

# THE RISE AND FALL OF THE PUBLIC LAW LITIGATION MODEL: IMPLICATIONS FOR PUBLIC MANAGEMENT

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## INTRODUCTION

Public administration scholars widely recognize that the 1926 publication of Leonard White's *Introduction to the Study of Public Administration* represented a turning point in the study of public administration (White, 1926). The Preface to White's first edition included the now famous statement that the book "assumes that the study of administration should start from the base of management rather than the foundation of law..." (White, 1926, vii-viii). Decades before White penned these famous words, Woodrow Wilson made a similar argument in an 1887 *Political Science Quarterly* article entitled "The Study of Administration" (Wilson, 1887, 22). "The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study," argued Wilson" (Wilson, 1887, 28). To Wilson and White, before public agencies could make use of modern principles of management and administration to improve the economy and efficiency of public agencies they must free themselves of the restraints imposed by law including constitutional, statutory and common law. Theorists such as Wilson, White and Frederick Taylor saw efficiency and economy as the core values of management (Rosenbloom, 1987, 78). Consequently, the undue legalization of public administration led to reduced efficiency and economy in the administration of public programs.

When Wilson and White expressed their desire to free public administration from judicial oversight of the exercise of administrative discretion, both understood that the doctrine of dual federalism sharply limited judicial oversight of state and local government public administration by the federal courts. And both clearly understood that state courts routinely heard cases where citizens and businesses challenged the authority of state and local government agencies to take various actions under state constitutions or municipal charters (Note, 1912, 648-649; Valente, 1980). White, in particular, expressed concern that the preoccupation with law made it impossible for public administrators to make fullest use of the latest managerial advances. According to White, the preoccupation with law led public administration to display “an exaggeration of legal correctness, and in consequence and accentuation of the lawyer in administration...” (White, 1939, 32; Storing, 1965, 42). Consequently, Wilson and White must have recognized legal restraints on state and local governments probably exceeded the legal restraints on federal agencies. Wilson and White thus faced a situation where state courts heavily regulated the public administration at the state and local level and the federal courts heavily regulated public administration and the federal level.<sup>1</sup>

During the same time Wilson and White argued for the reduction in judicial oversight of public administration, legal scholars warned that the judiciary had an important role to play in protecting citizens and private property rights from the abuse of power by a new generation of government regulatory agencies. Speaking in 1916, Elihu Root, President of the American Bar Association warned that “If we are to continue government of limited powers, these agencies of regulation must themselves be regulated. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that

with us is still in its infancy, crude and imperfect” (Davis, 1975, 11-12). A decade earlier, Frank Goodnow had attempted to define the new field of Administrative law in *The Principles of Administrative Law of the United States* (Goodnow, 1905). Goodnow defined administrative law as the “part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights” (Goodnow, 1905, 1; Storing, 1965, 40). To Wilson and White, the “objective of public administration....[was] the efficient conduct of public business” (Storing, 1965, 40). In contrast, to Goodnow and Root, the primary objective of public administration was to protect citizens from the violation of his or her rights. As government assumed more power to regulate the affairs of private citizens, the potential for violations of individual rights increased dramatically. Not surprisingly, much of the criticism focused upon economic regulation. Writing in 1933, before the New Deal led to an explosion in government economic regulation, public administration and administrative law scholar Marshall Dimock and the relationship between administrative law and public administration:

The United States is a government of commissions. Beginning with the State

Railway commissions shortly after the Civil War, the country has now placed

practically every business and profession under the control of some municipal,

state, or federal commission. The National Government has an Interstate

Commerce Commission, a Federal Trade Commission, a Federal Reserve

Board, a Tariff Commission, a Shipping Board, a Railway Conciliation Board,

a Federal Power Commission, a Federal Radio Commission and a Federal Farm

Board. In the States one usually finds Public Utility Commissions, Banking

Commissions, dental, medical and legal examiners, Industrial Accident Commissions,

And various other board and tribunals which exercise control over industry and

Commerce (Dimock, 1933, 36).

Through the late 1930s, neither state court or federal courts embraced the message of Wilson and White. Beginning in the late 1930s, however, the United States Supreme court abandoned its close scrutiny of federal executive branch agencies and adopted a policy of judicial acquiescence to the federal administrative process which remained in force through the late 1960s (Rosenbloom, 1981, 33). Writing in 1968, public law scholar, Martin Shapiro, aggressive that, “[a]t least during the last twenty years the federal court system has devoted the vast bulk of its energies to simply giving legal approval to agency decisions” (Shapiro, 1968, 264). However, the period of judicial acquiescence did not last long.

The essay argues that from the mid 1950s through the early 1980s, the Warren and Burger Courts fully embraced the so-called public law litigation model (Chayes, 1976, 1281-1316), which sought to democratize public administration by greatly expanding judicial oversight of public administration and bureaucratic government. During this period of time, a coalition of liberal and centrist Justices saw the democratization of public administration as necessary to assure greater citizen and interest group input in bureaucratic decision making as well as to protect citizens and the clients of government services from widespread civil liberties violations by public officials and public agencies. By the beginning of the

1980s, the essay also argues, the high court began the gradual process of scaling back the public law litigation model. Finally, the essay argues that a new public law risk management model is gradually replacing the public law litigation model in terms of defining the relationship between public administration and the judiciary. Instead upon relying upon the courts to resolve disputes between public agencies and those private interests, the public law risk management model places a premium on public organizations preventing disputes from having to go to court for resolution. Equally important, the public law risk management places a much heavier emphasis upon the enforcement of statutory and contractual rights and less emphasis on the protection of clearly established constitutional rights. Similarly, the public law risk management model places a much heavier on preventing non-constitutional tort lawsuits than so-called constitutional tort litigation. Finally, the article argues that the public law risk management model is much more proactive than the public law litigation model which depended heavily upon citizens, public interest groups and clients of government services to seek judicial review of administrative actions or the alleged failure to act in the best interest of the public.

### **THE DEMOCRATIZATION OF PUBLIC LAW**

When one looks back at twentieth century democratization of public law, the Warren Court's recognition of institutional reform litigation represented the turning point. In *Brown v. Board of Education*, 347 U.S. 483 (1954)(Brown I) and *Brown v. Board of Education*, 349 U.S. 294 (1955)(Brown II), the high court granted federal courts sweeping powers effectively gave birth to the institutional or structural reform litigation. Decided a year after Brown I found that Fourteenth Amendment's Equal Protection Clause prohibited States from requiring the

operation of separate public schools for white and non-white students, Brown II granted federal courts broad equitable powers to force the desegregation of thousands of public schools. By the late 1970s, institutional reform litigation had expanded to include state prisons, local jails, mental institutions and other types of public institutions. As explained by Professor James D. Carroll in a 1982 article:

In over half of the states, one or more institutions—prisons, mental institutions, institutions for the retarded, juvenile homes— have been declared unconstitutional, as structured and administered. Many state and local government officials have found themselves subject to demands that they be held personally liable in money damages to individuals and organizations claiming they have been harmed by the action of these officials (Carroll, 1982, 90).

During this period, the role of federal judges in institutional reform litigation took on mythical proportions. Federal District Judge Frank M. Johnson, Jr., for example, became a national figure for forcing the reform of Alabama's state prison system and state mental health facilities (Kennedy, 1978; Bass, 1993; Sikora, 1992; Yarbrough, 1981). Critics of managerial judges "contended that such intervention conflict[ed] with democratic principles; undermin[ed] the responsibility of legislators and administrators; affront[ed] the separation of powers doctrine; threaten[ed] public confidence in the courts and the legitimacy of their decisions....." (Yarbrough, 1985, 660). Defenders of managerial judges argued that because judges were "relatively insulated from political pressure" they had the ability to confront serious public policy issues

which legislators and administrators were unable or unwilling to deal with (Yarbrough, 1985, 661).

Second, the 1960s also saw the Warren Court require that street level public administrators comply with a much broader spectrum of civil liberties restrictions found in the Constitution's Bill of Rights. The Warren Court paid particular attention to the conduct of police officers. In the 1959 *Spano v. New York*, 360 U.S. 315 decision, Chief Justice Earl Warren emphasized the responsibility of police officers to conduct their official duties without violating the fundamental constitutional rights of those placed in police custody.

The abhorrence of society to the use of involuntary confessions does not

turn alone on their inherent untrustworthiness. It turns on deep-rooted

feeling that the police must obey the law while enforcing the law, that in

the end life and liberty can be as much endangered from illegal methods

used to convict those thought to be criminals as from the actual criminals

themselves (*Spano v. New York*, 1959, 320-321).

For example, in *Mapp v. Ohio*, 367 U.S. 643 (1961) the high court required all state and local courts to exclude illegally seized evidence in criminal proceedings. Then in *Gideon v. Wainwright*, 372 U.S. 335 (1963) the high court required States to provide indigent criminal defendants, facing conviction for a serious felony. And in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Warren Court imposed upon law enforcement officers the requirement that they obtain a waiver of the so-called Miranda warnings before interrogating individuals placed under police custody prior to any interrogation. Equally important to the day to day administration of public

agencies, the early 1970s saw the high court significantly expand the scope of Fifth and Fourteenth Amendment procedural due process protections to citizens facing the denial or revocation of a spectrum of governmental benefits (Cooper, 1982, 65-99; *Goldberg v. Kelly*, 1970, 254).

Third, the Warren Court moved to dismantle the public employment privilege doctrine by finding that public employees did not have any right to exercise fundamental constitutional rights while employed as a public employee (Rosenbloom, 1971, 144-168). These included the right to freedom of speech, freedom of association, procedural due process, equal protection, liberty and to be free from unreasonable searches and seizures (O'Neil, 1993; Rosenbloom, 1975, 52-59). The fact that the Warren and Burger Courts continued to permit public employers to place certain restrictions on the exercise of constitutional rights by public employees, forced federal judges to become heavily involved in distinguishing between constitutional and unconstitutional restrictions on the public employment relationship (Harvard Law Review, 1984, 1611-1800).

Fourth, coinciding with the expansion of civil liberties protections for citizens and public employees, the Warren Court and then the Burger Court took steps to open the door to federal constitutional tort lawsuits brought under the Ku Klux Klan Act of 1871, embodied in Section 1983 of Title 42 of the United States Code (Rosenbloom, 1980, 166-173). This led to an explosion in Section 1983 constitutional tort lawsuits filed against state and local government officials and local governments (Rosenbloom, 1980, 166-173). In the 1961 case of *Monroe v. Pape*, 365 U.S. 167, the Warren Court reinterpreted the Ku Klux Act of 1871 to permit citizens to sue state and local government officials for damages in federal court, for violating their constitutional rights (Note, 1961, 452). Then, in the 1978 case of *Monell v. New York City Dept. of Social Services*,



436 U.S. 658, the high court held that Section 1983 permitted individuals to collect money damages from local governments if a federal court found that a local government policy was responsible for the constitutional tort or statutory violation. Second, the passage of the Civil Rights Attorney's Fees Act to 1976, Section 1988 of Title 42 of the United States Code, made it economically viable for civil rights attorneys to pursue Section 1983 constitutional tort lawsuits by requiring courts to award the plaintiff attorney's fees if the plaintiff prevailed in the lawsuit (Spurrier, 1983, 199-208).

Most important, the late 1960 and 1970s, saw the high court strip the vast majority of local, state and executive branch employees of absolute official immunity from constitutional tort lawsuits and replace it with qualified official immunity (Ball, 1982, 7-26; Rosenbloom, 1980, 166-173). Equally important to expansion of constitutional tort litigation, in the landmark case of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Burger Court held that Section 1983 of title 42 of the United States Code did not grant local governments blanket immunity from liability for constitutional torts committed by their employees (Groszyk and Madden, 1981, 269).

Fifth, the Warren and Burger Courts lowered a number of barriers to judicial review of the administrative process by construing the Administrative Procedure Act of 1946 of creating a presumption of judicial review. As stressed by the Warren Court in *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967):

The legislative material elucidating that seminal act manifests a congressional

intention that it covers a broad spectrum of administrative actions, and this

Court has echoed that theme by noting that the Administrative Procedure Act's

“generous review provisions” must be given a “hospitable” interpretation.

(*Abbot Laboratories v. Gardner*, 387 U.S. 136, 1967).

During the 1970s, the lowering of the barriers to judicial review of the administrative process coincided with Congressional enactment of new laws directed at making “America a cleaner, healthier, safer, and fairer place to live and work” (Warren, 1997, 45). To implement many of these new mandates, Congress established the Environmental Protection Administration (EPA), the Occupational Safety and Health Administration (OSHA), the Consumer Products Safety Commission (CPSC), the Nuclear Regulatory Commission (NRC) and the Economic Employment Opportunity Commission (EEOC). And not surprisingly, the 1970s saw an explosion in litigation related to the regulatory process with both public interest groups as well as businesses and various special interests seeking judicial review of regulatory actions or inaction.

Sixth, the 1970s saw Congress extend to the public sector a number of key anti-discrimination laws including the Equal Pay Act, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act (Lee, Jr. 1987, 230-231). In addition to extending the coverage of existing anti-discrimination law to public sector organizations, the 1970s saw Congress enact Title IX of the Education Amendments of 1972 which prohibited recipients of federal aid from engaging in sex discrimination (Lee, Jr. 1987, 231). Congress also passed Section 504 of the Rehabilitation Act of 1973 which prohibited recipients of federal funds from discriminating on against clients or their employees on the basis of disabilities. Understandably, the federal courts played a key role in overseeing the compliance of public agencies with these anti-discrimination prohibitions.

### **MYTH AND REALITY: THE MATURING OF THE “NEW PARTNERSHIP”**

In a 1976 article entitled *The Impact of the Courts on Public Administration*, Judge David Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia forcefully defended increased judicial oversight of public administration and bureaucratic government.

Until ten or fifteen years ago, about the only public administrations regularly

troubled by court review were regulatory agencies functioning in a structured

system of advocacy considering primarily economic matters such as rate making.

Nonetheless, the absence of court involvement in the day-to-day activities

of public administration for years does not necessarily indicate that agency

processes ran so well that no review or restraints were necessary. The absence

of a phenomenon does not tell you why the phenomenon is absent (Bazelon, 1976,

101).

Judge Bazelon went on to argue that “the courts and the adversary process do not create a adversity (in the sense of “conflict” or “opposition”); they merely provide the forum and the technique whereby already-existing conflicts are brought out into the open in an effort to reconcile and resolve them” (Bazelon, 1976, 103). The judicialization of public led directly to the federal courts assuming unprecedented responsibility for overseeing the operation of public agencies (Cooper, 1988; Horowitz, 1977; Rosenbloom, 1983; Wood and Vose, 1990). Even street

level public servants found themselves forced to develop a working knowledge of basic constitutional rights or face the prospect of finding themselves the subject of costly constitutional tort lawsuits (Rosenbloom, Carroll and Carroll, 2000). Yet, by the time public administration scholars began to analyze the long-term implications of increased judicial oversight of public administration, the federal judiciary began to loosen its grip on public agencies.

First, the late 1980s and 1990s saw a significant reduction in institutional reform litigation. Historically, the state and local governments settled the vast majority of institutional reform lawsuits by entering into so-called consent decrees. As a condition of ending the lawsuit, the governmental entities agreed to take a number of steps to bring themselves into compliance with minimum constitutional requirements (Note, 1977, 428-463). To assure that governmental entities implemented the terms of agreements, federal judges maintained jurisdiction over the implementation of the consent decrees. To assure the finality of consent decrees, since the 1930s the high court had applied the test that “Nothing less than a clear showing of grievous wrong evoked by new and unforeseen circumstances should lead us to change what was decreed after years of litigation with the consent of all concerned” (*United States v. Swift & Co.*, 1932, 119; Sandler and Schoenbrod, 2005, 915). As a result of this high standard, once a private party or public agency entered into a consent decree to resolve alleged constitutional violations, little hope existed that down the road that a federal court might agree to modify the provisions of the consent decree. Not surprisingly, the longer consent decrees remained in place, State and local government officials grew increasingly concerned that the agreements provided them inadequate flexibility to deal with changed circumstances.

Through the 1980s and 1990s, popular and judicial

support for court ordered busing of public school students to achieve racial balance in public schools waned (Hansen, 1998, 28-29). During the same period of time, the construction of new state prisons and local jails to comply with judicial mandates to make room for new inmates resulting from tougher sentencing guidelines and to comply with the terms of court reform consent decrees took some of the pressure off State prison systems and local jails (Marks, 1998, 1).

Equally significant, the late 1980s and the 1990s saw the Rehnquist Court take a number of important steps to limit the duration of judicial oversight of public institutions and to make it easier for States and local governments to obtain modifications of consent decrees. Specifically, the Rehnquist Court took steps to get lower federal courts “to refrain from intruding on the policymaking prerogatives of governors, mayors, and their legislative counterparts unless necessary to protect rights” (Sandler and Schoenbrod, 2005, 915). For instance, in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), Chief Justice Rehnquist stressed that federal courts must move as quickly as possible to return control of public schools to local officials. “From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination” explained Rehnquist (*Board of Education of Oklahoma City v. Dowell*, 1991, 248). Also in *Missouri v. Jenkins*, 515 U.S. 70 (1995), the Rehnquist Court held that a Federal District Court judge lacked the authority to order across-the-board salary increases for teachers of the Kansas City, Missouri School District as part of a court approved plan to increase the attractiveness of Kansas City, Missouri schools for non minority students. Again, Chief Justice Rehnquist reminded lower federal courts of significant limitations on their authority to fashion remedies. Lower federal courts “must bear in mind that its end purpose is not only “to

remedy the violation” to the extent practicable, but also “to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.....” stressed Rehnquist (*Missouri v. Jenkins*, 1995, 102).

By the early 1990s, growing anger on the part of State and local government officials over judicial monitoring of prison reform, led State and local officials to seek greater freedom to modify long standing consent decrees. In *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), the Rehnquist Court made it easier for State and local officials to seek modification of existing consent decrees by holding that “[m]odification of a consent decree may be warranted when factual conditions make compliance more onerous” (*Rufo v. Inmates of the Suffolk County Jail*, 1992, 386). Specifically, the *Rufo* decision majority required federal courts to apply a new “unforeseen circumstances” test instead of the much more onerous “grievous wrong standard” (Sandler and Schoenbrod, 2005, 920).

The passage of the Prison Litigation Reform Act of 1995 also provided the Rehnquist Court an opportunity to weigh in on the institutional reform litigation involving state prisons and local jails (Belbot, 2004, 290-316). Congress enacted the law in an effort to reduce the number of alleged frivolous lawsuits filed against State prisons and local jails by inmates. The law required that prison inmates exhaust administrative remedies before filing constitutional tort lawsuits (Pybas, 2002, 14). It permitted state prison and local jail officials to file suit seeking to end court supervision “unless inmates can prove that the current conditions violate constitutional protections against cruel and unusual punishment (Sullivan, 2000, 1), and limited the amount of attorney fees paid to lawyers representing inmates in prison reform cases (Fee limits, 2001, 1).

In the 2000 case of *Miller v. French*, 530 U.S. 327 and the

2002 case of *Porter v. Nussle*, 534 U.S. 516, the high court upheld key provisions of the PLRA. In *Miller*, the high court upheld the PLRA provision which imposed the 90 day deadline for federal courts to consider requests by state and local prison and jail officials to modify consent decrees (*Miller v. French*, 2000, A34). And in the *Porter*, the high court upheld PLRA's exhaustion of remedy provisions.

The 2004 case of *Few v. Hawkins*, 540 U.S. 431 is symbolic of the increasingly restrictive attitude of the Rehnquist Court toward judicial oversight of public agencies. The *Few* case involved a consent decree entered into by the State of Texas which required it to increase the number of children eligible for Medicaid benefits. When Texas allegedly failed to fully implement the agreement, plaintiffs representing eligible children requested that the federal court overseeing the consent decree intervene. The State of Texas then argued that the Eleventh Amendment prohibited the federal court from imposing any monetary penalties against the State for violations of the consent decree. Although the *Few* majority held that the Eleventh Amendment did not bar citizens from going to court to enforce provisions of the a consent decree requiring the State of Texas, Justice Kennedy stressed that:

As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities. A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court

should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms (*Frew v. Hawkins*, 2004, 442).

In other words, the *Few* majority stressed the importance of providing State governments considerable flexibility in complying with the provisions of consent decrees.

Second, much like the treatment of institutional reform litigation, the 1980s and 1990s found the Burger and Rehnquist Courts generally unwilling to expand the scope of civil liberties restrictions on public employees and officials carrying out their official duties. During the 1970s and 1980s, for instance, the Burger Court “whittled away at the rights of criminal defendants” (Howard, 1980, 10). The procedural due process revolution of the early 1970s, evolved into a case by case application of the *Mathews v. Eldridge*, 424 U.S. 319 (1976) four point balancing test to determine the level of procedural safeguards necessary to meet the minimum requirements for procedural fairness (Cooper, 1982, 65-99). The same period saw the Burger and Rehnquist Courts expand the types of administrative searches not requiring public officials to first obtain a search warrant (Collins and Hurd, 1984, 189-208). This does not mean the 1980s and 1990s saw the Supreme Court relieve public agencies of their responsibility to operate public agencies without violating minimum constitutional standards. It does mean that the Supreme Court did not move to significantly expand constitutional obligations on public agencies and employees.

Third, the Warren Court’s abandonment of the public employment privilege doctrine did not mean that public employers lost the right to treat their employees differently than citizens who did not work for the government. Instead, the Burger and Rehnquist Courts



adopted the so-called public service model, which required federal courts to carefully balance the interests of the public employee with the “government’s interest as an employer in having an efficient and effective workforce,” when determining whether the government agency acted lawfully in restricting the constitutional rights of their employees (Rosenbloom and Bailey, 2003, 30). Clearly, public employees found themselves with greater protections than their private sector counterparts. But application of the public service model, meant the public employers preserved the right to substantially restrict the constitutional rights of their employees.

For instance, the Burger Court upheld restrictions on the partisan political activities of public employees (*Civil Service Commission v. National Association of Letter Carriers*, 1973). During the late 1980s, the Rehnquist Court upheld the random drug testing of certain public employees (*National Treasury Employees Union v. Von Raab*, 1989). Both the Burger and Rehnquist Courts narrowly construed the Fifth and Fourteenth Amendment procedural due process rights of public employees (*Board of Regents v. Roth*, 1972; *Cleveland Board of Education v. Loudermill*, 1985; *Gilbert v. Homer*, 1997). The Burger Court granted public employers broad discretion to establish dress and grooming standards for their employees (*Kelly v. Johnson*, 1976). The high court granted public employers considerable discretion to conduct administrative searches of the offices of their employees to gather evidence of non criminal misconduct with first obtaining a search warrant (*O’Connor v. Ortega*, 1987). Although one may make the argument that the Burger and Rehnquist Courts might have stripped public employees of all constitutional protections by returning to the privilege doctrine, the fact remains that only a handful of Supreme Court decisions significantly expanded the constitutional protections of public employees. Specifically, a series of decisions which

protected public employees from being removed from public jobs or being denied public jobs or government contracts solely as the result of their political affiliation or beliefs (Hamilton, 1999, 54-62; *Branti v. Finkel*, 1980; *Elrod v. Burns*, 1976, *O'Hare Truck Service, Inc. v. City of Northlake*, 1996; *Rutan, et al, v. Republican Party of Illinois et al*, 1990) Yet, even the political affiliation decision have done little to slow the conversion of classified or civil service positions into at-will positions.

If the Burger and Rehnquist Courts actually did little to expand the constitutional rights of public employees, then what explains the widely held perception that the federal courts had become much too heavily involved in the oversight of routine personnel decisions. The explanation is that the use of the public service model to resolve disputes between public employers and public employees over the scope of constitutional protections forced federal courts to become even more heavily involved in resolving relatively minor points of constitutional law. From a substantive perspective, public employee rights decisions of the Burger and Rehnquist neither significantly expanded or cut back the scope of constitutional protections but the large number of employee rights cases left the impression that the Burger and Rehnquist Court significantly expanded the constitutional rights of public employees.

Fourth, the 1980s and 1990s saw the high court take a number of important steps to make it more difficult for plaintiffs to prevail in Section 1983 constitutional tort lawsuits but only after further lowering important barriers to constitutional tort litigation. In *Owen v. City of Independence*, 445 U.S. 622 (1980) the Burger Court denied municipal governments the right to make use of the "qualified immunity" defense in constitutional tort lawsuits (Lee, Yong, 1987, 160). Then in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Burger Court expanded the scope of

Section 1983 lawsuits by holding that Section 1983 permitted lawsuits for alleged violations of federal statutory rights in addition to alleged violations of constitutional rights by state and local government employees and officials (Lee, Yong, 1987, 160). Equally significant, the *Thiboutot* decision held the Civil Rights Attorneys' Fee Act of 1976 applied to all Section 1983 constitutional tort lawsuits (Spurrier, 1983, 199). In a vigorous dissent, joined by Chief Justice Burger and Justice Rehnquist sharply admonished the *Thiboutot* majority for further expanding the authority of the federal courts to oversee the operations of state and local governments:

Today's decision confers upon the court unprecedented authority to oversee state actions that have little or nothing to do with the individual rights defined and enforced by the civil rights legislation of the Reconstruction Era. This result cannot be reconciled with the purposes for which 1983 was enacted. It also imposes unequal burdens on state and federal officials in the joint administration of federal programs and may expose state defendants to liability for attorney's fees in virtually every case (*Maine v. Thiboutot*, 1980, 26).

Within two years of the *Owen* and *Thiboutot*, the Burger Court began the process of making it easier for government officials to defend constitutional tort lawsuits. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Burger Court established a new test for determining when government employees and officials are entitled to "qualified immunity." The new test made government officials liable for violations of "clearly established" statutory or constitutional rights which a reasonable person

would have known (*Harlow v. Fitzgerald*, 1982, 818). In other words, the new test required federal courts to grant government employees qualified immunity if the court found that the alleged statutory or constitutional right violated by the government official was not clearly established at the time the alleged violation took place. The *Fitzgerald* majority stressed that the newly “clearly established” statutory or constitutional right test would permit “the resolution of many insubstantial claims on summary judgment” and avoid “subject[ing] government officials either to the costs of trial or to the burdens of broad reaching discovery” (*Harlow v. Fitzgerald*, 1982, 817-818).

Building upon the *Harlow v. Fitzgerald* decision, in the 1985 case of *Mitchell v. Forsyth*, 472 U.S. 511, the Burger Court held that public officials have a right to immediately appeal a lower federal court denial of “qualified immunity.” Prior to the *Fitzgerald* and *Forsyth* decisions, critics of liberalization of constitutional tort law complained that it simply took too long to determine as a “matter of law” whether a public employee or official was entitled to qualified official immunity. To rectify this situation, critics argued that lower federal courts should make greater use of summary judgment motions to quickly determine the eligibility of public officials for “qualified immunity” in order reduce the burden on public officials who faced an explosion in constitutional tort lawsuits. The *Forsyth* decision sent a clear message to lower federal courts that they must make much greater use of summary judgment to quickly resolve merit less lawsuits. Speaking for the *Forsyth* majority, Justice White explained the importance of speeding up the resolution of constitutional tort lawsuits:

Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the

essentially legal questions

whether the conduct of which the plaintiff complains violated clearly established

law. The entitlement is an immunity from suit rather than a mere defense to

liability; and like an absolute immunity, it is effectively lost if a case is erroneously

permitted to go to trial (*Mitchell v. Forsyth*, 1985, 527-528).

In the 1987 case of *Anderson v. Creighton*, 483 U.S. 635, the high court again stressed the importance of federal courts making use of summary judgment motions to expedite the resolution of constitutional tort lawsuit. To help lower federal courts apply *Fitzgerald's* “clearly established” constitutional right test, Justice Scalia, speaking for the *Anderson* majority, directed lower federal courts to make use of summary judgment motions to grant public officials “qualified immunity” from statutory or constitutional tort lawsuits if the court found that the right allegedly violated was not “sufficiently clear that a reasonable official would understand that what he is doing violates that right” (*Anderson v. Creighton*, 1987, 640). And in the 2001 case of *Saucier v. Katz*, 533 U.S. 194, the high court again stressed the importance of lower courts of making use of summary judgment motions to expedite constitutional tort lawsuits. Speaking for the *Saucier* majority, Justice Kennedy stressed that “[w]here the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive” (*Saucier v. Katz*, 2001, 194). In other words, the Rehnquist Court held that federal courts may not generally deny public employees and officials qualified immunity without a finding that the official or employee had received “fair warning” of the existence of a “clearly

established” constitutional or statutory right (Stivender, 2002/2003, 751-762).

Fifth, during the 1970s, the lowering of barriers to judicial review of the federal administrative process led a number of lower federal courts to broadly construe their new mandate. The United States Court of Appeals for the District of Columbia led the way in the development of the so-called ‘hard look’ doctrine which assumed that federal agencies lacked the objectivity “to review their own actions satisfactorily, and that Congress could not review a multitude of agency decision itself”(Warren, 2002: 2612). Led by Judge Harold Leventhal, Judge David Bazelon and Judge J. Skelly Wright, the D.C. Circuit moved to open the federal regulatory process to much broader citizen and interest group participation. “In the new era of participatory regulation, agencies not only had to listen to public interest groups, but the courts would remand or vacate regulatory decisions if those decisions did not reflect that adequate scrutiny had been accorded the new intervenors’ concerns (Horowitz, 1993: 146).

Through much of the 1970s, the Burger Court kept a hands off position towards increased judicial oversight of the administrative process. Then in the 1978 case of *Vermont Yankee Nuclear Power Corp v. Natural Resource Defense Council*, 435 U.S. 519, the high court sent a strong message to the D.C. Circuit that it lacked the authority to require the Atomic Energy Commission and its successor agency the Nuclear Regulatory Commission (NRC) to modify rule making procedures mandated by the Administrative Procedure Act. Speaking for a unanimous Supreme Court, Justice Rehnquist stressed that “[t]his sort of Monday morning quarterbacking not only encourages but almost compels the agency to conduct all rule making with the full panoply of procedural devices normally associated only with adjudicatory hearings” was not authorized by the Administrative Procedure Act (*Vermont*

*Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 1978: 547). The NRC had justified the modification of rule making procedures in order to provide public interest groups a greater opportunity to challenge rules regulating the storage of spent nuclear fuel rods at nuclear power plants.

During the early 1980s, the Burger Court took additional steps to limit judicial oversight of the federal administrative process. In the 1982 case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, the high court established a new administrative deference doctrine. The so-called *Chevron* doctrine directed federal courts to grant deference to agency interpretation of congressional mandates if federal agencies made use of rule making to interpret congressional mandates and that the court found (1) Congress had not clearly spoken on the issue and that (2) the agency had reasonably construed the statute (*Chevron U.S.A., INC. v. Natural Resources Defense Council, Inc.*, 1984, 845). Prior to the *Chevron* decision, the Supreme Court had taken the position that federal law required federal courts to make an independent determination of congressional intent and not give deference to an agency's interpretation. The *Chevron* decision came at the time the Reagan administration faced strong criticism for allegedly attempting to gut federal environmental laws.

Interestingly, through the end of the Rehnquist Court in 2005, the high court selectively applied the *Chevron* doctrine to limit judicial review of policy decisions by federal agencies. In the 1991 case of *Rust v. Sullivan*, 500 U.S. 175, the high court made use of the *Chevron* doctrine to uphold regulations issued by the Department of Health and Human Services prohibiting family planning clinics that received federal funds from counseling clients about abortion as a family planning option. By a vote of 5 to 4, the Rehnquist Court found that

the regulations were entitled to deference even though the new policy constituted “a sharp break with prior interpretation” (*Rust v. Sullivan*, 1991, 186). On the other hand, in the cases of *Christensen et al. v. Harris County*, 529 U.S. 576 (2000) and *United States v. Mead*, 533 U.S. 218 (2001), the Rehnquist Court refused to grant the Department of Labor and the United States Customs Service deference with respect to major policy initiatives on the grounds that the agencies did not use a formal mechanism, such as rule making to interpret congressional delegations.

The rejection of the “hard look” doctrine and recognition of the *Chevron* doctrine played a significant role in the transformation of the relationship between presidential administrations and the administrative state. Instead of viewing the federal bureaucracy and the Courts as a major obstacle to the implementation of an administration’s agenda, the 1980s and 1990s saw a series of presidential administrations make much more effective use of regulatory powers of executive branch agencies to implement an administration’s public policy agenda. Much like the Reagan Administration, the Clinton administration “turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals” (Kagan, 2001, 2248). As explained by Elena Kagan, former Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Council:

At the front end of the regulatory process, Clinton regularly issued formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course. And at the back end of the process (which could not but affect prior stages as well), Clinton personally appropriated significant regulatory action



through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own, in a way new to the annals of administrative process (Kagan, 2001, 2249).

This is not to say that the Burger and Rehnquist Courts abandoned judicial review of the federal administrative process. Instead, the Burger and Rehnquist Courts sought to limit the power of the federal courts to second guess the regulatory discretion of federal agencies as long as the agencies provided sufficient justification for regulatory actions. Writing in 2004, Professor Michael Herz provided an explanation for the conservative approach towards administrative law adopted by the Rehnquist Court:

The best explanation is that the three conservatives on the Rehnquist Court (Rehnquist, Scalia, Thomas) found themselves frequently checked by the four moderate or liberals (Stevens, Souter, Byers and Ginsburg) on a wide range of administrative law issues. Without sufficient votes to get their way, both wings of the Rehnquist Court found themselves forced to appeal to Justices O'Connor and Kennedy in an effort to assemble a majority or plurality on key issues.....In particular, Justice O'Connor did not feel comfortable sharply limiting judicial access to individuals and groups seeking to challenge the exercise of administrative discretion by public agencies. Equally important,

Justice O'Connor did not feel comfortable giving the federal courts a license to micro-manage the operations of public agencies (Herz, 2004:297).

It is too early to predict whether the addition of Chief Justice John Roberts and Associate Justice Samuel Alito to the high court will significantly alter the cautious approach applied by the Burger and Rehnquist Courts to judicial oversight of the administrative process. However, there is little likelihood the Roberts Court will embrace a return to the "hard look" doctrine embraced by D.C. Circuit during the 1970s and early 1980s.

Sixth, and finally, the Burger and Rehnquist Court took a number of steps to limit the further expansion of the jurisdiction to the federal courts to oversee the management of public programs and to hold public officials personally liable for alleged violations of statutory rights.

In the 1981 case of *Pennhurst State School v. Halderman*, 451 U.S. 1, the Burger held that before a federal court could find that Congress had intended to create a private cause of action to enforce the provisions of a federal mandate the court must find clear language of congressional intent to create a private cause of action. Subsequently, in *Suter v. Artist*, 530 U.S. 347 (1992)(The Adoption Assistance and Child Welfare Act of 1980); *Blessing v. Freestone*, 520 U.S. 329 (1997)(Title IV-D of the Social Security Act); *Alexander v. Sandoval*, 532 U.S. 275 (2001)(Title VI of the 1964 Civil Rights Act) and *Gonzaga University v. John Doe*, 536 U.S. 273 (2002) (Family Educational Rights and Privacy Act of 1974), the high court found insufficient language in the statutes to find that Congress had clearly intended to create private causes of action to permit citizens and clients to seek judicial intervention to enforce provisions of the laws. Only in *Wilder v. Virginia Hospital Association*, 496 U.S. 498

(1990)(Boren Amendment to the Medicaid Act) and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)(Title IX Education Amendments of 1972) did the high court find clear legislative language indicating congressional intent to create new private causes of action.

Equally important, the Rehnquist Court reinterpreted the Eleventh Amendment to prohibit Congress from making use of the Commerce Clause to abrogate the Eleventh Amendment immunity of States from money damage lawsuits brought in federal court and to sharply limit congressional use of Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity (Galloway, 2005, 106-120). Specifically, in the 1996 *Seminole Tribe v. Florida*, 517 U.S. 44 decision, the Rehnquist Court held that Congress could not use the Commerce Clause to abrogate the Eleventh Amendment immunity of States from money damage lawsuits brought in federal court by private citizens. Subsequently, the high court held Congress could not make use of Section 5 of the Fourteenth Amendment to waive the Eleventh Amendment immunity of States from money damage lawsuits filed for alleged violations of the Fair Labor Standards Act (*Alden v. Maine*, 1999, 706), and the Americans With Disability Act (*Board of Trustees v. Garrett*, 2001, 356). Yet, the high court held that Congress lawfully used Section 5 of the Fourteenth Amendment to abrogate the immunity of state government under the Family and Medical Leave Act (*Nevada Department of Human Resources v. Hibbs*, 2003, 721).

### **FROM THE PUBLIC LAW LITIGATION MODEL TO THE PUBLIC LAW RISK MANAGEMENT MODEL**

The public law litigation model evolved to deal with the widespread failure of public agencies to comply with

minimum constitutional rights in the administration of public programs and the failure to respect statutory rights. The public law litigation model also evolved because of the failure of administrative agencies to allow citizens and interest groups a greater opportunity to participation in the administrative process. The public law risk management model, in contrast, does not depend primarily upon the judiciary to assure compliance with legal restrictions on the management of public agencies and the conduct of public employees and officials. Instead, it depends upon much more heavily upon self-regulation by public agencies and their employees than judicial oversight of the day-to-day operations of public agencies. Consequently, to full implement the public law risk management model requires public agencies to develop a number of minimum legal competencies among their employees and officials.

First, an effective public law risk management program must work to assure the constitutional competence of public employees and officials. Even though little likelihood exists that the Supreme Court will expand existing constitutional restrictions on the operation of public agencies it is also unlikely that the high court will significantly reduce constitutional restrictions on the operations of public agencies. But the high court will continue to interpret existing constitutional restrictions on government action. For instance, in the 2005 case of *Kelo v. New London*, 125 S.Ct. 2655, by a vote of 5 to 4, the high court refused to hold that the Fifth and Fourteenth Amendments prohibited local governments from seizing private property to implement economic development plans (Cohen, 2006, 491). And the high court continues to struggle over how far local and state governments may go in placing land use restrictions on private property without requiring governments to compensate land owners under the Fifth taking clause (Rosenbloom, 1994, 504-505). The fact the federal courts will remain active in the

interpretation of constitutional restrictions on government agencies and public employees means that public organizations must continue to emphasize that their employees must not violate the clearly established constitutional rights of those who receive government benefits and services (Rohr, 1987; Rohr, 1989, Rosenbloom, Carroll and Rosenbloom, 2000). Consequently, the constitutional competence of public employees and officials must constitute a high priority of an effective public law risk management program.

Second, an effective public law risk management program also must devote attention to the effective management of both constitutional and non-constitutional torts (Epp, 2000, 407-430; Governmental Tort Liability, 1998, 2009-2026; Lee, Yong, 1987, 160-70 MacManus and Turner, 1993, 462-472;). Interestingly, the public law litigation model focused almost exclusively on constitutional tort litigation which involve suits alleging that public employees and officials violated the constitutional rights of citizens subject to some type of governmental action or the rights of the recipients of governmental benefits. In contrast, the public law risk management movement places as much attention on non-constitutional tort management as it does on constitutional tort management on the theory that governments have an obligation to deter government employees and officials from harming individuals in the course of the performance of officials duties (Note, 1998, 2014). In other words, the goal of public law risk management is not simply to argue that the doctrine of sovereign immunity shields a governmental entity from liability but to prevent government employees and officials from harming individuals in the first place.

Long before the public law litigation movement opened the door to constitutional tort law suit (Note, 1998, 2012-2014), State courts and state legislatures struggled

with whether to permit individuals to sue State and local governments for injuries resulting from the performance of officials duties by public employees and officials. Through much of the nineteenth and first half of the twentieth century, the Federal government and State governments and their political subdivisions relied upon the doctrine of sovereign immunity to shield governments and taxpayers from liability for the actions of their employees (Eikenberry, 1985, 742). Congress, state legislatures, state courts and federal courts refused to apply the doctrine of respondeat superior to the law of governmental tort liability. Instead, the vast majority of States relied upon common law to define the scope of governmental liability for non-constitutional torts. And many state courts made use of the governmental/proprietary test for determining the liability of State and local governments for non-constitutional torts (Cook, 1984, 579). Writing in 1975, Professor Kenneth Culp Davis described the confusing situation created by the continued use of the governmental/proprietary sovereign immunity test:

Streets, sidewalks and bridges are often proprietary, and police and fire departments  
are almost always governmental. Parks, swimming pools and recreation centers may  
be either; education is generally governmental, and municipal airports may be  
proprietary. At least one state has both governmental manholes and proprietary  
manholes; surely some states must have mixed manholes (Davis, 1975, 97).

Even though states such as Virginia and Florida continue to make use of the governmental/proprietary test for purposes of establishing governmental liability for non constitutional torts (*City of Chesapeake v. Cunningham*, 2004, 624; *Pollock v. Florida Department of Highway*

*Patrol*, 2004, 928), thirty three states have granted governmental units discretionary-function immunity similar to that granted by the Federal Torts Claims Act (FTCA) of 1946 to federal agencies (Rosenthal, 2007, 808;). For instance, the New Jersey And Georgia Tort Claims Act makes use of the discretionary-ministerial acts test (*Coyne v. D.O.T.*, 2005, 481). Discretionary-function immunity tests “generally waives the federal government’s immunity from liability for tortuous or omissions committed by its employees” with the exception of acts or omissions which occurred in relation to the performance of discretionary functions (Weaver and Longora, 2002, 335-49).

Not surprisingly, the increase in governmental liability for constitutional and non-constitutional torts has had serious budget implications for government agencies at the local, state and federal level. Increased liability has forced federal, state and local governments to adopt a number of different strategies to limit their liability including expanding insurance coverage, the establishment of municipal liability pools and self-insurance (Note, 1998, 2024). Despite the widely held misconception that the doctrine of sovereign immunity protects the vast majority of government and public officials from liability for non-constitutional torts, the 1980s and 1990s saw a large increase in tort related pay outs by governments; particularly at the municipal level (MacManus, 1997a, 27-31; MacManus, 1997b, 28-47; MacManus and Turner, 1993, 462-472 ). As a result of this surge in litigation, scholars began to argue that public agencies needed to devote much more attention to training their employee to avoid committing both constitutional and non-constitutional torts (Leazes, Jr., 1995, 167-181).

Third, an effective public law risk management program must train public employees and officials to deal with the explosion in the privatization of public administration (Auger, 1999, 435-454; Prager, 1994, 176-

184). While the federal government has historically spent tens of billions of dollars for the procurement of equipment for national defense, recent decades has seen defense contracting expand to include a vast array of service and maintenance contracts (Cooper, 1980, Cooper, 2003). Local governments now out source “animal control, legal services, fire protection, trash collection, health care, data processing, street cleaning, street repair, and recycling” (Padovani and Young, 2006, 29). Interestingly, public administration textbooks devote little attention to the public contracts and contract management (Peckinpugh, 1999, 10).

Much like the 19<sup>th</sup> century civil service reform movement, modern public contract law grew out of efforts by good government reformers to prevent graft and corruption in public contracting. Consequently, good government reformers pushed through reforms at the federal, state and local level directed at assuring the “continuous oversight and monitoring” of the negotiation and implementation of public contracts (Bowden and Klay, 1996, 389). As explained by one public contract expert:

In contract theory, the assumption that human beings and their attendant organizations are not to be trusted to do the “right thing” emerged directly from the anti-spoils, “good government” movement of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Based upon the experience of spoils oriented governments, reformers feared the collaboration between contracting parties was likely to become collusion. Enactment of elaborate control mechanisms was the response for public contracting (Bowden and Klay, 1996, 389).

As part of the public contract reform movement, the twentieth century saw governments increasingly rely upon



detailed contract specifications designed to assure governments received what they paid for. In the long run, however, reliance upon detailed contract specifications would drive up government procurement costs. Despite ongoing criticism that government contracting remains unnecessarily complex (Bowden and Klay, 1996, 389), public contracting remains heavily regulated at the local, state and federal level (Kettl, 1988, 9-28; Rehfus, 1990, 44-48).

And the combination of the increased frequency of government contracting and the ongoing complexity of government contracting increases the need for public employees with a working knowledge of public contracting and performance contracting (Brudney, Fernandez, Ryu, 2005, 393-419; Chi, Arnold and Perkins, 2003, 12-21; Hardy, 2005, 49; Harkness, 2006, 896).

Fourth, an effective public law risk management program requires that public employees develop a working knowledge of the public employment law. Employment related anti-discrimination laws include federal, state and local prohibitions against discriminating against public employees on the basis of sex, religion, national origin and age. Federal anti-discrimination laws include Title VII of the 1964 Civil Rights Act as amended by the Equal Employment Opportunity Act of 1972, the Equal Pay Act of 1963, the Age Discrimination in Employment of 1967, the Pregnancy And Discrimination Act of 1978, the Americans Disability Act of 1990, and the Civil Rights Act of 1991. Some state and local governments have gone beyond the scope of federal anti-discrimination law and have prohibited discrimination on the basis of sexual orientation. In addition to anti-discrimination laws, there are numerous complex legal issues related to the administration of workers' compensation (Chan, 2003, A3), unemployment insurance, occupational health (Cruz, 2002, 46-52) and safety and minimum wage and maximum hour

laws (Gibson, 2001, 152; Wilkins and Wald, 2005, 265-270) and family and medical leave legislation (Kim, 1998, 42), (Barnes and Good, 2005, 48-55). Not surprisingly, the period since the 1970s has seen an explosion in employment practices lawsuits filed against public entities related to the spectrum of employment practices ranging from hiring practices and sexual harassment under Title VII of the 1964 Civil Rights Act to alleged violations of the Americans With Disability Act (Lenckus, 2005, 35; Palermo, 2004, 108).

Fifth, an effective public law risk management program must also focus on helping public administrators comply with a maze of criminal and administrative ethics laws directed at preventing public corruption and maintaining public confidence in the objectivity and impartiality of public employees as they carry out their official duties (Gilman, 1995, 58-75; Huddleson and Sands, 1995, 139-149; Lewis, 1993). These so-called rule driven ethics provisions typically deal regulate (1) the acceptance of gifts from non-government sources, (2) gifts between employee, (3) conflicting financial interests, (4) government employees seeking other employment, (5) misuse of public positions, and (6) lobbying of their former agencies by government employees and officials (United States Office of Government Ethics, 2006). Equally important, many public employees must comply with comprehensive public financial disclosure requirements.

Sixth, an effective public law risk management program must continue to work to familiarize their employees with the traditional area of administrative law which includes (1) administrative rulemaking, (2) evidentiary adjudication and enforcement, (3) judicial review of administrative action (Rosenbloom, 2003). Without questions, public administration will continue to face the daunting task of implementing legislative mandates and the administration of numerous public

programs. And public agencies will continue face the judicial review of how they go about carrying out their duties and responsibilities.

Administrative process risk management also deals with the complexity of complying with mandates imposed by one level of government upon another. Failure to comply with mandates may subject governments to the loss of funds and large fines. For instance, at the municipal level, “there are significant exposures in both solid and liquid waste disposal” which include “[l]andfill management, effluent treatment, storm drainage, drinking water purity” and for a range of other possible environmental dangers (Esenberg, 1992, 72-77).

Seventh, an effective public law risk management program must deal with legal issues related to the personal liability of public officials and employees for constitutional and non-constitutional torts (Rudolph, 1998, 164). The fact that a governmental entity may be protected from liability under tort claims statutes or the doctrine of sovereign immunity does not automatically mean the employees and officials employed by the same governmental entity are entitled to the same level of immunity. Consequently, public agencies typically indemnify their employees for constitutional and non-constitutional torts committed within the course of the performance of official duties (Schwartz, 2001, 1209-1249).

### **THE TRANSITION FROM THE PUBLIC LAW LITIGATION TO THE PUBLIC LAW RISK MANAGEMENT MODEL**

When one looks carefully at the evolution of the public law litigation model, it is clear that it evolved to deal with the widespread failure of public agencies to comply with minimum constitutional standards and to allow citizens and interest groups sufficient opportunity to

participate in governmental decision making (Driver, 1979, 43-106). And it is clear that the public law litigation model played a major role in the democratization of public administration (Rosenbloom, 2006, 28-39). Yet, during the 1980s and 1990s, the Burger and Rehnquist Court moved methodically to reduce the impact of the public law litigation model on the day-to-day operations of public agencies (Cooper, 2002, 643-652; O'Leary and Wise, 1991, 316-27).

Interestingly, during the same time in which the court began to reduce their oversight of public agencies, there occurred an unprecedented increase in the privatization of the delivery of public goods and services. (Savas, 1987; Savas, 2000). Ironically, with the privatization of public administration has come a much greater reliance upon the legal process to assure that public agencies actually receive what they contract for. With a significant reduction in the impact of the public law litigation model on public agencies and the need for public administration to rely much more heavily upon the legal process to assure the efficiency and effectiveness of public programs, the opportunity exists for true reconciliation between law and public administration (Moe and Gilmour, 1995, 135-46).

Much of the hostility towards the public law litigation resulted from the belief that judges had assumed too much day-to-day responsibility for the oversight of public agencies. In sharp contrast to the public law litigation model, the public law risk management model relief much less heavily upon the courts to resolve disputes between government agencies. Instead, it relies upon effective risk management which helps to prevent legal problems from forcing government agencies to have to defend themselves in court or go to court to interpret a badly drafted contract.

Interestingly, the public law risk management issues

necessary for the effective operation of public agencies are very similar to the legal risk management issues that are essential to the effective operation of the majority of private and non-profit organizations.

Critics of a public law risk management model will argue that the model places much less emphasis upon assuring that public agencies fully respect democratic values and further reinforce the trend of making public organizations more like private organizations. The constitutional rights those directly impacted by governmental actions and does little to open government decision making to greater citizen and interest group participation or deal with the problem of non governmental organizations not being subject to the same constitutional and administrative law restrictions as public agencies (Rosenbloom and Piotrowski, 2005, 103-121). Yet, one may make a strong argument that the benefits of public law risk management far outweigh any potential costs. In an 1933 article, Professor Marshall Dimock prematurely argued that the split between law and public administration finally had come to an end:

In America, the quickened interest in public administration has brought was

lighted about the beginning of the century by Frank J. Goodnow, the "father

of American administration," and which was permitted to die down due to

the attempt to "rid political science from the bondage of the lawyer" --- this

beacon light is now looked to by an increasing number for a more realistic,

a more complete development of public administration. Public administration

and administrative law are as inseparable as cause and effect (Dimock, 1933, 35).

More than seven decades after Marshall Dimock argued that public administration and administrative law are inseparable, many public administrators continue to look at the legalization of public administration with suspicion.

Interestingly, supporters of the reinventing government movement have devoted little attention to the fact that with the explosion in government contracting the opportunity for procurement and public contracting fraud has significantly increased (Palmer, 2005, 68-76). Strong evidence exists that “the public sector often pays inadequate attention to the cost of managing contracting out and monitoring contractor compliance” (Prager, 1994, 176). Consequently, many public organizations find themselves being overcharged for good and services (Harrow Jr. and Higham, 2007, A1-A8). Consequently, “efficient monitoring, though costly, pay for itself by preventing overcharges and poor quality performance in the first place, by recouping inappropriate outlays, and by disallowing payment for inadequate performance” (Prager, 1994, 182). Effective public law risk management is thus essential in maintaining the efficiency and effectiveness during an era of increased privatization and outsourcing of the delivery of public goods and services.

In conclusion, the public law risk management model played a vital role in the democratization of public agencies. The time has come for public administrators to fully embrace effective legal risk management as essential to the efficient and effective operation of public agencies.

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1. The author takes note of the fact that during the first three decades the Supreme Court did make use of the Fifth and Fourteenth Amendment to apply the so-called 'liberty of contract' doctrine to strike down various state laws directed at protecting the health and safety of workers or establishing minimum wage laws.