

**CENTER AND PERIPHERY IN ANTEBELLUM FEDERAL  
ADMINISTRATION: THE MULTIPLE FACES OF POPULAR  
CONTROL\***

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I. INTRODUCTION

Steven Calabresi and Christopher Yoo make a basic claim in their new book: all Presidents are essentially Unitarians.<sup>1</sup> In one way or another, they all seek to have exclusive control over the executive power and to direct the activities of those in the executive branch. The evidence for this claim is a broad survey of governmental practice from the earliest days of the Republic to the twenty-first century. At this level, the Calabresi-Yoo claim is not terribly controversial. A somewhat stronger claim, however, occasionally creeps into their discussion. That stronger claim might be stated as an argument for the normative force of practice. Because Presidents have consistently acted as if they were the exclusive seat of executive power, that practice should govern our constitutional understandings of the allocation of power within the federal government.

This stronger claim is much more problematic. To make it out, at least the following issues would need to be addressed: What is the normative force of practice? What practices count as having normative force? And, how is practice to be interpreted? Other papers at this conference address these questions and I have addressed the interpretive issue in an earlier article.<sup>2</sup> In this contribution I will leave those issues mostly to the side. However, the title of this panel, “Presidential and Popular Control of Bureaucratic Elites,” suggests an obvious normative basis for linking presidential control of the bureauc-

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1 See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (discussing the theory of the unitary executive).

2 See Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 662–64 (2009) (discussing how the normative force of practice is to be interpreted).

racy with popular democracy. Presidents are popularly elected. Hence, whatever the other arguments for presidential control of bureaucratic elites, one is surely that it tends to implement popular control of the bureaucracy.

I'm sympathetic to the basic thrust of this claim.<sup>3</sup> But my purpose here is different. I want to explore other meanings of popular control, and, in keeping with the historical orientation of this conference, how those other meanings were operationalized in the organization of the Early Republic. For unitarianism has no exclusive claim to democratic legitimacy. And, as we shall see, other ideas and mechanisms of popular control are competitive with the unitarian vision, both theoretically and as a matter of governmental operation. The recognition that popular control has other meanings and is operationalized through devices that compete with presidential direction can provide a more realistic assessment of both the normative power and the practical reach of unitarianism, whatever the aspirations of antebellum Presidents, or their successors.

To some degree this description of practices in the Early Republic is a retelling of the old story of the struggle between center and periphery in all substantial organizations—public or private. But my narrative is not entirely descriptive. Early practices were based upon normative considerations. Americans then and now have been committed to multiple forms of popular control of government. I will close therefore with some reflections on the degree to which these commitments, notwithstanding their competition with unitary presidential control, tend to increase popular control of governmental action—which, in some sense, is what democracy is all about.

## II. ALTERNATIVE METHODS OF POPULAR CONTROL

Before proceeding to explore governmental practice in the antebellum Republic, let me briefly describe some competing models of popular control of administration. These four types of control arrangements hardly exhaust the universe of organizational arrangements with some claim to democratic legitimacy. Nevertheless, each has a strong claim to provide a democratic pedigree for administrative action, each has familiar contemporary examples, and each, as we shall see, was well represented in the organizational structures of the antebellum federal government.

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<sup>3</sup> See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) (discussing voters' expectations and influences in presidential elections).

Assembly control of administration is an obvious first candidate. American administrative agencies famously have two principals, the President and Congress. Congress, unlike the president, is popularly elected. No Senator or Representative can take office without winning the popular vote. And, it is Congress, not the President, that creates, empowers, and funds administrative agencies. If popular control of administration is wanted, Congress can—to some degree—provide it.<sup>4</sup> That Congress is motivated to do so seems obvious. Congress hardly lets any executive effort to act autonomously go unchallenged. When, in November 2008, Secretary Paulson sent Congress a three-page bill giving the Treasury virtually unlimited discretion to spend \$700 billion, he got back a nearly 150-page statute, bristling with requirements for reports to Congress and with opportunities for congressional oversight and amendment.<sup>5</sup>

Direct citizen involvement in administration is also a well-known technique for popular influence on, if not control of, administrative action. Modern federal statutes often insist on public hearings, opportunities for notice and comment on agency rulemaking, the solicitation of advice from advisory committees, the use of standards previously formulated by private groups, and so on and on. And, as a practical matter, Presidents would not appoint, and Congresses would not confirm, heads of major departments or agencies who were not broadly acceptable to the groups most directly affected by their actions. Some citizen participation has a stronger legal character. For example, citizens are given an independent right to enforce a number of federal environmental statutes in the face of government inaction or recalcitrance.

Decentralized administration of federal law is also a common feature of American governmental arrangements. Occupational safety and health standards and environmental standards are implemented largely by state personnel. And a huge proportion of federal spending on infrastructure projects and social welfare programs is carried out at the state and local level. The use of nonfederal personnel to implement federal programs is motivated by a host of reasons. The desire of both Congress and the President to avoid “increasing the size of the federal government” is surely chief among them. But this

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4 A significant line of contemporary political science research is devoted to political control of the bureaucracy and focuses almost exclusively on congressional control. See the references in KENNETH J. MEIER & LAURENCE J. O'TOOLE, JR., *BUREAUCRACY IN A DEMOCRATIC STATE: A GOVERNANCE PERSPECTIVE* 22 tbl.2.1 (2006).

5 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

political sleight of hand simultaneously pays tribute to the notion that government administered by officials “closer to the people” reinforces popular control and democratic accountability. The necessary result is variance across states, and perhaps within them, of the real force and effect of federal law—a variance that reflects local political preferences and popular political culture.

Finally, it is an accepted feature of the organization of federal administration that political parties will play a role in who administers federal law. This can, of course, reinforce presidential control over administration. But, in House Speaker Tip O’Neill’s famous phrase, “all politics is local.” The mobilization of parties in national elections is the mobilization of parties at the state and local level. And those state and local actors must be given a role in the selection of new administrations and the setting of the party’s agenda. Nor is party participation in administrative governance merely a replication of either decentralized implementation or the influence of congressional office holders. The party faithful, who influence appointments to federal agencies and the shaping of party platforms, may or may not simultaneously be the majority party that is in control of state and local governmental machinery or of Congress. Although nowhere mentioned in the Constitution, and feared by the Constitution’s drafters, political parties have become an essential feature of American democratic governance and a major avenue for outside influence on administrative personnel and priorities.

Competition for control among elected officeholders, direct public participation in administrative implementation, decentralized enforcement and execution and local partisan participation all contribute to popular control of administration. Moreover, these accepted features of American governance all, to some degree, undermine overhead control of administration by the Chief Executive. As the discussion below illustrates, these are not features of American government that emerged accidentally or without an understanding of their potential contributions to some vision of democratic governance. But, in antebellum America, these different approaches to popular control of administration were often pursued by mechanisms that are unfamiliar to contemporary institutional designers or that had a different political salience in that earlier period.

### III. ELECTORAL CONTROL

I will not here belabor the separation of powers issues that punctuate the 200-plus years of competition between Congresses and Presidents for control over administrative action. The existing literature

is massive, perhaps excessive. W.F. Willoughby put the point well in his 1919 treatise, when he said that the U.S. Constitution “failed utterly to recognize or to make any direct provision for the exercise of administrative powers.” He continued, “[i]n consequence of this failure our entire constitutional history has been marked by a struggle between the legislative and executive branches as to the relative parts that they should play in the exercise of this power.”<sup>6</sup> Those comments seem as perspicacious in 2009 as they did in 1919. But a few additional thoughts directly relevant to the current theme of popular control seem in order.

First, the claim that the President represents the people by popular election was not really a credible claim until the Jacksonian period. It was not until about 1830 that state election laws enfranchised most white males and bound presidential electors to cast their ballots, for President and Vice President, in accordance with the popular vote.<sup>7</sup> The Federalists’ normative claim for a strong chief executive with substantial control over administration was based on efficiency, not democracy. Indeed, democratic legitimacy was generally thought to reside in the legislative branch, particularly the House of Representatives, for many years the only directly elected branch of the federal government. When the Jeffersonian Republicans took over from the Federalists in 1801, Thomas Jefferson described his election as working a revolution in the American form of government.<sup>8</sup> By this he meant that his party was committed to returning authority to the legislature, reducing the size of the federal workforce and recognizing the states as the principal governing authorities for the country. Jefferson’s actions were not always true to this vision,<sup>9</sup> but it was not

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6 W.F. WILLOUGHBY, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES 242 (1919).

7 See SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 181–217, 308–09 (2005), for a discussion of the progression in American presidential elections towards the principle of universal white adult male suffrage.

8 Letter from President Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 212, 214–15 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (taking the position that the judiciary should not have the exclusive right to interpret the Constitution, and that each of the three branches of government should have an equal right to independently decide the meaning of the document).

9 Henry Adams summed up the inconsistency of Jefferson’s actions with his “Virginia Republican” principles: “[T]he embargo and the Louisiana purchase taken together were more destructive to the theory and practice of a Virginia republic than any foreign war was likely to be.” 2 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 273 (Antiquarian Press Ltd. 1962) (1890).

until Jackson that the President could realistically claim to speak for the people.

Second, in the Early Republic, even more than now, congressional statutes named the President as the administrative officer in charge of new legislative policies.<sup>10</sup> It was recognized that the President would delegate this authority to others, and that the statutes themselves gave the President a direct role in administration. Nevertheless, both Congress and the courts distinguished between the President's directive authority under statutes that specifically authorized presidential action, and those that empowered other officers to carry out administrative duties.<sup>11</sup>

This was true even under statutes that were highly presidential in form. For example, the Embargo of 1807–1809<sup>12</sup> is often characterized as “Jefferson’s Embargo,” because the plan was his idea, and the implementing statutes<sup>13</sup> virtually all named the President as the principal administrative officer. But, not every provision of the legislation carried this implication. One of the Treasury’s early instructions to Collectors of Revenue under the embargo statutes informed them that the President considered vessels loaded with provisions to be suspicious and subject to detention. Following orders, the Collector at Charleston refused to grant clearance to a vessel loaded with rice and ostensibly bound for Baltimore. The Collector had publicly denied that he personally found the vessel suspicious, but explained his actions by invoking the presidential instruction.

Relying on the Collector’s public statements, the owner of the vessel brought a mandamus action in the federal circuit court to have his vessel released. Justice Johnson, a Jefferson appointee sitting as a circuit judge, ordered the vessel released.<sup>14</sup> The relevant statute allowed

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10 See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1299–300 (2006) (describing occasions where Congress presumed administrative and regulatory responsibilities to be the President’s in regards to war or foreign affairs).

11 See the discussion in Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006), arguing that the President has authority to administer the laws only when the statute specifically grants it, but not when the statute grants the authority to another executive officer.

12 For classic treatments of the embargo, see generally WALTER WILSON JENNINGS, *THE AMERICAN EMBARGO 1807–1809* (A.M. Schlesinger ed., 1921), and LOUIS MARTIN SEARS, *JEFFERSON AND THE EMBARGO* (1927).

13 For details on the statutory history of the embargo, see Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1650–55 (2007).

14 See *Ex parte Gilchrist*, 10 F. Cas. 355, 366 (C.C.D.S.C. 1808) (No. 5420) (stating that there is good reason for the court to exercise its mandamus power and release the vessel).

detention when the Collector was of the opinion that the vessel intended to evade the embargo. According to Justice Johnson, nothing in the statute gave the President the authority to direct the Collector to hold a vessel contrary to the Collector's own judgment. On the advice of the Attorney General that circuit courts had no mandamus jurisdiction, Jefferson instructed other Collectors to ignore mandamus orders from federal circuit courts. And Congress quickly passed an amendment to the embargo statutes confirming the President's authority to direct the seizure of a vessel, but not before the opposition press excoriated Jefferson as dictatorial and an enemy of the rule of law.<sup>15</sup> The *Gilchrist* case, and the political warfare that surrounded it, illustrate not only the continuous struggles over presidential authority, but also the contemporary understanding that the directive authority of the President with respect to administration was subject to control by statute.<sup>16</sup>

The default position was surely that the President could direct so long as the officer had discretion under the statute and the President's directions did not go beyond the officer's authority.<sup>17</sup> But, Congress could change the default. Under the embargo statutes, the collectors clearly had discretion, but on Judge Johnson's interpretation, they had no discretion not to exercise it themselves. And Presidents may not rewrite the law.<sup>18</sup> In short, antebellum statutes often reinforced the President's claim to exercise democratic political con-

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15 For a discussion of *Gilchrist* and the reactions to it, see 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 324–38 (rev. ed. 1926) (noting Jefferson's decision to seize certain vessels, the intense public reaction it caused, and Johnson's decision to call Jefferson's instructions illegal).

16 President Jefferson may have had the better of the argument on the merits as well. The first embargo statute provided that the President had authority to issue "such instructions to the officers of the revenue, and of the navy and revenue cutters of the United States, as shall appear best adapted for carrying the same [meaning the statute] into full effect." An Act Laying an Embargo on All Ships and Vessels in the Ports and Harbors of the United States, ch. 5, § 1, 2 Stat. 451 (1807) (repealed 1809). Moreover, while Jefferson's instructions constrained the collectors' discretion, they did not displace that discretion completely. And, as Jefferson later explained to Governor Pinckney, he acted to ensure the consistent and faithful execution of the laws. See Letter from President Thomas Jefferson to Governor Charles Pinckney (July 18, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 8, at 102–04 (discussing Jefferson's goals of consistency and uniformity when deciding the law).

17 Indeed, so long as the officer had discretion under the statute, there was no judicial review of his judgment. On judicial review in the antebellum republic and the limitations of the writ of mandamus, see Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1669–84 (2008) and authorities therein cited.

18 For a classic early case, see *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804), noting that the President gives orders according to instructions and acts of Congress.

trol over administration by adding the imprimatur of a popularly elected assembly. But not always.

Third, and finally, if normative commitments to a particular form of popular control of administration are to be judged by how events played out on the ground, congressional claims to authentic popular control may be superior to those of Presidents, at least in the antebellum period. Presidents like Washington, Jefferson and Jackson exercised substantial control over administrative matters, both large and small. But, the overall pattern of political action favored what Woodrow Wilson famously called “congressional government.”<sup>19</sup> Although Wilson almost certainly over-stated his case, he had this to say about the presidency in 1885:

The business of the president, occasionally great, is usually not much above routine. Most of the time it is *mere* administration, mere obedience of directions from the masters of policy, the Standing Committees. Except in so far as his power of veto constitutes him a part of the legislature, the President might, not inconveniently, be a permanent officer; the first official of a carefully-graded and impartially regulated civil service system, through whose sure series of merit-promotions the youngest clerk might rise even to the chief magistracy.<sup>20</sup>

Other commentators have been less imaginative, but they often echo Wilson’s basic proposition. Speaking of the period before Jackson reasserted presidential power, Wilfred E. Binkley said: “[B]y 1825, unless the trend were checked, the presidency bade fair to represent, in time, not much more than a chairmanship of a group of permanent secretaries of the executive departments to which Congress . . . paid more attention than to the President.”<sup>21</sup> And, at the close of the Jacksonian era, populated by Presidents (Polk perhaps excepted) whom no one remembers, Leonard White concluded concerning the appointments process for administrative personnel, “[i]n this aspect of the struggle for power, the legislative branch stood relatively a victor in 1861 even though the executive still held high [i.e., constitutional] ground.”<sup>22</sup>

To be sure, as Calabresi and Yoo point out over and over again in their book, Presidents often asserted their claim to executive author-

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19 WOODROW WILSON, CONGRESSIONAL GOVERNMENT (The World Publishing Co. 1973) (1885).

20 *Id.* at 170.

21 WILFRED E. BINKLEY, PRESIDENT AND CONGRESS 78–79 (3d rev. ed. 1962) (1947).

22 LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829–1861, at 124 (1954).



ity,<sup>23</sup> and, at least after Jackson, they could do so in part on the basis of their popular mandates. My point is merely that there was a strong and competing vision of political control based in electoral politics—assembly government. From the 1820s forward, Congress increasingly organized itself in specialized committees in order, not just to legislate, but to oversee administration. Presidential authority had a number of good years, but in most years throughout the antebellum period, the idea of “political control of administration” would have been interpreted to refer to the relationship between administrators and Congress.

#### IV. POPULAR INVOLVEMENT IN ADMINISTRATION

*The Ambiguity of Office.* Today the idea of popular control of bureaucratic elites tends to be understood as a desire to infuse bureaucratic processes—populated by professionalized and mission-oriented career civil servants—with the preferences and normative commitments of ordinary citizens. While we recognize that many agencies and departments cannot operate effectively without the specialized knowledge of biologists, engineers, economists, and so on, and while we also expect these personnel to be dedicated to their agency’s core mission, we do not believe that protecting the environment, regulating consumer fraud, or building highways, exhausts our vision of good public policy or a good life. The involvement of ordinary citizens in administration through participation in agency processes, serving on advisory committees and the like, is often designed to temper agency tunnel vision. By a “bureaucratic elite” we tend to mean a group of professionals with specialized knowledge who are dedicated to a particular task or mission.

These modern ideas of bureaucratic elitism are almost wholly inappropriate to the conditions of American governance in the Antebellum period. President Washington famously based appointments of officers on what he called “fitness of character,” by which he meant people who had the respect of their fellows and would therefore help to engender respect for the new national government.<sup>24</sup> Virtually all field personnel were chosen from the locality in which they would

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23 Often, but surely not always. President Tyler, for example, proposed to make the Treasury a truly independent agency, thus, in his words establishing “a complete separation . . . between the sword and the purse.” John Tyler, Inaugural Address (Apr. 9, 1841), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1889–90 (James D. Richardson ed., 1897).

24 LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 258–59 (1948).

serve. In a significant sense the officers' authority did not come from the office. The government's authority came from its association with the private status of the office holder. Popular control, that is, control of official action by people who were respected in their communities, was in this sense built into the idea of office itself.

Moreover, most officials outside of the capital, which contained relatively few, were part-time employees, compensated by fees and commissions. These officials were not the full-time salaried career civil servants of modern imagination, but hybrid "officers" who combined federal authority, independent political standing and private entrepreneurship. It was quite unclear whether the federal official should be viewed as an officer who also had a private occupation, or as a private citizen who carried out some aspects of the public service. Customs and excise tax collectors, federal marshals, and deputy postmasters were spread across the country in areas of both large and minimal population and commerce. In many smaller communities there simply was not enough government work to justify full-time salaried employees. The local printer or general store owner was primarily that, and only served incidentally as the local deputy postmaster.<sup>25</sup>

This confusion of public and private roles could obviously lead to abusive practices, particularly when "good character" took on political overtones. President Washington also demanded that appointees be well-disposed toward the government. In the context of the times, this also meant that the appointee was a good Federalist. In the early years of the Republic, political disagreement was often interpreted as disagreement over fundamental principles. Hence, the local printer-postmaster was often also the publisher of a federalist newspaper or broadsheet. Complaints were rife that these printer-postmasters circulated Federalist newspapers without paying postage and delayed or misplaced Republican publications posted for delivery through the mails.<sup>26</sup>

Similarly, while paying on a piece rate or commission tended to promote energy in office, it also had its downside. Many believed that pecuniary rewards for unpleasant jobs like tax collection were essential. Tench Coxe, the U.S. Commissioner of Revenue, wrote to

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25 See generally Karen Orren, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 *STUD. AM. POL. DEV.* 60 (1994) (describing the notion of office in the Early Republic as a holdover from an earlier period in which offices were treated as a species of property).

26 For a study emphasizing the excesses of these and other Federalist office holders, see CARL E. PRINCE, *THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE* (1977).

Alexander Hamilton that “it was more easy to excite [the tax collectors’] attention and Vigilance and to animate their exertions by an addition to their Commissions . . . than to their salaries.”<sup>27</sup> But, it was not easy to get the incentives right. The prospect of large gains from finding that importers had fraudulently declared the contents or value of a vessel’s goods, tempted collectors and other revenue officers to turn technical violations into allegations of fraud—allegations that could force large settlements from ship owners who could not afford to risk either delay in selling their goods or losing their vessels and cargoes.<sup>28</sup>

Central offices at the capital attempted to regulate the behavior of widely-dispersed federal officials. Alexander Hamilton, for example, issued scores of Treasury circulars and instructions to field personnel,<sup>29</sup> and other department heads followed similar practices. Moreover, Congress reinforced supervisory authority in numerous statutes specifying that lower level officials were subject to the superintending instruction of higher level administrators.<sup>30</sup> But, these statutory provisions and administrative attempts at control went somewhat against the grain of conventional understandings of an officer’s position. Offices were never heritable property as they had sometimes been in England, but the degree to which a part-time official paid by fees and commissions and engaged in other businesses was subject to stringent overhead supervisory control was a vexed question. As a legal matter it was often difficult to determine whether a person was an “officer” or a “contractor.”<sup>31</sup>

When Thomas Jefferson took office in 1801, the federal civilian establishment consisted of roughly 3,000 officers, only 150 of whom

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27 Letter from Tench Coxe, U.S. Comm’r of Revenue to Alexander Hamilton, Sec’y of the Treasury (July 25, 1792), in 12 *THE PAPERS OF ALEXANDER HAMILTON* 85, 88 (Harold C. Syrett ed., 1967).

28 Nicholas Parrillo, *The Rise of Non-Profit Government in America: The Case of Federal Customs Collection* 53 (Dec. 4, 2008) (unpublished manuscript, on file with author).

29 A small sample of Hamilton’s Treasury circulars is included in 3 *THE WORKS OF ALEXANDER HAMILTON* 537–70 (John C. Hamilton ed., New York, John F. Trow 1850). Other examples appear in LAURENCE F. SCHMECKEBIER, *THE CUSTOMS SERVICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 8 (1924); 5 *THE WORKS OF ALEXANDER HAMILTON* 49 (Henry Cabot Lodge ed., 1904); and 6 *id.* at 340.

30 See, e.g., Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 232, 234 (stating that the Postmaster General will be in charge of those under his employ); An Act to Establish the Treasury Department, ch. 12, § 2, 1 Stat. 65, 65–66 (1789) (discussing the duties of the Secretary of the Treasury); Act of June 5, 1794, ch. 48, § 4, 1 Stat. 376, 378, (repealed 1802) (noting that certain duties are under the control of the department of the treasury).

31 See, for example, Justice Marshall’s opinion in *United States v. Maurice*, 26 F. Cas. 1211, 1213 (C.C.D. Va. 1823) (No. 15,747) (noting that there is some ambiguity as to who, according to law, is counted as an officer).

were located in the capital. These latter officials were easily supervised, but field personnel had to be managed by correspondence, reports, and inspections. Given the difficulties of communication and transportation, even Herculean efforts on the part of central office personnel were of uncertain affect. Commenting on the early system of annual audits in the General Land Office, for example, Matthew Crenson reported:

The department would appoint some respected citizen who lived in the vicinity of a district land office to take a day off from his private labors and look in on the affairs of the register and receiver [of public lands]. Frequently, the examiner was a friend and political ally of both officers, and it was not uncommon for him to know nothing at all about the proper manner in which to conduct the business of a land office. The report which he sent to Washington was, in most cases, completely useless.<sup>32</sup>

In this case, popular control was compounded. To oversee officers, who were themselves ambiguously attached to the government, the Department used other private citizens.

Ordinary citizens were enlisted to enforce the obligations of federal officers in other ways as well. Most federal officials were required to take an oath of office and to provide a bond for faithful service.<sup>33</sup> Nonfeasance or malfeasance could result in the forfeiture of the bond and also in criminal penalties.<sup>34</sup> Superior officers were authorized to pursue collections of bond forfeitures or fines by lawsuit.<sup>35</sup> This injected yet another popular element into the control of administration—local juries—a question to which we will shortly return. In addition, many of these statutes provided a “*qui tam*” action, allowing a private party to bring suit against an officer and, if successful, to retain one-half the proceeds of the fine or forfeiture.<sup>36</sup>

This is not to say that the idea of office was static during the Antebellum period. But, in many ways, changes tended to reemphasize popular control by giving it another form. As will be discussed in more detail below, Andrew Jackson’s program of democratizing of-

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32 MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* 88 (1975).

33 *See, e.g.*, Act of Apr. 18, 1796, ch. 13, § 2, 1 Stat. 452, 452–53 (requiring agents appointed to trading houses with American Indian tribes to take an oath to faithfully execute the trust committed to him); *see also* Mashaw, *supra* note 10, at 1317.

34 *See* Mashaw, *supra* note 10, at 1316–17 (discussing the range of penalties and forfeitures included in early statutes).

35 *See, e.g.*, Act of Apr. 18, 1796, ch.13, § 7, 1 Stat. at 453 (requiring agents to forfeit a sum for offence in a court action prosecuted by a supervisor of Indian affairs).

36 *See, e.g.*, Act of Apr. 10, 1816, ch. 44, § 3 Stat. 266; Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (requiring that one half of a forfeiture be given to the informant).

fices by making them available to anyone with appropriate party backing was an attack on “bureaucratic elites.” But elitism here meant high social standing, or the sense of privilege that came from long service in a particular office. The Jacksonian “spoils system” was a re-invention of popular control of administration in opposition to office holding as a privilege of higher status individuals or as a quasi-property right. And while this democratic or popular innovation degenerated into a corrupt system that supported party organizations, it did not necessarily support presidential control of administration. In order for the new system to work as a way of mobilizing local political actors in national elections, those local actors, and the people in Congress who represented them, had to be given substantial control over office holding.<sup>37</sup>

*The Use of Laymen in Administrative Decision Making and Enforcement.* In a number of ways, early arrangements for federal administration of the law insinuated laypersons directly into public administration. For example, in one of its first revenue measures,<sup>38</sup> Congress required that customs officials use laymen to assist in resolving any disputes about valuation. Under the statute, a ship’s papers and invoices were required to be taken as prima facie evidence of what the vessel contained and of the value of the goods.<sup>39</sup> If officials believed that some goods were not disclosed in the invoices, or that the invoices misrepresented the value of the cargo, they could levy additional duties, but only with the approval of two reputable merchants who would be asked to determine the value of the goods and their conformity to the ship’s invoices.<sup>40</sup>

Similarly, ships clearing a port were required to declare their next destination and were allowed to unload only at that port. Collection officers could waive this requirement but only with the agreement of the wardens of the local port (presumably state or local officials) or, if there were no wardens, two reputable citizens “acquainted with matters of that kind.”<sup>41</sup> Should goods not be accompanied by invoices or should they be damaged in transit, they were once again to be valued by two merchants.<sup>42</sup> And, as in the case of suspected fraud

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<sup>37</sup> See generally CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (Russell & Russell Inc. 1963) (1904) (discussing the history of civil service and patronage in government).

<sup>38</sup> Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1790).

<sup>39</sup> *Id.* § 13.

<sup>40</sup> *Id.* § 22.

<sup>41</sup> *Id.* § 12.

<sup>42</sup> *Id.* §§ 16, 22.

in the invoices, one merchant was appointed by the collector and the other by the owner or consignee of the goods in dispute.<sup>43</sup>

The involvement of merchants in the activities of custom houses was much more extensive than these statutory provisions reveal. Customs officials were chosen from the merchant class and constantly accommodated federal policy to the necessities of trade.<sup>44</sup> As Gautham Rao has recently demonstrated, it is hardly too much to say that in the early years of the Republic, the major customs houses were run by the local merchants.<sup>45</sup>

A similar involvement of both regulatory beneficiaries and neutral parties can be found in the national government's first foray into health and safety regulation.<sup>46</sup> That statute, in addition to requiring specific provisions and medicines aboard sailing vessels,<sup>47</sup> required that the master keep the ship in port if the mate or first officer and a majority of the crew felt the ship was unseaworthy.<sup>48</sup> The master could petition a district judge, or if unavailable, a justice of the peace, for an order to put to sea. And, while the judicial officer had final authority to make a decision, he was required to appoint three skillful mariners in the town to examine the vessel and to make a report on its condition.<sup>49</sup>

*Qui tam* actions have already been mentioned, and they were attached to a large number of federal statutes, not only to police the activities of federal officers, but also to provide additional enforcement resources beyond those available through the U.S. Attorneys in each state. Moreover, to avoid the expense of maintaining a substantial standing Navy, the United States relied heavily on the issuance of Letters of Marques to private vessels, which authorized them to seize enemy vessels and their cargos as prizes.

The nation's first attempt at regulating steamboat safety also employed private inspectors as the primary mechanism of regulation.<sup>50</sup> Section 6 of that Act required each owner or master of a steamboat to obtain a yearly inspection of the vessel and a half-yearly inspection of the boilers. The procedure was for the master or owner to petition a

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43 *Id.* § 16.

44 Gautham Rao, *The Creation of the American State: Customhouses, Law, and Commerce in the Age of Revolution 84–85* (Dec. 2008) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

45 *Id.* at 4–7.

46 Act of July 20, 1790, ch. 29, 1 Stat. 131.

47 *Id.* §§ 8, 9.

48 *Id.* § 3.

49 *Id.*

50 Act of July 7, 1838, ch. 191, § 3, 5 Stat. 304.

federal district judge to appoint one or more persons competent to make an inspection.<sup>51</sup> If the inspector found the vessel seaworthy and its boiler safe, a permit would be issued for the carriage of passengers.<sup>52</sup> Although inspectors were required to swear on oath to faithfully carry out their duties, they were paid by the owner or master of the vessel—five dollars for the inspection of the boat and five dollars for certification that the boilers were safe.<sup>53</sup> Beyond the requirement that the inspector be “competent,” judges could apparently appoint anyone as a steamboat inspector.<sup>54</sup>

A number of these techniques for inserting lay decision making into federal administration and law enforcement turned out to be ineffective or corruptible. Privateers tended to be useless against regular navies, tended not to make nice distinctions between friend and foe, and sometimes were hard to restrain once peace was restored.<sup>55</sup> Informer suits could be used for personal harassment, or to corrupt public officers through collusion between the informant and the enforcer,<sup>56</sup> and the use of judicially appointed lay steamboat inspectors turned out to have little or no impact on the loss of life from exploding boilers on steamships.<sup>57</sup> Nevertheless, in the antebellum period it seems clear that Congress was willing to use lay administration and enforcement of federal law in extremely important areas of government policy. Valuation was the most contested issue in customs administration, and customs duties provided virtually the whole of federal revenues. Steamboat safety was one of the hottest topics of public concern from the 1820s until a more reliable system of regulation was developed in the years immediately preceding the Civil War.<sup>58</sup> *Qui tam* actions were ubiquitous in federal law, and privateers

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51 *Id.* § 3.

52 *Id.* §§ 4–6.

53 *Id.*

54 *Id.* § 3.

55 On the system of prizes and its abolition, see RICHARD HILL, *THE PRIZES OF WAR: THE NAVAL PRIZE SYSTEM IN THE NAPOLEONIC WARS, 1793–1815* (1998); CHRISTOPHER MCKEE, *A GENTLEMANLY AND HONORABLE PROFESSION: THE CREATION OF THE U.S. NAVAL OFFICER CORPS, 1794–1815* (1991); DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL* (1999); and FRANCIS R. STARK, *THE ABOLITION OF PRIVATEERING AND THE DECLARATION OF PARIS 221* (1897).

56 See Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 89, 97 (discussing the forms of abuse of *qui tam* by informants in England and the United States).

57 See EDMUND BURKE, COMM’R OF PATENTS, REPORT OF THE COMM’R OF PATENTS TO THE SENATE OF THE U.S. ON THE SUBJECT OF STEAM BOILER EXPLOSIONS, S. EXEC. DOC. NO. 30-18, at 178 (1848).

58 See Mashaw, *supra* note 17, at 1628–66 (discussing the development of steamboat regulation at a national level in the United States).

provided by far the greatest source of naval power for the United States in the War of 1812.

*The Lay Jury and Federal Administration.* Federal law not only insinuated private parties into the administration and enforcement of federal law, the lay jury provided an enormous constraint on, and sometimes a disabling obstacle to, official enforcement of the law.

Much of the secondary literature on judicial review of administrative action in the nineteenth century describes that review as quite limited and, where present, quite deferential.<sup>59</sup> This is certainly true if one focuses on writ review, primarily mandamus actions.<sup>60</sup> But common law actions were widely available and could provide substantial relief with respect to many federal administrative activities.<sup>61</sup> Seizure of property by revenue officers could be tested by trover, detinue, assumpsit, and other common law actions. Official immunity was non-existent. Similar actions were available against postal officials who lost or damaged property consigned to the mail. The propriety of official action with respect to land patents and invention patents could be tested collaterally by various forms of property action or in suits for patent infringement.<sup>62</sup>

Moreover, common law actions involved jury trial, which was viewed as a popular control over the potential abuses of federal officials. The need for a jury trial to protect against official abuse was sometimes portrayed in incendiary terms.

Suppose, therefore, that the military officers of Congress, by a wanton abuse of power, imprison the free citizens of the United States of America; suppose . . . that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift—suppose, I say, that they commit similar or greater indignities, in such cases a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same; but what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government

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59 See, e.g., Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 296 (1948) (referring to the slight power of writs of mandamus and of equitable injunctions in the face of the Supreme Court's doctrine of non-reviewability of administrative discretion); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 15–16 (1983) (referring to the increased expressions of judicial deference during the nineteenth century, already a time of limited judicial control of administrative law); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 801–04 (1986) (explaining the deferential standard of review in this area where Congress had intended great agency discretion).

60 Supported by Lee, *supra* note 59, at 296.

61 For a review and critique of the limited review position, see Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

62 Woolhandler, *id.*, provides a general description of these actions.



against the weak and helpless citizens, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed? What refuge shall we then have to shelter us from the iron hand of arbitrary power?<sup>63</sup>

This complaint, as its language might suggest, was similar to complaints made in virtually every state concerning the failure of Article III to provide for jury trials in federal courts and civil cases.<sup>64</sup>

The Judiciary Act of 1789 responded to some considerable degree to the critics' fears. Common law actions were preserved by the requirement that the laws of the several states be regarded as "rules of decision"<sup>65</sup> in both the district and circuit courts of the United States. And, except in equity and admiralty actions, those cases would be tried before a jury, chosen from the locality and assembled according to local practice.<sup>66</sup> Jury decisions were protected from reversal by providing only for review by writ of error, not by appeal.<sup>67</sup> In addition, large classes of cases involving federal officials could be tried in state courts of general federal question jurisdiction was provided only in the Supreme Court in cases appealed from state supreme courts.<sup>68</sup>

Popular control of federal officialdom through jury trial in civil cases was not a trivial matter. From the very earliest years of the Republic, federal officers found themselves mired in litigation before local juries sympathetic to plaintiffs, and with only modest hope of rescue by appeal or reimbursement from a special congressional appropriation.<sup>69</sup> Leonard White recounts the travails of David Gelston,

63 Letter to the Editor from "A Democratic Federalist," PA. PACKET, Oct. 23, 1787, reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION: 1787-1788 at 154 (John Bach McMaster & Frederick D. Stone eds., Lancaster, The Historical Society of Pennsylvania 1888).

64 See DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 10-19 (1971) (chronicling the issue of jury trials throughout the states during the constitutional ratification process).

65 Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (establishing that the laws of the states shall be regarded as rules of decision in trials at common law where the Constitution, treaties, or statutes of the United States do not otherwise require or provide).

66 *Id.* § 29 (establishing that trial of cases punishable with death shall be had in the county where the offence was committed, that jurors shall be designated by lot, that writs of venire facias shall issue from the clerk's office, and that when there is a defect of jurors, jurymen shall be returned *de talibus circumstantibus* in order to complete the panel).

67 *Id.* § 25 (establishing review writ of error as the only ground for reversal).

68 *Id.* § 25. Numerous federal statutes also confirmed the jurisdiction of state and local courts. See, e.g., Act of Mar. 2, 1799, ch. 43, § 28, 1 Stat. 733, 740-41 (authorizing actions for violation of the postal laws to be brought in any state or territorial court or before justices of the peace).

69 See Mashaw, *supra* note 10, at 1325-29 (describing the personal legal entanglements derived from the position of federal officer during the Federalist period, citing the stories of William Bingham and Jeremiah Olney).

who became collector for the Port of New York in 1802.<sup>70</sup> During his eighteen years of service, Gelston obtained \$37,000 as his share of the value of seized property, but lost \$107,000 in only one of the lawsuits brought against him. Gelston, like many federal officers, sought relief from Congress, but often found the claims committees unsympathetic. And, even when relief was provided, it could be long delayed. Gelston left office in 1820. His accounts were finally settled in 1842—by a payment to his estate.

Jury interposition was a particular problem in the enforcement of the embargo. While he hoped that naval officers would do their duty, Albert Gallatin wrote to Thomas Jefferson concerning enforcement by collectors of revenue: “[W]e cannot expect that the collectors generally will risk all they are worth in doubtful cases.”<sup>71</sup> Congress was occasionally willing to provide some protection for federal officials,<sup>72</sup> but Congress did not lightly give up the right to jury trial. During the enforcement of the embargo legislation, Gallatin proposed a statute that would put all embargo-related litigation in federal court and provide collectors with immunity from a suit for damages if they obtained Treasury certification of the reasonableness of their actions. His proposals failed to pass.

The Taney Court later attempted to create, judicially, some protection for federal officials, but its efforts were largely unavailing. After Postmaster General Amos Kendall was driven to the door of the poorhouse by judgments that he could not pay, the Supreme Court discovered immunity for high public officials, like Kendall, in the English common law.<sup>73</sup> But the Taney Court’s broader attempt to in-

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<sup>70</sup> See LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801–1829*, at 153–56 (1951) (referring to the cases involving damages won against Gelston by ship owners during his tenure, despite the lack of any suggestion of misappropriation or misfeasance on his part).

<sup>71</sup> 1 WARREN, *supra* note 15, at 338 (quoting Gallatin’s letter to Jefferson).

<sup>72</sup> Some early statutes allowed a court to absolve a federal official of damages from seizing a taxpayer’s ship or goods by finding that the official had reasonable cause, even if a jury had declared the seizure illegal. See Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627 (detailing provisions to protect the collector from personal liability in an act to regulate the collection of duties on imports and tonnage); Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47–48 (repealed 1790).

<sup>73</sup> *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 97–98 (1845) (“[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake.”); 2 FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY* 165–66 (1893) (comparing British ministerial privilege with the holding in *Kendall*).

terpret congressional legislation as implicitly establishing immunity<sup>74</sup> was firmly rejected by subsequent legislation reaffirming the right to trial by jury “according to the due course of law.”<sup>75</sup>

Where popular sentiment opposed federal policy, the requirement of jury trial in criminal prosecutions or in civil forfeiture actions could virtually nullify federal administration. Massachusetts was a hotbed of opposition to the Embargo of 1807–1809. Describing efforts to enforce the embargo in Massachusetts, John Quincy Adams wrote to W.B. Giles: “[T]here may be impediments to execution [of the laws] besides those known to the Constitution.”<sup>76</sup> And, “[t]he district court after sitting seven or eight weeks, and trying upwards of forty cases, has at length adjourned. Not one instance has occurred of a conviction by jury . . . .”<sup>77</sup> Much later, Douglas Lamar Jones investigated the role of judge and jury in enforcing the embargo in Massachusetts by looking at the proceedings before District Judge Davis. In cases tried before Judge Davis alone, convictions predominated, either by court judgment or by a no contest plea. During the same period in the same court, federal juries convicted twelve defendants while acquitting fifty-three.<sup>78</sup>

Although the willingness of juries to convict remains a significant consideration in the enforcement of federal and state law today, popular control of administration through damage actions against officials plays a much smaller role in popular control of administration in the twenty-first century than it did in the nineteenth. Control of officialdom by jury verdict was seen as an important safeguard of individual liberty, even though it clearly interfered with supervisory control of upper-level federal officials. Perhaps the only way that the fear of jury verdicts promoted centralized control of administration

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74 *Cary v. Curtis*, 44 U.S. (3 How.) 236, 252 (1845) (holding that the Act of March 3, 1839 was a bar to an action of assumpsit lying against collectors of the customs for unascertained duties or for duties paid under protest).

75 Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 (specifically contradicting the Supreme Court’s holding in *Cary*, by directing that “nothing contained in the second section of the act entitled ‘An act making appropriations for the civil and diplomatic expenses of Government for the year one thousand eight hundred and thirty-nine,’ [Act of March 3, 1839] . . . be construed to take away or impair, the right of any person or persons who have paid or shall hereafter pay money, as and for duties, under protest, to any collector of the customs . . . and to have a right to a trial by jury . . . according to the due course of law”).

76 Letter from John Quincy Adams to William Branch Giles (Dec. 26, 1808), in 3 WRITINGS OF JOHN QUINCY ADAMS, 1801–1810, at 281, 283–84 (Worthington Chauncey Ford ed., The MacMillan Company 1914).

77 *Id.* at 287.

78 Douglas Lamar Jones, “*The Caprice of Juries*”: *The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 326 n.68 (1980) (indicating that Judge Davis’s conviction rate was much higher than that of federal juries).

was the incentive that it provided to federal officers to seek advice from superiors before acting. Although that advice would not protect the officer in a damage action if a jury determined his actions to be illegal, it was useful when the officer sought reimbursement, however belatedly it might arrive, from Congress.

## V. DECENTRALIZED ADMINISTRATION

As mentioned previously, modern federal practice includes substantial utilization of state and local personnel in “cooperative federalism” schemes that leave substantial discretion in state and local authorities concerning both policies and enforcement priorities. This both reduces the size of the federal “bureaucratic elite” and promotes decision making in sites of governance that are closer to the people. Whether these state and local actors are actually more representative of the local population may be disputed, but that such arrangements limit top-down control by federal officials is hardly controversial.

Patterns of activity in antebellum America were somewhat different, but arguably were equally respectful, if not more, of decentralized control. The most obvious form of respect was to leave much of the protection of citizens’ health and welfare to state action. In antebellum America, the federal government regulated some health and safety matters, seamen’s contracts and steam ships being the major and exceptional examples, but this left huge amounts of state and local regulation to be established and implemented as states and localities saw fit.<sup>79</sup> Localism in the implementation of federal law was also respected by the prohibition in the 1789 Judiciary Act against arrest or trial of anyone “in any other district than that whereof he is an inhabitant.”<sup>80</sup>

Other statutes went somewhat further. Although titled “An Act to Establish a Uniform Rule of Naturalization,” the first Naturalization Act, while providing that any person who resided in the United States for two years could become a citizen, specified that the application for citizenship should be to any common law court of record in the state where he had resided for at least one year. These state courts

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79 See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (discussing the extensiveness of state and local regulation in the nineteenth century).

80 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 92 (1789).

were left on their own to determine whether the applicant was of “good character.”<sup>81</sup>

In a couple of instances, Congress reversed the modern scheme of state implementation of federal law by providing for federal implementation of state requirements. Federal revenue officers were harnessed to the enforcement of state quarantine regulation<sup>82</sup> and to the widespread state practice of regulating the quality of exports.<sup>83</sup> Under the latter statute, federal officials were not only enforcing state law, they were enforcing the requirement of inspection by state administrative officials.

Indeed, it is hard to overstate the degree to which retaining law-making and implementation at the state level was equated in antebellum America with the maintenance of government by the people. The sordid undertones of slavery protection infected many claims for the special democratic legitimacy of “states rights,” but there is little reason to doubt that Jeffersonian Republicans and Jacksonian Democrats were sincere in the belief that popular control of government meant leaving much of it in the hands of the states.

## VI. POPULAR CONTROL THROUGH PARTY ORGANIZATION

One might think of the injection of party ideology into the selection and retention of administrative officials as part and parcel of unitary control by the President. Presidents are, at least in formal terms, the leaders of their parties, and they are more ideologically aligned with their party electorate than with the electorate as a whole. Selection on the basis of party might therefore be a form of *ex ante* control of administrative action from the top. Emphasizing ideological alignment and party loyalty economizes on the necessity of overhead monitoring and direction. On this view, control of administration through party organization is little more than the implementation of electoral victories through mechanisms that strengthen the unitary executive.

There is much to be said for this view. But there are other aspects of party participation in the appointments and agenda-setting proc-

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81 Act of March 26, 1790, ch. 3, § 1, 2 Stat. 103, 103 (repealed 1795). For a description of state practice see GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996).

82 Act of May 27, 1796, ch. 31, 1 Stat. 474 (repealed 1799) (authorizing the President of the United States to direct federal officers to aid in the execution of state quarantine and health laws).

83 Act of Apr. 2, 1790, ch. 5, 2 Stat. 106 (repealed 1799) (directing federal revenue officers to aid in the enforcement of state export inspection laws).

esses of the Executive Branch that move control away from the President; that, indeed, emphasize both congressional control and local popular control.

We have already discussed the somewhat ambiguous position of federal officials in the early years of the Republic. Both Federalists and Jeffersonian Republicans selected their office-holders largely on the basis of character or standing in the community. Jefferson engaged in partisan removals to establish parity between Federalists and Republicans after his election, but the general practice prior to Andrew Jackson's election was to retain appointees unless demonstrably corrupt or incompetent. This produced something like a "career service" of experienced administrators, which may have contributed to the efficiency of administrative operations. It certainly contributed to the stability and relative autonomy of office-holders. Jackson was correct that office was morphing into a form of property where sons sometimes followed their fathers into the same federal positions.<sup>84</sup>

Jackson attacked this system in his famous first annual message to Congress:

There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. . . . Office is considered as a species of property, and government rather as a means of promoting individual interests than as an instrument created solely for the service of the people. . . .

In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another.<sup>85</sup>

In short, rotation in office was a means by which democracy could be served and the aristocracy of office defeated.

Although Jackson's democratic ideals degenerated into a spoils system that was later viewed as the epitome of corrupt government, many others had voiced similar, democratic rationales for a system of rotation, or for term limits. Carl Russell Fish's classic study shows that public-spirited rationales for rotation can be traced back to Dutch, English, colonial, and state practices.<sup>86</sup> Prominent among them are

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84 See FISH, *supra* note 37, at 75–78 (“[S]ons were often appointed to succeed fathers . . .”); WHITE, *supra* note 22, at 300–01 (“Forty years of substantially steady practice prior to 1829 had established a tradition of permanence and stability in the public service of the federal government.”).

85 Andrew Jackson, First Annual Message (Dec. 8, 1829), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 23, at 1005, 1011–12 (James D. Richardson ed., 1897).

86 See FISH, *supra* note 37, at 52–104 (examining the origins and significance of the rotation system).

avoiding autocracy and corruption, eliminating any sense of property in office, educating citizens in the responsibilities of governance, weakening executive power (where appointments required legislative approval), assuring the loyalty of officials to the elected government, and avoiding the need to assign cause to rid the government of ineffective personnel.

Fish also gives an explanation of the spoils system that emphasizes its relationship to popular control of the government. In his analysis, for the mass of people to influence ordinary government operations, they must be organized. Having a party that emerges episodically at election time is not enough. In order to shape the agenda of government and to bring out the vote in national elections, the party must be continuously active at the state and local level. This continuous effort requires resources; and, if influence is not to be limited to the rich and well-born, the party must supply the resources. Politics must pay. And in Jacksonian America the only way that that could be accomplished was for the civil service to provide the payroll for party workers.

More recent studies echo Fish's account. Gerald Leonard, for example, details the transition from "antiparty" constitutional thought to the idea of party in America as the bulwark of popular sovereignty.<sup>87</sup> Moreover, the shrewd political operative, Martin Van Buren, who did much to get Jackson elected and who followed him into the White House, defended the spoils system in essentially the same terms. For Van Buren, who was perhaps the first theoretician of party politics, the spoils system was required in order for there to be either serious electoral competition or widespread participation by the populace in influencing the policies of the government.<sup>88</sup>

Party control of administration is "popular" in a double sense. First, parties are porous. Virtually anyone who is willing to devote effort and/or resources to party work can become involved and have influence. Second, unless the party is effective in getting candidates elected by popular vote, it will disappear, or be required to change its positions on matters of political moment. And, in turn, elected representatives are both beholden to the party and in a position to provide it with benefits that may be essential to its continued success. As a consequence, the patronage controlled by the party must also be in the control of both local and national elected officials. While pa-

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87 See GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* (2002).

88 See MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* (Augustus M. Kelley Publishers 1967) (1867).

tronage is nominally in the control of the appointing official, the President or the department head, it may be, and often is, in the substantive control of both congressmen and local elected officials.

To some degree, the Jacksonian spoils system, with its tendency to parcel out power to local party organizations and elected officials, created a reaction that began in Jackson's own administration. Officials at the center sought to create systems of audit, oversight, and inspection that would allow them to control this newly democratized group of federal administrative officials.<sup>89</sup> But, these efforts were only modestly successful.<sup>90</sup> A unitary executive in principle could not be unitary in fact if competition for the loyalty of administrators based on local, party, and congressional connections effectively limited overhead control. This was not merely a limitation based on failures of implementation in a system committed to top down control. Local, party, and congressional control were also normatively attractive visions of popular control of administration.

## VII. CONCLUSION

From the foregoing, it seems fair to conclude that popular control of bureaucratic elites has a number of meanings and may be pursued through multiple techniques. It may be appropriate to characterize these techniques as carrying out two more general approaches to popular government. In one, government is popular because those who have authority are under the control of political actors who are popularly elected. This is true of both presidential and congressional control of administration and also of decentralized administration through state and local officials. In this version of popular control, bureaucrats' democratic pedigree comes from their connection to the representatives of the people, whether at the national or at the state and local level.

The second general approach is to insinuate "the people" into administration itself. One means for pursuing this vision is to blur the distinction between laymen and officials. This was a particularly prevalent form of popular control in antebellum America, either because officials were only tentatively or ambiguously attached to the

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<sup>89</sup> See CRENSON, *supra* note 32 for a general discussion.

<sup>90</sup> See WHITE, *supra* note 22, at 251–69, 376–93 (discussing the management of the post office and the policy of compensation for government officers); see also MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789–1837*, at 200–70 (1968) (examining the administration of the Land Office Business from 1830–1837).



national government, or because official station was mediated through participation in a non-governmental organization—the political party. In another form, citizens were the administrators, but were called upon on an *ad hoc* basis to resolve valuation disputes, to inspect sailing vessels and steamboats, or to determine the liability of both officials and private parties by jury verdict. In other instances, these lay personnel became the enforcement arm of the government itself, either as *qui tam* relators or as privateers.

These visions of popular control not only compete with unitary presidential control by weakening the capacity of central officials under presidential direction to manage implementation effectively, but also compete normatively as independently attractive means for limiting bureaucratic excesses, guiding bureaucratic judgment, and enforcing bureaucratic loyalty. I cannot here begin to evaluate the relative strengths and weaknesses of these alternative and competing notions of popular control of bureaucracy. Indeed, such a task may be beyond the scope of many books, not just one short paper. The degree to which one finds one or another vision of popular control attractive depends upon contingent factors that shift both with subject-matter context and across time periods. It could hardly be otherwise. Every vision of popular control, whether it is representative democracy through established national institutions, decentralized control through local and state representatives, or the insinuation of lay energy and judgment into the processes of bureaucratic administration, has both strengths and well-known defects. Strong control by the Chief Executive can promote democratic accountability; it can also degenerate into forms of authoritarian excess. The participation of regulated parties or beneficiaries in the administration of federal law can provide a needed corrective to bureaucratic tunnel vision; it can also degenerate into the seizure of public power by private interests. Local control of administration can harmonize national policy with local political culture; it can also obstruct the effective implementation of national goals.

Because all institutional designs have the vices of their virtues, pluralist approaches have much to recommend them. “Checks and balances” may be a hackneyed phrase that, like “federalism” or “separation of powers,” often takes on positive or negative connotations depending upon its effect on substantive outcomes. Yet, I cannot help but believe that the pluralistic approach to popular control of government action that has characterized American government from the very beginning has a deep wisdom. Unitarianism has its virtues, and popular control of bureaucratic elites is chief among them. But, presidential control has no unique claim to democratic legiti-

macy, and the excesses of any form of popular control are perhaps best remedied by the competition of other visions of democracy, institutionalized in different ways.