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The Birth of the Administrative State: Where It Came From and What It Means for Limited Government

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For those who hold the Constitution of the United States in high regard and who are concerned about the fate of its principles in our contemporary practice of government, the modern state ought to receive significant attention. The reason for this is that the ideas that gave rise to what is today called "the administrative state" are fundamentally at odds with those that gave rise to our Constitution. In fact, the original Progressive-Era architects of the administrative state understood this quite clearly, as they made advocacy of this new approach to government an important part of their direct, open, comprehensive attack on the American Constitution.

As a practical matter, the modern state comes out of Franklin Roosevelt's New Deal, which launched a large bureaucracy and empowered it with broad governing authority. Also, as a practical matter, the agencies comprising the bureaucracy reside within the executive branch of our national government, but their powers transcend the traditional boundaries of executive power to include both legislative and judicial functions, and these powers are often exercised in a manner that is largely independent of presidential control and altogether independent of political control.

But while the actual growth of the administrative state can be traced, for the most part, to the New Deal (and subsequent outgrowths of the New Deal like the Great Society), the New Deal merely served as the occasion for implementing the ideas of America's Progressives, who had come a generation earlier. It is the origins of the modern state—and the constitutional implications of that change—upon which we will focus our attention.

The consequences of adopting Progressive ideas as a foundation for a major piece of our contemporary government are profound, especially when one considers the impact of these ideas on the bedrock principles of our Constitution. It is best to begin with an illustration. Consider the plight of the C. T. Chenery Corporation in the early 1940s.

In 1935, Congress had enacted the Public Utility Holding Act, which required that public utility holding companies reorganize their corporate structures and that the recently created Securities and Exchange Commission (SEC) oversee and approve the reorganization plans. The law did not name any specific standard that the SEC was to use in evaluating the plans, and the SEC itself did not set any particular rule to govern its decisions.

Thus, when the Federal Water Service Corporation was to be reorganized, its management group—the C. T. Chenery Corporation—had no way of knowing what it had to do in order to maintain its controlling

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interest in the company. When it became clear that the SEC would allow preferred stockholders to convert their shares of the old company into shares of the newly reorganized company, the Chenery Corporation went out and bought itself a large block of preferred stock on the open market. The reorganization plan approved by the SEC did, as expected, allow preferred stockholders to convert their shares; but the SEC explicitly excluded Chenery from making such a conversion, thus depriving Chenery of its ownership.

The reason for the SEC's exclusion of the Chenery Corporation was that the agency decided that it was impermissible for a management company to purchase stock during a reorganization. This was not a prohibition that was part of any law, rule, or regulation when the Chenery Corporation made the purchase. Nor was it a prohibition that applied to any company other than Chenery. Nor was it a prohibition that the SEC ever employed again in the future. It was, instead, a standard that the SEC invented on the spot and applied retroactively to this one company.

When the Chenery Corporation brought suit in federal court, protesting the obvious violation of the rule of law, the SEC countered that the courts should defer to the expertise of the agency and allow the agency to exercise its judgment on a case-by-case basis. The Supreme Court, in 1943, did not find such an argument compelling, reasoning that, "before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government"[1]—that the SEC must, in other words, act according to the rule of law.

But four years later, the SEC found the Court friendlier to its *ad hoc* decision making. Having kept the Chenery case in litigation during this time, the SEC persuaded the Court to change its mind, and in 1947, the Court concluded that any "rigid" requirement that agencies always act according to pre-established rules "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." To insist that agencies follow pre-existing rules in making their decision would be, the new Court claimed, "to exalt form over necessity."[2] The rule of law, in other words, would have to take a back seat to the social expediency provided by expert administration.

THE FOUNDING, THE PROGRESSIVE ERA, AND THE RULE OF LAW

Arbitrary Government vs. the Rule of Law

The Chenery case is now commonly cited in administrative law courses as an example of the vast discretion granted to bureaucratic agencies when Congress delegates to them its legislative power. The case also serves as a good illustration of the kind of injustice the American Founders sought to avoid by instituting a Constitution structured around the separation of powers and grounded in the rule of law. The contrast here helps us see the principled differences between Progressive and Founding-era notions of what constitutes good government.

The Founders understood that there are two fundamental ways in which government can exercise its authority. The first is a system of arbitrary rule, where the government decides how to act on an *ad hoc* basis, leaving decisions up to the whim of whatever official or officials happen to be in charge; the second way is to implement a system grounded in the rule of law, where legal rules are made in advance and published, binding both government and citizens and allowing the latter to know exactly what they have to do or not to do in order to avoid the coercive authority of the former.

As Thomas G. West has explained, the Founders implemented a rule-of-law system partly out of reaction to schemes like those favored by Massachusetts

[1] *Securities and Exchange Commission v. Chenery*, 318 U.S. 80 (1943), at 92–93.

[2] *Securities and Exchange Commission v. Chenery*, 332 U.S. 194 (1947), at 202.

Governor John Winthrop in the early years of Puritanism in the United States. Winthrop believed that governmental decision making ought to depend upon the goodness of the government official. Under such a plan, West explains,

> where the prudence of the magistrate decides each case, no one could know for sure whether what he did would be permitted or forbidden, or what the penalty would be. Nothing except the good will of the magistrate keeps the government from acting according to whimsy or dictatorial willfulness.[3]

In the Chenery case, the company had no way of knowing what to do or not to do in order to maintain its ownership and was forced to rely on whatever *ad hoc* decision the administrators in the SEC felt like making. Against such a scenario, the advantages of the Founders' rule-of-law system are evident.

First, the rule of law facilitates government by the consent of the governed. Since rules are made in advance and apply to a broad array of cases that may arise in the future, the people have the opportunity to consent by way of the deliberation and votes of their elected representatives. In a situation where *ad hoc* decision making is used, a decision is made only once a particular case arises, thus providing no opportunity for the citizens to grant their consent.

Second, as West explains, the rule of law makes it much more difficult "for government to play favorites, to benefit its personal friends and harm its personal enemies." It is thus the best means of maintaining a government dedicated to the equal protection of its citizens' rights, which is the aim of all legitimate government, according to the American Declaration of Independence.[4]

[3] Thomas G. West, "The Constitutionalism of the Founders vs. Modern Liberalism," *Nexus: A Journal of Opinion*, Vol. 6, No. 1 (Spring 2001), p. 79.

[4] *Ibid.*, p. 80.

Securing the Rule of Law: The Separation of Powers

In order to secure individual rights in a system based upon the rule of law, the Founders implemented a constitutional design centered on the separation of powers. Under the separation-of-powers system, the legitimate authority of government would be exercised by three co-equal departments, each making sure that the others remained within the confines of their proper constitutional places.[5] The fundamental aim of the separation of powers, which the American Founders developed from John Locke's *Second Treatise of Government* and, even more directly, from Montesquieu's *Spirit of the Laws*,[6] was to safeguard rights against the possibility of arbitrary government. Indeed, James Madison in *Federalist* 47, echoing Thomas Jefferson, redefined "tyranny" to mean the absence in government of the separation of powers.[7]

It is from this fundamental aim of separation of powers that we can discern three important tenets of American constitutionalism, although this is by no means an exhaustive list.

- The first is the principle of non-delegation. If the separation of powers means anything at all, it means that one branch of government may not permit its powers to be exercised substantially by another branch.[8]
- The second tenet is a corollary of the first: There may be no combination of functions or powers within a single branch. As Madison, quoting Jefferson in the passage from *Federalist* 47 mentioned above, elaborates: "The accumulation of

[5] See Publius, *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), No. 51, pp. 347–349. All citations to *The Federalist* will cite the paper number, followed by page number in the Cooke edition.

[6] See John Locke, *Second Treatise*, chapter 12 ("Of the Legislative, Executive, and Federative Power of the Commonwealth"), and Montesquieu, *Spirit of the Laws*, Part 2, Book 11, Chapter 6 ("On the Constitution of England").

[7] *Federalist* No. 47, p. 324; Thomas Jefferson, *Notes on the State of Virginia*, Query XIII: "The Constitution of the State, and Its Several Charters," paragraph 4.

[8] See *Federalist* No. 48, p. 332.

all powers legislative, executive and judiciary in the same hands…may justly be pronounced the very definition of tyranny."[9] Under this second tenet of the separation of powers—a tenet vital to maintaining the rule of law—those making the law would also have to be subject to its being enforced upon them by an independent authority. Those involved in execution could not make up the law as they went along, but would instead have to enforce laws that had been previously established by a separate authority; and those on whom the law was enforced could have their cases judged by an authority entirely separate from that which had brought prosecution.

- The third tenet of the separation of powers is the responsibility of administration to the republican executive. The government remains "wholly popular," in the words of *Federalist* 14,[10] because those who carry out the law (administrators, under the traditional meaning of the term) are directly answerable to the President, who is elected. The Constitution grants all of "the executive power" to the President and requires him to "take care that the laws be faithfully executed."[11] Administration—as vigorous as some of the Founders surely envisioned it—was thereby placed wholly within a single branch of government, and a clear line of political accountability for administrators was established so that their exercise of power would take place only within the confines of the law.[12]

The Progressives' Rejection of the Separation of Powers

For the American pioneers of the administrative state—the Progressives of the late 19th and early 20th centuries—this older, limited understanding of government stood in the way of the policy aims they believed the state ought to pursue in a world that had undergone significant evolution since the time of the Founding. They believed that the role of government, contrary to the perceived ahistorical notion of Founding-era liberalism, ought to adjust continually to meet the new demands of new ages. As Woodrow Wilson wrote in *The State*, "*Government does now whatever experience permits or the times demand*."[13]

A carefully limited government may have been appropriate for the Founding era, when the primary concern was throwing off central government tyranny, but in order for government to handle the demands placed upon it by modern times, the Founding-era restrictions on its powers and organization would have to be eased and the scope of government expanded. This is why John Dewey criticized the Founders for believing that their notions about limited government transcended their own age; they "lacked," he explained, "historic sense and interest."[14] At the most fundamental level, therefore, the separation of powers was a deadly obstacle to the new liberalism, since it was an institutional system intended to keep the national government directed toward the relatively limited ends enumerated in the Constitution and the Declaration of Independence.

Beyond this fundamental difference on the very purpose of government, the three tenets of the separation of powers mentioned above posed a particular problem for the Progressives' vision of national administration at the outset of the 20th century. The range of activities they wanted the government to regulate was far too broad for Congress to handle under the original vision of legislative power.

Instead, to varying degrees, the fathers of progressive liberalism envisioned a delegation of rulemaking, or regulatory, power from congressional lawmakers to an enlarged national administrative apparatus, which

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[9] *Federalist* No. 47, p. 324.

[10] *Federalist* No. 14, p. 84.

[11] U.S. Constitution, Article II, Sections 1, 3.

[12] One of the best explications of this principle is found in Justice Antonin Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), at 697–734.

[13] Woodrow Wilson, *The State* (Boston: D.C. Heath, 1889), p. 651. Emphasis in original.

[14] John Dewey, *Liberalism and Social Action* (New York: Capricorn Books, 1963), p. 32.

would be much more capable of managing the intricacies of a modern, complex economy because of its expertise and its ability to specialize. And because of the complexities involved with regulating a modern economy, it would be much more efficient for a single agency, with its expertise, to be made responsible within its area of competence for setting specific policies, investigating violations of those policies, and adjudicating disputes.

The fulfillment of progressive liberalism's administrative vision, therefore, required the evisceration of the non-delegation doctrine and the adoption of combination of functions as an operating principle for administrative agencies. Furthermore, the Progressives believed that administrative agencies would never be up to the mission they had in mind if those agencies remained subservient to national political institutions. Since modern regulation was to be based upon expertise—which was, its advocates argued, objective and politically neutral—administrators should be freed from political influence. Thus, the constitutional placement of administration within the executive and under the control of the President was a problem as the Progressives looked to insulate administrators not only from the chief executive, but from politics altogether.

It is the Progressives' desire to free bureaucratic agencies from the confines of politics and the law that allows us to trace the origins of the administrative state to their political thought. The idea of separating politics and administration—of grounding a significant portion of government not on the basis of popular consent but on expertise—was a fundamental aim of American Progressivism and explains the Progressives' fierce assault on the Founders' separation-of-powers constitutionalism. It was introduced into the United States by Progressive reformers who had themselves learned the principle from what was then the "cutting edge" theory of history and the state developed in 19th century Germany.

In this regard, no one was more important to the origins of the administrative state in America than Woodrow Wilson and Frank Goodnow. Wilson served as the 26th President of the United States and was a leading academic advocate of Progressive ideas long before his entry into politics. Much of his contribution to Progressive thought came in his work from the 1880s, when he was in the early stages of a prolific academic career that would see him in posts at Bryn Mawr College, Wesleyan University, and Princeton (of which he became president) prior to his entry into political life in 1910. Goodnow was the founding president of the American Political Science Association and a pioneer in the new field of administrative law who started to make his own contributions to the Progressive movement in the last decade of the 19th century.

WOODROW WILSON

Beyond Civil Service Reform: The Separation of Politics and Administration

The idea of shielding administration, at least to some degree, from political influence had been around in the United States for some time—at least since the reaction against the 19th century spoils system, in which many jobs in the federal bureaucracy were doled out on the basis of one's affiliation with the party currently in power as opposed to one's actual merit or skill.

The establishment of the Civil Service Commission through the Pendleton Act of 1883 marked a significant victory for opponents of the spoils system, but it took the Progressives, starting with Wilson and Goodnow, to take this rather narrow inclination against the influence of politics in administration and make it part of a thoughtful, comprehensive critique of American constitutionalism and part of a broader argument for political reform. While the opponents of the spoils system certainly wanted to shield administration from political cronyism, they did not offer a new theory of administration. The Progressives, by contrast, were concerned less with eradicating the evils of political cronyism than with creating a realm of neutral administrative discretion shielded from political influence.

Wilson introduced the concept of separating politics and administration—of treating administrative governance as an object of study entirely separate from politics—in a series of essays in the latter part of the 1880s.[15] Goodnow expanded upon this Wilsonian concept in the 1890s and eventually published a book in 1900 titled *Politics and Administration*.

The fundamental assumption behind the vast discretion that Progressives wanted to give to administration was a trust in or optimism about the selflessness, competence, and objectivity of administrators, and thus a belief that the separation-of-powers checks on government were no longer necessary or just. If the Framers of the Constitution had instituted the separation of powers out of fear of "the abuses of government"—fear that the permanent self-interestedness of human nature could make government "administered by men over men"[16] a threat to the natural rights of citizens—then the advocates of administrative discretion concluded that such fears, even if well-founded in the early days of the republic, no longer applied in the modern era. Thus, administration could be freed from the shackles placed upon it by the separation of powers in order to take on the new tasks that Progressives had in mind for the national state. This key assumption behind the separation of politics and administration is exemplified in Wilson's political thought.

The strong Progressive belief in the enlightenment and disinterestedness of administrators stands as an instructive contrast to the permanent self-interestedness that the Framers of the U.S. Constitution saw in human nature.[17] Just as this sobriety about the potential for tyranny led the Framers to circumscribe carefully the authority of the national government, the Progressives' passionate optimism fueled their call for maximum discretion for administrators.

This is not to suggest that the Framers denied discretionary power to the national government; no reader of *Federalist* 23—or many other papers of *The Federalist*, for that matter—could draw such a conclusion. Rather, they understood that such discretion had to be channeled through the forms and law of the Constitution in order to be safe for liberty. Thus, as Alexander Hamilton explained in *Federalist* 23 and elsewhere, the vigorous discretion that the national government must have is made safe by the "most vigilant and careful attention of the people."[18] For the people to exercise this kind of vigilance, the officers who exercise discretion must do so in a system of clear electoral accountability and within the confines of the rule of law.

It is precisely this kind of accountability to the realm of politics from which the Progressives, by contrast, wanted to free administrators. For the Progressives, there was something special about civil servants that somehow raised them above the ordinary self-interestedness of human nature. Such confidence came from a faith that the progressive power of history had elevated public servants to a level of objectivity. They would, supposedly, be able to disregard their own private or particular inclinations in order to dedicate themselves to the objective good. Because of this disinterestedness, restraints on their discretion were unnecessary.

Wilson subscribed thoroughly to this doctrine of historical progress, which he had learned from reading German state theorists like G. W. F. Hegel and Johann Bluntschli and from his own teachers like Richard T. Ely, who had received his education at German universities. Wilson came to believe that history had solved the problem of faction—that human nature was no longer a danger in democratic government. He wrote frequently of a "steady and unmistakable growth of nationality of sentiment," of a growing unity and

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[15] For a more elaborate explication of Wilson's teaching on administration and the broader connection between his principles and modern liberalism, see R. J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, Md.: Rowman & Littlefield, 2005).

[16] *Federalist* No. 51, p. 349.

[17] See, for example, *Federalist* No. 6, where Publius addresses the Anti-Federalist and Enlightenment notion that human nature had improved and become less dangerous. He characterizes those holding such notions as "far gone in utopian speculations." *Federalist* No. 6, p. 28.

[18] *Federalist* No. 23, p. 150.

objectivity in the American mind, and concluded that the power of the national government could be unfettered because one faction or part of the country was no longer a threat to the rights of another.[19]

Administration and the "Living Constitution"

With the threat of faction having receded as a result of historical progress, Wilson argued, a new understanding of the ends and scope of government was in order. This new understanding required an evolutionary understanding of the Constitution—one in which the ends and scope of government are determined by looking not to the pre-established law of the Constitution, but instead to the new demands placed upon government by contemporary historical circumstances.

In his New Freedom campaign for President in 1912, for instance, Wilson urged that the rigid, mechanical, "Newtonian" constitutionalism of the old liberalism be replaced by a "Darwinian" perspective, adjusting the Constitution as an organic entity to fit the ever-changing environment. Wilson also blamed separation-of-powers theory for what he believed to be the inflexibility of national government and its inability to handle the tasks required of it in the modern age:

> The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. No living thing can have its organs offset against each other, as checks, and live.[20]

Wilson saw the separation of powers as a hindrance because efficiency was to be valued over anything else. As he claimed in 1885, efficiency had become the pre-eminent principle in government because history had brought us to an age where the administrative functions of government were most important: "The period of constitution-making is passed now. We have reached a new territory in which we need new guides, the vast territory of *administration*."[21]

Wilson's work on empowering administration with significant discretion to regulate national progress seems to have taken off immediately following his graduate education at Johns Hopkins University. It was at Hopkins where Wilson imbibed deeply in the administrative writings of German authors who belonged to the Hegelian tradition, especially Bluntschli, and where he learned from teachers like Ely, who had studied under Bluntschli at Heidelberg.

Wilson's first sustained work on administration came right at this time in an unpublished essay written in November 1885, titled "The Art of Governing." This work led to the writing, the following year, of Wilson's seminal essay, "The Study of Administration," where the case for separating politics and administration and for freeing administration from the confines of constitutional law is made explicitly for the first time in the United States. Wilson subsequently elaborated on this case in notes he prepared for an annual lectureship at Johns Hopkins from 1888 to 1897.

But even prior to entering graduate school, Wilson's views on administration had been taking shape, as evidenced by his 1882 essay "Government By Debate." It was in this essay that Wilson first suggested freeing administration from political influence because large parts of national administration were, he contended, apolitical and based on expertise. Administrative departments, Wilson wrote then, "should be organized in strict accordance with recognized business

[19] Wilson, *Congressional Government*, 15th ed. (Boston: Houghton Mifflin, 1900 [orig. pub. 1885]), p. 42.

[20] Wilson, *The New Freedom* (New York: Doubleday, Page and Company, 1913), p. 47.

[21] Wilson, "The Art of Governing," November 15, 1885, in *The Papers of Woodrow Wilson* (hereafter cited as *PWW*), 69 vols., ed. Arthur S. Link (Princeton, N.J.: Princeton University Press, 1966–1993), Vol. 5, p. 52. Emphasis in original.

principles. The greater part of their affairs is altogether outside of politics."[22]

Wilson's thesis in his works on administration was that it was far better and more efficient for a professional class of experts, instead of a multiplicity of politicians with narrow, competing interests, to handle the complex business of the modern state. To the objection that entrusting administrators with such discretion might not comport with the Constitution's distribution of power, Wilson responded that administrative principles and constitutional principles were distinct and, thus, that constitutional limitations could not easily be applied to the exercise of administrative authority. The constitutional principle of checks and balances, for example, interfered with efficiency and should not be applied to the exercise of administrative power: "Give us administrative elasticity and discretion," he urged; "free us from the idea that checks and balances are to be carried down through all stages of organization."[23]

Relying heavily on European models of administrative power, Wilson laid out a vision for administrative discretion in 1891 that directly rejected the rule-of-law model:

> The functions of government are in a very real sense independent of legislation, and even constitutions, because [they are] as old as government and inherent in its very nature. The bulk and complex minuteness of our positive law, which covers almost every case that can arise in Administration, obscures for us the fact that *Administration cannot wait upon legislation, but must be given leave, or take it, to proceed without specific warrant in giving effect to the characteristic life of the State*.[24]

Wilson well understood that this wide latitude for administrative action undermined the separation of powers, which he attacked and contrasted with what he called the "actual division of powers," where there are many "legislative and judicial acts of the administration."[25]

Enlightened Bureaucrats: Importing the European State

Wilson's argument for freeing administrators from close political control was grounded in the characteristic Progressive confidence in the expertness and objectivity of the administrative class. For years, Wilson had been urging special education for future administrators at elite universities. He argued that "an intelligent nation cannot be led or ruled save by thoroughly trained and completely-educated men. Only comprehensive information and entire mastery of principles and details can qualify for command." Wilson had faith in the power of expertise, of "special knowledge, and its importance to those who would lead."[26] He later referred to "the patriotism" and "the disinterested ambition" of the new administrative class.[27]

Wilson is thus a critical figure for the Progressive vision of administration, because he is largely responsible for applying Hegelian optimism about the objectivity of administrators to the American system. Wilson assumed, just as Hegel had in the *Philosophy of Right*, that a secure position in the bureaucracy, with tenure and good pay, would relieve the civil servant of his natural self-interestedness, thereby freeing him of his particularity and allowing him to focus solely on the objective good of society.[28]

Wilson's model for this conception of administrators, he freely acknowledged, was almost entirely foreign to American constitutionalism. Yet it was his own notion of the distinction between politics and administration, Wilson argued, that cleared the way

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[22] Wilson, "Government By Debate," December 1882, in *PWW*, Vol. 2, p. 224.

[23] Wilson, "Notes for Lectures at the Johns Hopkins," January 26, 1891, in *PWW*, Vol. 7, p. 122.

[24] Wilson, "Notes for Lectures," in *PWW*, Vol. 7, p. 121. Emphasis added.

[25] Wilson, "Notes for Lectures," in *PWW*, Vol. 7, pp. 134–138.

[26] Wilson, "What Can Be Done for Constitutional Liberty," March 21, 1881, in *PWW*, Vol. 2, pp. 34–36.

[27] Wilson, "Notes for Lectures," in *PWW*, Vol. 7, p. 122.

[28] See G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press, 1967), pp. 191–192.

for importing what was essentially a Prussian model of administration into the United States. Precisely because administration was to be insulated from politics and from the Constitution, an administrative system that had come from a monarchy could be brought to America without harming America's republican political institutions. As Wilson memorably put it in "The Study of Administration":

> It is the distinction, already drawn, between administration and politics which makes the comparative method so safe in the field of administration. When we study the administrative systems of France and Germany, knowing that we are not in search of *political* principles, we need not care a peppercorn for the constitutional or political reasons which Frenchmen or Germans give for their practices when explaining them to us. If I see a murderous fellow sharpening a knife cleverly, I can borrow his way of sharpening the knife without borrowing his probable intention to commit murder with it; and so, if I see a monarchist dyed in the wool managing a public bureau well, I can learn his business methods without changing one of my republican spots.[29]

Or, as Wilson asked elsewhere in the "Study," "Why should we not use such parts of foreign contrivances as we want, if they be in any way serviceable? We are in no danger of using them in a foreign way. We borrowed rice, but we do not eat it with chopsticks."[30] And so Wilson knew that his vision for administration was a novelty in America. In fact, when he later taught administration in the 1890s, he said that there was only one author other than himself who understood administration as a separate discipline: Frank Goodnow.[31]

FRANK GOODNOW

When Wilson made this observation about Goodnow, he was referring to Goodnow's *Comparative Administrative Law*, published in 1893. That book certainly put Goodnow on the map, although his real contributions to the modern understanding of administration's place in the political order came primarily with the publication of *Politics and Administration* in 1900. Two other works—*Social Reform and the Constitution* (1911) and *The American Conception of Liberty and Government* (1916)—later helped to clarify Goodnow's Progressive agenda, especially for the courts, and to fill out his views on the fundamental purposes of civil government. Goodnow produced almost all of this work while a professor at Columbia University, where he had been brought by his mentor, John Burgess, to teach political science and law and where he became the first to teach administrative law in the United States. Prior to teaching at Columbia, Goodnow had spent a year studying in France and Germany; he would go on to finish his career at Johns Hopkins, where he served as president until his retirement in 1929.[32]

Although a student of Burgess, Goodnow was much more radical than Burgess in his Progressivism. Goodnow looked for ways that American national government could be modified to accommodate Progressive policy aims; this goal could best be accomplished, Goodnow believed, by freeing administration to manage the broad scope of affairs that Progressives believed needed government intervention.

Like Wilson, Goodnow argued that government needed to adjust its very purpose and organization to

[29] Wilson, "The Study of Administration," November 1886, in *PWW*, Vol. 5, p. 378. Emphasis in original.

[30] *Ibid*.

[31] Wilson, "Notes for Lectures," in *PWW*, Vol. 7, pp. 118–120. Wilson's mention of Goodnow came in an 1894 revision he made to these notes.

[32] Samuel C. Patterson, "Remembering Frank J. Goodnow," *PS*, Vol. 34, No. 4 (December 2001), pp. 875–881; Charles G. Haines and Marshall E. Dimock, "Introduction" to *Essays on the Law and Practice of Governmental Administration: A Volume in Honor of Frank Johnson Goodnow*, ed. Haines and Dimock (Baltimore: Johns Hopkins Press, 1935), pp. vii–viii.

accommodate modern necessities;[33] and, like Wilson, he believed that history had made obsolete the Founders' dedication to protecting individual rights and their consequent design of a carefully limited form of national government. In *Social Reform and the Constitution*, Goodnow complained about the "reverence" for constitutional law, which he regarded as "superstitious" and an obstacle to genuine political and administrative reform.[34]

In *Politics and Administration*, Goodnow made clear that his push for administrative reform was not simply or even primarily aimed at correcting the corruption of the spoils system. Rather, administrative reform was, for Goodnow, instrumental to the end of achieving Progressive, big-government liberalism. Progressives had in mind a wide array of new activities in which they wanted national-government involvement; such involvement could not be achieved with the old system of placing administration under political direction:

> Before we can hope that administrative officers can occupy a position reasonably permanent in character and reasonably free from political influence, we must recognize the existence of an administrative function whose discharge must be uninfluenced by political considerations. This England and Germany, and France though to a much less degree, have done. To this fact in large part is due the excellence of their administrative systems. Under such conditions the government may safely be intrusted with much work which, until the people of the United States attain to the same conception, cannot be intrusted to their governmental organs.[35]

Understanding administrative reform this way—as a means to securing the broader aims of Progressive liberalism—is what makes the work of Goodnow, and Wilson too, so much more significant to the development of modern American thought and politics than had been the case with the civil-service reformers.

Goodnow's Rejection of the Founding Principles

Goodnow and his fellow Progressives envisioned an almost entirely new purpose for the national government. Government itself, therefore, had to be viewed through an historical lens. The principles of the original Constitution, Goodnow reasoned, may have been appropriate for the Founding era, but now, "under present conditions[,] they are working harm rather than good."[36] The error that the Founders made was not in constructing government as they did, but rather in thinking that their particular construction and manner of conceiving politics would transcend their own age and would be appropriate for future ages as well. They did not realize the historical contingency of their principles.[37]

The modern situation, Goodnow argued, called for less focus on constitutional principle and law and much greater focus on empowering and perfecting administration. He even repeated, using almost the same words, Wilson's proclamation from 1885 that the nation had to move from constitutional to administrative questions. "The great problems of modern public law are almost exclusively administrative in character," wrote Goodnow. "While the age that has passed was one of constitutional, the present age is one of administrative reform."[38] In order to address the adminis-

[33] Frank J. Goodnow, *Social Reform and the Constitution* (New York: Macmillan, 1911), p. 1.
[34] *Ibid.*, pp. 9–10.
[35] Frank J. Goodnow, *Politics and Administration* (New Brunswick, N.J.: Transaction, 2003 [orig. pub. 1900]), pp. 86–87.
[36] Goodnow, *Social Reform and the Constitution*, p. 2.
[37] Frank J. Goodnow, *The American Conception of Liberty and Government* (Providence, R.I.: Brown University Colver Lectures, 1916), p. 20.
[38] Frank J. Goodnow, *Comparative Administrative Law*, student edition (New York, Putnam, 1893), p. iv. See Wilson's similar statement in "The Art of Governing," in *PWW*, Vol. 5, p. 52, quoted above.

trative questions that history was pressing upon the nation, Goodnow urged a focus not on the "formal" governing system (i.e., the rule of law under the Constitution), but on the "real" governing system, which becomes whatever is demanded by the necessities of the time.[39]

The focus of the Founders' constitutionalism on government's permanent duty to protect individual rights was an impediment to the marked expansion of governmental power that Progressives desired; thus, the ideas that animated the Founders' conception of government had to be discredited.

Goodnow understood the political theory of the Founding quite well. He knew that the notion that government's primary duty was to protect rights came from the theory of social compact—a theory which held that men are naturally endowed with rights prior to the formation of government and therefore consent to create government only insofar as it will protect their natural rights. The Founders' system of government, Goodnow acknowledged, "was permeated by the theories of social compact and natural right." He condemned these theories as "worse than useless," since they "retard development"[40]—in other words, their focus on individual liberty prevents the expansion of government. The separation-of-powers limits on government, Goodnow realized, came from the Founding-era concern for individual liberty: "It was the fear of political tyranny through which liberty might be lost which led to the adoption of the theories of checks and balances and of the separation of powers."[41]

Goodnow's critique of the Founders' political theory came from the perspective of historical contingency. Their understanding of rights and the role of government, he argued, was based upon pure "speculation," and "had no historical justification."[42] Here Goodnow employed the same critique as his fellow Hegelian Wilson, who had written in 1889 that the idea of social compact had "no historical foundation."[43] Instead of an understanding of rights grounded in nature, where the individual possesses them prior to the formation of government, Goodnow urged an understanding of rights that are granted by government itself. He remarked favorably upon European trends in understanding rights as contingent upon government:

> The rights which [an individual] possesses are, it is believed, conferred upon him, not by his Creator, but rather by the society to which he belongs. What they are is to be determined by the legislative authority in view of the needs of that society. Social expediency, rather than natural right, is thus to determine the sphere of individual freedom of action.[44]

Goodnow found it necessary to critique the theory of natural rights because he knew it was the foundation for the requirement of government based upon consent and the rule of law. The principle of government by the consent of the governed was a problem for Goodnow and those who shared his vision of administrative power. Goodnow's vision required significant deference to expertise. The empowering of administrators, as he saw it, was justified not because the administrators had the consent of the people, but because they were experts in their fields.

This is why Goodnow wanted to improve administration not by making it more accountable to preexisting rules made by the consent of the governed, but by making it less so. He observed and conceded

[39] Goodnow, *Politics and Administration*, pp. xxxi, 1–3.

[40] Goodnow, *Social Reform and the Constitution*, pp. 1, 3. See also *The American Conception of Liberty and Government*, p. 13, where Goodnow identified the main problem with the American conception of liberty and government as its foundation in nature.

[41] Goodnow, *The American Conception of Liberty and Government*, p. 11.

[42] *Ibid.*, p. 9.

[43] Wilson, *The State*, p. 13.

[44] Goodnow, *The American Conception of Liberty and Government*, p. 11.

that the doctrines of "sovereignty of the people and of popular participation in the operations of government" were an integral part of American political culture, and he therefore acknowledged that this aspect of the culture would be a difficult hurdle for his vision of administration to overcome. "Our governmental organization developed," he explained, "at a time when expert service could not be obtained, when the expert as we now understand him did not exist."[45]

Bureaucratic Rule over Politics

Since administrative experts were now available, Goodnow urged that they be employed and empowered with significant discretion to manage the new tasks that Progressives had in mind for the national government. He was well aware that insulating administration from the control of politics and law ran up against the traditional, constitutional role for administration, where administrators are subservient to the chief executive and their duty is confined to carrying out established laws. He explained that his conception of administration was novel, considering as it did the sphere of administration to lie outside the sphere of constitutional law; indeed, this new conception is exactly what Wilson had given Goodnow credit for in 1894. Emphasizing the distinction between the constitutional and administrative spheres, Goodnow remarked that the student of government "is too apt to confine himself to constitutional questions, perhaps not considering at all the administrative system."[46]

It is for this reason of considering administration as an object of study outside of the Constitution that Goodnow's landmark book on administrative law—*Comparative Administrative Law*—relies almost entirely upon an account of foreign administrative systems.[47] He knew, as Wilson did, that such a concept was a novelty in the American political tradition. Modern administrative law, therefore, would take it for granted that the political branches of government had to cede significant discretion to administrative agencies; the new body of law would be dedicated to establishing a framework for governing the *extent* and *organization* of this discretion.[48]

In making his case for freeing administration from political influence, Goodnow did not speak of a strict or rigid separation between politics and administration; indeed, he noted that the boundary between the two is difficult to define and that there would inevitably be overlap.[49] But this overlap seems to be in one direction only, in a manner that enlarges the orbit of administration; that is, Goodnow seemed to contemplate instances where administrative organs will exercise political functions but apparently did not contemplate instances of political organs engaging in administrative activity. He characterized the function of politics as "expressing" the will of the state, while the function of administration is to "execute" the will of the state; but he made clear that the overlap between politics and administration would come in the form of administrative agencies taking a share in "expressing" and well as "executing" state will:

> No political organization, based on the general theory of a differentiation of governmental functions, has ever been established which assigns the functions of expressing the will of the state exclusively to any one of the organs for which it makes provision. Thus, the organ of government whose main function is the execution of the will of the state is often, and indeed usually, intrusted with the expression of that will in its details. These details, however, when expressed, must conform with the general principles laid

[45] *Ibid.*, p. 45. See also p. 36.

[46] Goodnow, *Politics and Administration*, pp. 5–6.

[47] Goodnow, *Comparative Administrative Law*, p. v.

[48] *Ibid.*, pp. 1, 10–11.

[49] See, for example, Goodnow, *Politics and Administration*, p. 16. For an account of this point, see Patterson, "Remembering Goodnow," p. 878.

> down by the organ whose main duty is that of expression. That is, the authority called executive has, in almost all cases, considerable ordinance or legislative power.[50]

The notion that Goodnow might see administration as subordinate to politics—as confined only to executing previously expressed will or law[51]—is hereby called into question. Goodnow's statement essentially laid the foundation for the bureaucracy to act without the prior enactment of law by the legislature. He elaborated: "As a result, either of the provisions of the constitution or of the delegation of the power by the legislature, the chief executive or subordinate executive authorities may, through the issue of ordinances, express the will of the state as to details where it is inconvenient for the legislature to act."[52]

The key to trusting administrators with the kind of discretion that Goodnow envisioned was his profound faith in the expertness and objectivity of the administrative class, just as it had been for Wilson. Administrators could be freed from political control because they were "neutral." Their salary and tenure would take care of any self-interested inclinations that might corrupt their decision making, liberating them to focus solely on truth and the good of the public as a whole. As Goodnow explained:

> [S]uch a force should be free from the influence of politics because of the fact that their mission is the exercise of foresight and discretion, the pursuit of truth, the gathering of information, the maintenance of a strictly impartial attitude toward the individuals with whom they have dealings, and the provision of the most efficient possible administrative organization.[53]

[50] Goodnow, *Politics and Administration*, p. 15.

[51] For an example of Goodnow's making such a claim, see *ibid*., p. 24.

[52] *Ibid*., p. 17.

[53] *Ibid*., p. 85.

A natural objection here would be that freeing administrators from political control is a recipe for corruption—that it is precisely through the electoral connection of public officials that we "make their interest coincide with their duty," as Hamilton puts it in *The Federalist*.[54] But for Goodnow, it is just this connection to electoral politics that would make administrators corrupt, while the absence of accountability to the electorate somehow makes them pure. Politics, Goodnow explained, is "polluted" and full of "bias," whereas administration is all about the "truth."[55] Goodnow's confidence in the objectivity of administrators, like Wilson's, is a sign of his Hegelianism, and it shows that he accepted Hegel's premise that bureaucrats could be freed of their particularity and devote themselves wholly to the objective good of the state.[56]

CONCLUSION: THE LEGACY OF PROGRESSIVISM

The main tenets of the Progressive vision for administration, articulated by the likes of Wilson and Goodnow, have come to have a powerful influence in the administrative state by which America is governed today.[57] For a thorough understanding of this phenomenon, one would, of course, have to examine the trans-

[54] *Federalist* No. 72, p. 488.

[55] Goodnow, *Politics and Administration*, p. 82.

[56] See note 25, above.

[57] When speaking of Wilson and Goodnow as founders of the administrative state, I do not suggest that we see in the modern administrative state the *complete* fulfillment of the ideas of these men. The primary features of administration today—delegation, combination of functions, limited presidential control—are grounded in the notion of separating administration from politics; but like most political phenomena, this separation does not go quite as far in practice as it did in theory. In spite of the dramatic push toward establishing significant administrative discretion over policymaking, it still matters very much, for example, what happens in Congress and the presidency. The point of this essay is, however, to explore the *animating ideas* behind the growth of the administrative state in the 20th century and to suggest the ways in which such ideas developed out of Progressive political theory. The principles of Wilson and Goodnow are, in this way, central to the very premise of the modern administrative state.

lation of Progressive ideas into the actual reshaping of American government that took place during the New Deal of Franklin Roosevelt,[58] but even a brief glance at the primary features of the modern state shows important continuities between it and the main principles of Progressivism. In particular, the constitutional separation-of-powers structure that was designed to preserve individual rights and uphold the rule of law has been considerably weakened, and we can see the effects of Progressivism on the three key tenets of the separation of powers that were described at the outset of this essay.

As legal scholar Gary Lawson explains in a seminal essay on the topic, the Supreme Court ceased applying the non-delegation principle after 1935 and allowed to stand a whole body of statutes that enact the new vision of administrative power.[59] These statutes, to varying degrees, lay out Congress's broad policy aims in vague and undefined terms and delegate to administrative agencies the task of coming up with specific rules and regulations to give them real meaning. The executive agencies, in other words, are no longer confined to carrying out specific rules enacted by Congress, but are often left to themselves to determine the rules before seeing to their enforcement.

Lawson cites, for example, securities legislation giving the SEC the power to proscribe the use of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." The agency, on the basis of its expertise, and not Congress, on the basis of its electoral connection, is charged with determining the specific policy that best serves the "public interest." In another example, legislation on broadcast licenses directs that the Federal Communications Commission (FCC) shall grant licenses "if public convenience, interest, or necessity will be served thereby."[60]

More recently, the Supreme Court under William Rehnquist made clear that there would be no revisiting the abandonment of non-delegation. In the case of *Mistretta v. United States*, the Court upheld the statute that delegated to the U.S. Sentencing Commission the power to set sentences (or sentencing guidelines) for most federal crimes. If any case were going to constitute grounds for non-delegation review, it would have been this one. Congress created the Sentencing Commission as, essentially, a temporary legislature with no purpose other than to establish criminal penalties and then to go out of existence.[61] But *Mistretta* simply served as confirmation that the federal courts were not going to bring the legitimacy of the administrative state into question by resurrecting the separation of powers.

The second tenet of separation of powers—the prohibition on combining functions—has fared no better in modern constitutional and administrative law. As Lawson explains, "the destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body." His example here is the Federal Trade Commission (FTC):

> The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the

[58] For a more extensive discussion of the principles of Wilson and Goodnow and their adoption in the New Deal by Roosevelt's administrative architect, James Landis, see R. J. Pestritto, "The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis," *Social Philosophy and Policy*, Vol. 24, Issue 1 (January 2007), pp. 16–54.

[59] Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review*, Vol. 107 (1994), p. 1240. He cites two cases as the last instances of the Court's applying the non-delegation doctrine: *Schechter Poultry v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

[60] Lawson, "Rise and Rise," p. 1240. He cites here these sections of the U.S. Code: 15 U.S.C. Sec. 78j(b) and 47 U.S.C. Sec. 307(a).

[61] *Mistretta v. United States*, 488 U.S. 361 (1989).

> investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. The Commission adjudication can either take place before the full Commission or before a semi-autonomous administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission.[62]

The FTC is a particularly apt example, since it was the "quasi legislative" and "quasi judicial" character of the FTC that was upheld in 1935, in the landmark Supreme Court case of *Humphrey's Executor v. United States*—the first time that the Court so clearly acknowledged that agencies technically within the executive branch could exercise substantially non-executive functions.[63]

Progressive liberalism has also succeeded, at least partly, in defeating the third tenet of the separation-of-powers framework by weakening the political accountability of administrators and shielding a large subset of agencies from most political controls. While the independence of "independent regulatory commissions" and other "neutral" agencies is not as clearly established as delegation and combination of functions, the federal courts have certainly recognized the power of Congress to create agencies that are presumably part of the executive (where else, constitutionally, could they be?) but are nonetheless shielded from direct presidential control. Normally, this shielding is accomplished by limiting the President's freedom to remove agency personnel. In *Humphrey's Executor*, for example, the Supreme Court overturned the President's removal of an FTC commissioner by reasoning that the Commission was more legislative and judicial than it was executive.[64] More recently, it upheld the Independent Counsel provisions of the Ethics in Government Act (the provisions were subsequently repealed), concluding that even an office as obviously executive in nature as a prosecutor could be shielded from presidential control.[65]

These rulings reflect the acceptance of a key tenet of the modern administrative state: that many areas of administration are based upon expertise and neutral principles and must therefore be freed from the influence of politics. That such a notion has become ingrained in the American political mindset was evidenced by the near universal outrage expressed over the Supreme Court's 2000 decision in *FDA v. Brown and Williamson*. In this surprising exception to its standard deference for agencies, the Court ruled that before the Food and Drug Administration (FDA) could promulgate and enforce regulations on tobacco, Congress first had to pass a law actually giving the agency the authority to do so.[66] The decision, which simply upheld the rule of law, was denounced because it would subject tobacco regulation to the control of the people's elected representatives in Congress, where tobacco-state legislators might derail it, instead of giving FDA scientists *carte blanche* to regulate in accord with their own expertise.

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[62] Lawson, "Rise and Rise," p. 1248.

[63] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). See also the more recent case of *Withrow v. Larkin*, 421 U.S. 35 (1975), which upholds and confirms the combination of functions in the administrative state.

[64] *Humphrey's Executor v. United States*. See also Nolan Clark, "The Headless Fourth Branch," in *The Imperial Congress*, ed. Gordon S. Jones and John A. Marini (New York: Pharos Books, 1988), pp. 268–292.

[65] *Morrison v. Olson*.

[66] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). This is, strictly speaking, a statutory case as opposed to a non-delegation (i.e., constitutional law) case, and the Court does not, in its opinion, indicate any reversal of its long-established delegation jurisprudence. Rather, the significance of the case comes from the Court's refusal, in a high-profile controversy, to read into the law a deference to agency expertise that was not there in the first place.

The acquiescence in the realms of law, politics, and culture to the concepts of delegation, combination of functions, and insulating administration from political control is explained by what legal scholars call the victory of "functionalism" over "formalism," or what political theorists might loosely translate as "pragmatism" over "originalism." Simply defined, a functionalist or pragmatic approach begins not with the forms of the Constitution, but with the necessities of the current age, thereby freeing government from the restraints of the Constitution so that the exigencies of today can be met. As one scholar argues, "Respect for 'framers' intent' is only workable in the context of the actual present, and may require some selectivity in just what it is we choose to respect."[67] This sentiment, elevating expedience and efficiency over the separation of powers, was expressed very clearly by Justice Blackmun in his opinion for the Court in *Mistretta*: "Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[68]

The rise of the administrative state that is such an integral feature of modern liberalism thus required the defeat of the separation of powers as a governing principle, at least as it was originally understood, and its replacement by a system that allows delegations of power, combination of functions, and the insulation of administration from the full measure of political and legal control.

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[67] Peter L. Strauss, "Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?" *Cornell Law Review*, Vol. 72 (1987), p. 493. See also Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," *Columbia Law Review*, Vol. 84 (1984), pp. 573–669.

[68] *Mistretta v. United States*, 488 U.S. 361, at 372.