기고논문

A New Framework for Public Personnel Management: Toward Judicial Accountability

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The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights (Justice Brennan in *Owen v. City of Independence*).

The theory of public employment involves the relationship between a state, as employer, and its civil servants—who are otherwise ordinary citizens. This relationship involves the rights, expectations, and obligations between the two. Until the 1960s, United States courts assumed that government could restrict the First Amendment freedoms of public employees as it saw fit (Dotson, 1955 : 77~88). As the U. S. Supreme Court held in *Adler* v. *Board of Education* (1951), the petitioners (school teachers) "have the right under our law to assemble, speak, think and believe as they will . . . [but] they have no right to work for the State . . . on their own." It added, "They may work for the school system upon the reasonable terms laid down by the proper authorities . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[1] The Court also maintained that the Due Process Clause would *not* be applicable to public employees.[2]

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1) *Adler v. Board of Education*, 342 U. S. 485, 492 .

During the last three decades, the United States Supreme Court, in a series of landmark decisions, has fundamentally altered this relationship by "constitutionalizing" it—that is, bringing the public employment relationship within the constitutional framework. Having done so, the judiciary has emerged as a senior partner in public management within the separation of powers framework (Rosenbloom, 1987 : 75~83). What does this constitutionalization mean to today's public administrators? What different requirements, if any, does it place on them in the conduct of public personnel management? From the viewpoint of public administration research, one may also ask : what does this change suggest to the future of public personnel management theory? These are the questions I explore in this book.

By now, it is well known that the new employment relationship has fundamentally transformed the environment of public personnel management in the United States. It is also evident that the change requires a new framework for personnel management—the framework that is grounded in constitutional values. What is not entirely clear are the implications of this new requirement as it relates to public administration theory and the contours of its application. In this book, I will report that the new relationship is accompanied by a rapidly growing body of case law clarifying the uncertainties in application. I will also remind the readers that the management environment created by this case law is complex, full of uncertainty, yet inexorably demanding. Happily, a framework appears to be emerging that provides a new set of normative values grounded in the Constitution, including a multitude of case law principles. Taken together, the framework sets forth a new direction for research and a new requirement for public management. In this respect, I find the differences between the classical employment relationship and the new one are profound, particularly in their underlying value premises. The differences, in fact, strike at the heart of American public administration theory.

Pickering v. *Board of Education* (1967) illustrates the point.[3] Marvin Pickering, a school teacher, disagreed with his school board's failed financial proposal and published a letter in a local newspaper criticizing the board policy. The school board fired him based on disloyalty, disruption of the workplace harmony, and harming the reputation of the school system.

2) *Bailey v. Richardson,* 341 U. S. 918 (1951).

3) *Pickering v. Board of Education,* 391 U. S. 563 (1968).

Under the classical public management model (as shown in *Adler)*, the Supreme Court could have sustained the board decision because First Amendment freedoms would not apply to this teacher. Under the new model,[4] however, the Supreme Court required the board to carefully examine its need to restrict free speech of the school teachers against the constitutional right of these teachers, as citizens, to speak out on matters of public concern. Since the board had failed to do so, the Court ruled that the board action was unconstitutional.

The new framework makes demands on public administrators in many ways. It demands that administrators—superiors or subordinates—be fair, resonable and respectful of others' rights and privacy ; it also demands that they be cognizant of the legal and constitutional implications of their possibly wrongful action. As the Supreme Court has held time and again in recent years, public administrators at all levels may be held personally liable for damages—compensatory and punitive—should their wrongful action result in the violation of others' rights.[5] It may be inconsequential, according to the Court, whether they actually knew or understood the rights in issue. As the Court wrote unequivocally, they can be held personally liable if their conduct violates "clearly established . . . constitutional rights of which a reasonable person would have known."[6] In sum, the new framework makes it imperative that public administrators improve their "constitutional competence," to use Rosenbloom's words (Rosenbloom & Carroll, 1990). This is not an easy task, given that so little emphasis is placed on constitutional principles in the present public administration curriculum (O'Leary, 1989 : 115). It requires an empirical investigation to determine how extensively and deeply today's public managers have adopted this new philosophy of management. There is no doubt, however, that those who do not understand the new management philosophy will be frustrated, confused, and even dangerous—dangerous in that they can be a legal liability to the employer (Lee, 1987 : 160–170).

4) This case represents a landmark decision on this subject, contributing to the development of a new framework for management that I explore in this study.

5) *Wood v. Strickland*, 420 U. S. 308 (1975) ; *Harlow v. Fitzerald*, 457 U. S. 800 (1982) ; *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989) ; *Hafer v. Melo*, 60 LW 4001 (November 5, 1991).

6) *Harlow v. Fitzerald*, 457 U. S. 800 (1982).

1. The Nature of the Public Employment Relationship in the United States

The public employment relationship in the United States is fundamentally different, as one may expect, from that in the private sector.[7] This is because employers in the public sector are governmental bodies, and the U. S. Constitution forbids governmental bodies from encroaching upon certain individual rights.

Ideally, the Constitution would have enumerated the limits of governmental authority over public service employees vis a vis the rights and freedoms these employees may exercise while in public service. This, of course, is not the case. In most countries, the demarcations are drawn explicitly in the constitution or the code of laws. The entire issue of the public employment relationship in the United States, however, has been left to the realm of the "unwritten constitution." From the point of view of the U. S. Constitution, it is not possible to identify what specific rights the Constitution has guaranteed public employees and what authority the state might have over these employees. In the final analysis, the parameters of this rights-expectations-obligation question in the United States are determined by the judiciary as it interprets the Constitution.

That the public employment relationship in the United states evolves via case law presents characteristics not commonly seen in other democracies. Unlike the application of the formal law (statutory law) to identifiable situations, the case law approach relies on the method of the common law, deciding case by case and building on what previous courts have decided. This means that the U. S. constitutional system is designed to work and make progress, for the most part, when the existing rules and interpretations are challenged in court. I use the phrase "for the most part" because in our separation of powers arrangement, the legislative body has primary responsibility to "make all laws which shall be necessary and proper for carrying into Execution all foregoing Powers . . . vested in the Constitution."

As mentioned eralier, the federal judiciary in the 1960s completely reversed its earlier position on the public employment relationship by

7) Some may disagree with this point, arguing that public employees should not be treated any differently from private sector employees.

placing it under the constitutional purview. The Court decisions during this period can be viewed as the judiciary's challenge to the rise of the administrative state (Rosenbloom, 1987 : 76). As Rosenbloom wrote, "Since the 1950s, several Supreme Court Justices and federal judges have noted the challenges that large-scale and ubiquitous public administration poses to the constitutional and political order." After World War II, the federal government and several states adopted the loyalty-security program, severely curtailing the rights of public employees, as well as individual citizens. The program sought to exclude from federal service people who were believed to be disloyal to the United States. Under the program, the government placed in the "suspect" category those who read the *New York Times*, participated in the peace movement, or read Marxist literature. As can be expected, this policy generated a large number of lawsuits challenging the constitutionality of the post-War loyalty-security program. These lawsuits provided the judiciary with an ample opportunity to critically re-examine the validity of some of the classical judicial doctrines (such as the doctrine of privilege) that were undergirding the power of the administrative state. In a sense, bad laws provide the opportunity to test the Constitution. The Sedition Act of 1798 and the Espionage Act of 1917 also provided the occasion to expand the scope of First Amendment freedoms.

Another characteristic of the case law approach to the public employment relationship is its cumulative effect of creating newly acquired rights and benefits. The rights and benefits tend to expand but cannot be taken away arbitrarily (without due process). As Justice White wrote in *Cleveland Board of Education v. Loudermill* (1985), "The right to due process is conferred, not by legislative grace, but by constitutional guarantee."[8] The American administrative state in the present century has expanded the domain of public goods tremendously in the form of rights, benefits, and entitlements. Under the new public employment relationship, the administrative state can create new benefits and entitlements but can no longer take them away without constitutionally protected due process. The beneficiaries do not have to take the "bitter with the sweet," accepting the unreasonable conditions of the provider.[9] As the so called "bitter with sweet" doctrine is no longer found constitutionally tenable, it is the engine of the Due Process Clause that helps to expand employee rights.

8) *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, 1493 (1985).

9) *Arnett v. Kennedy*, 416 U. S. 134 (1973).

The American public employment relationship is as complex as case law itself. It is adaptive, full of uncertainty, and develops only when it is challenged. The way it has been evolving is, indeed, deeply American in design, although many have been less than willing to appreciate it. It is, in fact, a system of positive constitutional law. As Ostrom wrote, "Persons in a constitutional republic must be able to initiate and sustain causes of action in the protection of their constitutional rights and in the imposition of limits upon governmental authorities" (Ostrom, 1973 : 104). One wonders : How has it been possible that this important constitutional heritage escaped the scholarship of American public administration for so long?

2. A Drift in American Scholarship

Literature abounds to show that, historically, the study of public administration in the United States began with the doctrine of efficiency as its disciplinary foundation. As Woodrow Wilson wrote in his well-known essay "The Study of Public Administration," "The field of administration is a field of business" (Wilson, 1887 : 198~222). He saw the civil service reform of 1883 as a "moral preparation," in Wallace Sayre's worlds,[10] for making public administration "businesslike."

Since Wilson, the study of public administration has taken many different directions, but the focus has remained remarkably the same : the pursuit of efficiency in the administrative state. However it is cut, one cannot deny the fact that public administration researchers have been basically recasting the same concern that Alexander Hamilton wrote of in Federalist No. 70, long before Wilson : "Energy in the Executive is a leading character in the definition of good government. It will only remain to inquire, what are the ingredients which constitute this energy?" (Hamilton, Madison, & Jay, 1901 : 49~58). A central premise in Hamilton's thesis in *Federalist Papers* is the executive supremacy in public administration. As John Rohr traces the intellectual history in his popular book, *To Run a Constitution* (1986), American scholarship basically proceeded with an assumption that the

10) Wallace Sayre, "The Triumph of Techniques over Purpose," *Public Administration Review* 8 (Spring 1948), pp.134~137. This is a book review essay on Paul Pigors and Charles A, Meyers, *Personnel Administration : A Point of View and a Method* (New York : McGraw Hill, 1947).

entire executive power of the national government was vested in the President (Rohr, 1986). Thus, if we substitute "efficiency" for "energy," Hamilton's concern was the same for all—the Wilsonians, the proponents of scientific management, the human relations advocates, the administrative behaviorists, and the political economists : how to increase efficiency or how to create an efficient government. To them, a good government was an efficient government.

What has emerged from this disciplinary orientation is the field of contemporary public personnel administration, single - mindedly focusing on a narrow track of the science of personnel management. The topics popular in personnel textbooks, therefore, have been efficiency principles, including position classification, job evaluation, performance appraisal, merit pay, and POSDCORB training (Planning, Organizing, Staffing, Directing, Coordinating, and Budgeting) (Gulick & Urwick, 1937). On reflection, the classical writers in American public administration have failed to pay attention in their scholarship to the centrality of constitutional values in the design of American public administration freedoms, liberty, fairness, and due process.

Constitutional values are at the core of democratic administration. Yet, as Ostrom argued, American scholarship in public administration has rejected the theory of democratic administration in favor of the bureaucratic theory of administration based on the philosophy of efficiency (Ostrom, 1973). This rejection was a fundamental error in the study of American public administration. Rohr, in tracing the constitutional origin of the administrative state, takes up this theme and argues that nowhere in the Constitution is it written that the executive power is vested exclusively in the president. Under the separation of powers arrangement, Congress is supposed to share much of the executive power, from appointments to foreign policy-making (Rohr, 1986 : 15~27).

How could public administration scholars be so wrong when designing the field of public administration? Woodrow Wilson, Frank Goodnow, and Louis Brownlow were all constitutional scholars. According to a thesis advanced by Rohr, these scholars took their signal from Publius (this was the pseudonym James Madison used in his Federalist Papers) but went about differently. "At the founding of the Republic," Rohr argues, "there was a solid consensus that the primary purpose of government is the protection of individual rights." But since Anti-Federalists were afraid that the establishment of the strong national government would be a threat to individual rights, Publius tried to ease their concerns by arguing that only a

strong government could protect individual rights effectively. Classical writers, including Louis Brownlow, joined Publius, according to Rohr, in defending powerful government as instrumental for higher ends. For them, the higher ends were the realization of democracy, so they substituted "democracy" for individual rights, a serious departure from Publius (*Ibid.* : 147). It is no surprise that the Brownlow Report, one of the best pieces on the application of classical public administration theory, focused on the doctrine of efficiency while providing no serious discussion of the protection of individual rights as government's primary purpose.

The "politics of administration" school was somewhat an exception to this efficiency orientation, in that its goal was to liberate public administration from the Wilsonian system of efficiency and to redirect its inquiry toward the nexus between administration and democratic values (Dimock & Dimock, 1964 : Chapter 8). While the proponents of politics of administration made their case strongly, the thrust of their inquiry was largely directed to the questions of politics, legitimacy, and political accountability. They were successful in reinstating the democratic administration, which Wilson and his contemporaries rejected. From the viewpoint of the public employment relationship, however, the politics of administration school did not go far enough to inquire into the nexus between public administration and the Constitution, particularly as pertains to individual rights.

The judiciary, too, seemed to show little interest in the constitutional issues of public personnel administration, claiming no jurisdiction over the issues that, under the common law, belonged to the appointing authority. Even in the sphere of individual rights in general, the judiciary had not gone very far until the last half century (Lewis, 1991 : 67).

3. Emerging Ethos in the New Personnel Management

As discussed, much has changed during the last three decades, thanks to judicial intervention. As David Rosenbloom observed in his seminal essay published in 1975, "the courts have almost completely transformed the nature of the constitutional position of public employees in the United States" (Rosenbloom, 1975 : 52). From the viewpoint of public administration theory, the change is nothing less than a rejuvenation of what Ostrom called "the rejected alternative," the democratic administration grounded in the theory of a positive Constitution (Ostrom, 1973 : 102~105).

The new approach recognizes that American public administration oper-

ates within the constitutional framework of separation of powers, that the executive ought to be energetic but is not the sole source of executive power, that public administrators are not exclusively under the executive branch but are an embodiment of all three branches—executive, legislative, and judicial. In this approach, the courts play a senior partner's role in public management, demanding that administrators be accountable to the Consititution. The approach engenders a new administrative culture in which, as Rohr envisioned, [Public administrators] should learn to think like judges, as well as like legislators, and executives, because they are all three of these" (Rohr, 1986 : 185).

But the new approach does not negate the concept of efficiency as a concern of central importance. The courts have emphasized time and again that First Amendment freedoms are not absolute and that under certain circumstances, they may be compromised for the efficient functioning of a democratic system—without which First Amendment rights become a mockery.[11] In *Pickering*, for instance, the Court took pains to explain that the need of government to operate efficiently can be a compelling government interest sufficient to legitimize government regulation of employees' free speech. The Court made it clear that, although public employees do not lose their rights conferred by the Constitution becase they have chosen to work for government, First Amendment rights should be balanced against the need of the state to operate efficiently.[12] In sum, the Court recognizes that efficiency is still essential for public administration. What it requires is that the administrative state pursue the goal of efficiency in a manner that is consistent with constitutional values.

During the past three decades, the courts have reviewed a number of cases dealing with public employee rights, the rights arising from the Constitution and laws. It is possible to identify a few broad principles that the Supreme Court has set forth for public management. These principles serve as a point of departure for public management and research as American public administration takes its journey beyond the bicentennial.

11) *United Public Workers of America v. Mitchell*, 330 U. S. 75 (1947).

12) The judicial concern for efficiency finds its root in the nineteenth century "spoils politics." The Civil Service Act of 1883 was a challenge to the spoils system, and Congress rejected its premise as a design principle for public administration.

A. Constitutionally Guaranteed Rights

The Constitution confers upon individual citizens certain fundamental rights (such as certain freedoms, due process, and equal protection) that government must respect. A long-standing doctrine in American public administration has been that these rights do not apply to public employees. The Constitution does not explicitly address this question, as it says little about public administration. In their wisdom, therefore, the judiciary has been relying on the old English common law, assuming that public office is a function of public law. If it were a function of public law, the tenure of office should be subject to public law and the appointing authority, and not subject to the Constitution. In his seminal article published in 1955, "The Emerging Doctrine of Privilege in Public Employment," Arch Dotson called this theory the "doctrine of privilege." Under this doctrine, public employees are presumed to serve at the pleasure of the appointing authority. Therefore, as Dotson argued, "the government may impose upon the public employee any requirement it sees fit as conditional to employment (Dotson, 1955). Accordingly, constitutional protections would not apply to public employees as they are to individual citizens.

The history of public personnel administration in the United States attests to the fact that this doctrine indeed served as a basic framework for public law and management—until the 1960s. During the 1960s and 1970s, the Supreme Court, in a series of cases—*Wieman v. Updegraff* (1952) ; *Slochower v. Board of Education* (1955) ; *Cramp v. Board of Public Instruction* (1961) ; *Sweezy v. New Hampshire* (1956) ; *Baggett v. Bullit* (1963) ; *Shelton v. Tucker* (1960) ; *Speiser v. Randall* (1957)—had rejected the privilege doctrine as "wooden" and "meaningless."[13] In 1967, in *Keyishian v. Board of Regents,* the Court once again rejected the privilege doctrine, this time, in the context of academic freedom : "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is, therefore, a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[14]

13) See *Wieman v. Updegraff,* 344 U. S. 183 (1952) ; *Slochower v. Board of Education,* 350 U. S. 551 (1955) ; *Cramp v. Board of Public instruction,* 368 U. S. 278 (1961) ; *Sweezy v. New Hampshire,* 354 U. S. 234 (1956) ; Baggett v. Bullit, 364 U. S. —— (1963) ; *Shelton v. Tucker,* 364 U. S. 479 (1963).

B. Employment as a Property Right

The constitutionality of the privilege doctrine also has been challenged on the basis of the Due Process Clause. In 1972, in *Roth v. Board of Education*, the Court pronounced that it was abandoning the privilege doctrine once and for all, declaring that the expectation of continued employment creates a property interest that the Constitution protects. Once a property interest has been established, public employers may not take it away without constitutionally guaranteed due process. Somewhat problematic in this approach is what precisely would give rise to the expectation of continued employment. At one point, the Court believed that public policy, formal or de facto practice, would engender the expectation of continued employment.[15] At another time, however, the Court placed emphasis more on the language of the statute and how the courts interpret it than on the customary practices.[16]

C. Equal Protection and Discrimination

Another major development in public personnel administration in recent years involves the application of the equal protection guarantees of the Fourteenth Amendment. While the Equal Protection Clause literally guarantees everyone "equal protection of the laws" or simply "no discrimination," the phrase had been interpreted historically to mean "separate but equal," particularly as it relates to race (*Plessy v. Ferguson* 1896. The separate but equal doctrine permitted employers, public or private, to legally engage in discriminatory practices in employment, education, housing, public transportation, public accommodations, and many other spheres of American life.

In 1954, in *Brown v. Board of Education*, the Court struck down the separate but equal doctrine, declaring that "in the field of public education the doctrine of 'separate but equal' has no place," and that segregation in public education is "a denial of the equal protection of the laws." The *Brown* decision galvanized the civil rights movement into a nationwide force (Lewis, 1991 : 15~33). In response, Congress passed the Civil Rights Act

14) *Keyishian v. Board of Regents*, 385 U. S. 589,603 (1966).

15) *Perry v. Sinderman*, 408 U. S. 593 (1972).

16) *Bishop v. Wood*, 426 U. S. 341 (1976).

of 1964—almost 100 years after the ratification of the Fourteenth Amendment—to articulate (and expand) the meaning of the Equal Protection Clause. In this legislation, Congress made discrimination unlawful in education (Title VI) and employment (Title VII), among others, if it were based on race, color, religion, nationality, or sex. In 1972, Congress amended Title VII (Equal Employment Opportunity) to apply it to the public sector at all three levels—federal, state, and local.

As Title VII applies to personnel management, public policy is focused not only on the questions of damages (back pay, make-whole, and injunctive relief), but also on affirmative action or proactive measures. Here, technical challenges are found to be enormously complicated. For example, how may discrimination be objectively measured, and what different thresholds may the judiciary use for determining various damages? The law in this area is in great flux as the Court has been sharply divided over the issues. This means that public administrators must keep abreast of the rapidly developing case law in this area.

D. Affirmative Action and the Constitution

Affirmative action is equally complicated, if not more so. Presently, it seems as though the Court has reached an impasse on the question of affirmative action even in a restricted sense. While some justices (Chief Justice Rehnquist and Justice Scalia in particular) insist that the Equal Protection Clause means that the Constitution is colorblind, permitting no racial or gender-based classifications whatsoever, others (Justices Powell, Brennan, and Marshall, all retired, and Justice Stevens) maintain that the Constitution allows remedial affirmative action, permitting the opportunity to correct the effects of past wrongs. To deal with this dilemma the Court has developed a complicated analytical framework for reviewing affirmative action complaints, but it often finds the consensus difficult to achieve. In *University of California Regents v. Bakke* (1978),[17] the Court, in a plurality opinion, established that a carefully designed affirmative action program would not be constitutionally impermissible. Yet, a decade after *Bakke*, the Court still finds it difficult to achieve consensus over what such a carefully designed program should be. Again, public administrators are expected to follow closely the development of case law.

17) 438 U. S. 265 (1978).

E. Immunities and Liability of Governmental Bodies

Public service has its own hazards—suing and being sued for damages. Can the government, as the sovereign, be sued for damages when its supposedly collective action results in the violation of constitutionally and statutorily guaranteed individual rights? Can a public official be held personally liable for his or her own misconduct that results in the violation of other's rights? The written Constitution is silent on these subjects.

Since the Constitution says little about matters of governmental liability, the courts initially relied on the old English common law, which states that the king can not be sued in his own court. In practice, this conventional wisdom has been interpreted to mean that the sovereign must consent to be sued and, unless it has consented, it is absolutely immune from civil liability. The old English Crown did, in some cases, consent to accept civil complaints against the Crown.

The question is whether governments in the United States—federal, state, and local—have consented via legislation to be sued for damages. In 1947, Congress enacted the Federal Tort Claims Act, allowing civil damages against governmental officials in their personal capacity and limited claims against the United States (Wise, 1985 : 845~856). Most state governments have followed by enacting restricted tort laws permitting civil damage suits against them (Hildreth & Miller, 1985 : 245~264). With respect to local governmental liability, according to the Court in *Monell v. Department of Social Services of the City of New York* (1978),[18] Congress removed all immunities from local governmental entities when it enacted the Civil Rights Act of 1871.

The Fourteenth Amendment was ratified in 1867. As a way to enforce its provisions, Congress enacted the Civil Rights Act, declaring that state and local officials ("every person who, under color of any statute . . . of any State . . .) shall be liable for civil damages when their actions cause or contribute to the deprivation of individual rights, privileges, or immunities secured by the Constitution and laws. There had been a controversy in the Supreme Court concerning whether the 1871 law (now codified as 42 U. S. C. Section 1983) included municipalities in the phrase "every person." Until 1978, the Supreme Court did not think that Section 1983 could be read to be the consent by municipalities for civil liability. In 1978, in *Monell v.*

18) 436 U. S. 658 (1978).

Department of Social Services of the City of New York, the Court reversed its earlier holding in *Monroe v. Pape* (1961),[19] holding that Section 1983 did, indeed, remove the municipality's absolute immunity from liability for constitutional and statutory torts. As can be expected, the *Monell* decision changed the nature of the legal environment for public administration in general and particularly at the local level.

In 1989, in *Will v. Michigan Department of State Office,*[20] the Court gave another interpretation of the 1871 law exempting the states from Section 1983 liability. The Court believed that Section 1983 did not override the Eleventh Amendment establishing the state jurisdiction over certain judicial matters. This meant that civil liability involving state governments (not officials) would be matters of state law.

4. Personal Liability of Public Administrators

With regard to official liability (in the personal capacity), case law has been growing rapidly in recent years. While federal officials are subject to suit for constitutional and statutory torts, the Supreme Court has ruled time and again that state and local governmental officials are subject to Section 1983 liability. In 1991, in *Hafer v. Melo,*[21] the Court confirmed once again that state officials are included in the phrase "every person" of the 1871 statute so they may be held liable to civil damages, including compensatory and punitive damages, should their wrongful action violate the rights and privileges secured by the Constitution and federal laws.

If modern governments in the United States are called the "administrative state"—apparently because of their bureaucratic omnipresence—the recent Court decisions clearly challenges the administrative state by demanding that it be accountable to the judiciary. Recent courts have been shaping an administrative environment in which governments and officials "may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."[22]

These are among the new ethos that have emerged in contemproary

19) 365 U. S. 167 (1961).

20) 109 S. Ct., 2304 (1989).

21) 60 LW 4001 (November 5, 1991).

22) *Owen v. City of Independence, Missouri,* 445 U. S. 622, 651 (1980).

American public administration. In the chapters that follow, we will witness a rich body of case law that touches upon virtually every aspect of administrative behavior. The chapters will make it clear that today's public administrators, or for that matter, public employees in general, may not be able to escape from judicial scrutiny in their conduct of public administration. On a positive side, they will find that a commitment to constitutional values enriches their administrative milieu, strengthens their moral and ethical convictions, and heightens the place of administration in a constitutional democracy.

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