and law-based democratic values such as equity and transparency. Building on these conversations, we formulated the three-part approach, presented here, in which the legal and managerial approaches to public administration might be brought together. Rather than claim complete novelty, we emphasize that the generally pessimistic tone of scholars regarding the potential and continuing tension between law and management in very recent scholarship has motivated our renewed challenge to the discipline to conceive of these approaches as mutually stimulating and reinforcing. In the end, we believe our proposal’s primary implication is the simultaneous achievement of public service delivery that is efficient, effective, and defensible in the constitutional democracy of the United States.

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On the other hand, these administrative changes may actually serve to further emphasize the importance of markets and market-based mechanisms as government invests public dollars to partner with private corporations and prop up market viability.


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