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Progressivism and the Beginnings of the True Administrative State

by

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Introduction and Summary

When did the administrative state come into existence in America? Scholars have debated this question for decades. Part of the difficulty in answering this question stems from the ambiguity of the term "administrative state." For some scholars, an administrative state is defined by the presence of administrative agencies with important powers. Under this definition, anytime a government relies upon administrators for assistance in carrying out its functions, it is an administrative state.

The difficulty with such a definition is that it is overbroad. Almost every government with real power requires administrative agencies to make important decisions about the application and enforcement of law. To apply the term "administrative state" to all of these governments renders the term relatively meaningless. Other scholars, therefore, adopt a more specific definition of an administrative state. This narrower definition defines an administrative state as a government where legislative, executive, and judicial powers are delegated to administrative officers, many of whom are insulated to some degree from political oversight and influence.[1]

[1] See Joseph Postell, *From Administrative State to Constitutional Government*, 116 HERITAGE FOUNDATION SPECIAL REPORT (2012), at 5-7, for elaboration on this definition.

The debate over the definition, and therefore the historical origin, of the administrative state is more than a mere historical controversy. As the previous essay in this series explains, the debate over the origin of the administrative state is central to the debate over its legitimacy.[2] If the administrative state was present in America from the very founding of the nation, then it is much less likely that the administrative state contradicts the principles of the American Constitution. However, if the true administrative state, properly understood, did not emerge until well after the Constitution was established, the possibility that it conflicts with American constitutionalism seems more plausible.

Even among those scholars who agree that the administrative state did not emerge in America until after the Civil War, a consensus has emerged that the 1880s was the decade in which it was born.[3] In that decade, two important laws were passed – the Pendleton Act in 1883 and the Interstate Commerce Act in 1887 – that, respectively, established a civil service system and a new federal regulatory agency, the Interstate Commerce Commission (ICC). This is a plausible surface-level reading of the evidence. The notion of civil service is central to the idea of an administration separated from political influence, one of the core ideas of an administrative state. The creation of a new administrative agency with jurisdiction over the practices of railroads, on top of this, seems to indicate a shift in thinking about administration in the 1880s.

Closer inspection of these two laws, however, reveals that they were not based on a new theory of an administrative state. They were carefully crafted to remain within constitutional limitations. The administrative state did not emerge in America until the 20th Century, when Progressive political theorists began to defend a new theory of constitutionalism at odds with the older constitutionalism. This new theory transferred lawmaking authority to unelected experts in a newly-established bureaucracy, which was to be separated from political influence and granted deference by reviewing courts.

Consonant with their new theory of constitutionalism, progressives promoted reforms to establish direct democracy in the place of representative democracy, yet also argued that direct democracy must give up control over policy to administrative officials who were removed from politics. To accomplish this balance between political control and bureaucratic independence, progressives advocated a new approach to the separation of powers. Instead of a division of power into legislative, executive, and judicial power, progressives preferred a very different two-part division: political power and administrative power.

This new division involved the transfer of some legislative power from the elected, political part of the government to the administrative power. The administrative power would legislate – that is, make "law" through the adoption of binding regulations and orders – in matters where its technical expertise would be useful, translating the general will of the people into specific rules and directives. Also, progressives assumed that the people would be able to ensure that the bureaucracy served their wishes, rather than its own, through political oversight and control. But progressive reformers were vague on the specifics of how the bureaucracy was to remain

[2] Joseph Postell, *Reconciling Administration and Constitutionalism in Early America*, PERSPECTIVES FROM FSF SCHOLARS, No. 2, January 14, 2019.
[3] For two prominent sources, see Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STANFORD LAW REVIEW (1986): at 1189; and Cass R. Sunstein, AFTER THE RIGHTS REVOLUTION (1990), at 19.

accountable. This question of accountability would plague the administrative state in the century following its creation.

Shortly after developing and publicly defending their theoretical work, progressive reformers seized the opportunity to create an administrative state in the period between 1900 and 1920. That opportunity was afforded by the presidencies of Theodore Roosevelt and Woodrow Wilson. Roosevelt campaigned for legislation that would strengthen the ICC, and finally got his wish with the enactment of the Hepburn Act of 1906. Hepburn vested ratesetting and final adjudicatory power in the ICC, making it a modern administrative agency combining legislative, enforcement, and judicial power. During Wilson's first term as President, the Clayton Antitrust Act created a new administrative agency, the Federal Trade Commission, and empowered it to issue injunctions to "prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce." Also, Congress created the Federal Reserve, putting the nation's monetary policy in the hands of a new, powerful administrative agency. Finally, the civil service system, which was limited in scope after the Pendleton Act's passage, was expanded dramatically by 1920 to cover 70 percent of federal officers.

So when did the administrative state come into existence in America? The true administrative state came into existence between 1900 and 1920, driven by a new theory of constitutionalism and actualized by landmark legislation wherein legislative, executive, and judicial powers were comingled and delegated to administrative officers insulated from political control. The administrative state's creation was not inevitable. Rather, it was a choice made by reformers in the 20th Century who thought the Constitution's structural safeguards, such as traditional separation of powers, protecting individual rights, and preserving limited government were outdated. And the emergence of the administrative state well after the Constitution's establishment heightens the apparent and continuing tension that exists between the principles of the administrative state and those of the Constitution.

Republicanism, the Civil Service, and the Pendleton Act

Enacted in 1883, the Pendleton Act is often credited as taking the first steps towards a modern civil service. But the idea of appointing some offices by merit, rather than by patronage, was defended by many Whigs in the 1830s and 1840s, and a small percentage of the national administration was already selected by merit examinations prior to the Civil War.[4] But the officers covered under such examinations did not possess significant powers or discretion.

President Ulysses S. Grant supported the proposals of a civil service commission established in 1871 by a congressional appropriations rider. Many of these proposals would eventually find their way into the Pendleton Act. But there were strong objections to the proposals on the grounds that they violated the Constitution. Grant's Attorney General, Amos Akerman, explained the objection:

> The objection is substantially this: That a rule…that a vacant civil office must be given to the person who is found to stand foremost in a competitive examination,

[4] See Joseph Postell, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO AMERICAN CONSTITUTIONALISM (2017), at 105-6.

> in effect makes the judges in that examination the appointing power to that office and thus contravenes the constitutional provisions on the subject of appointment.[5]

Akerman proposed to circumvent the constitutional objection by making the examination merely advisory rather than binding: "I see no constitutional objection to an examining board, rendering no imperative judgments, but only aiding the appointing power with information."[6]

There was some debate in Congress in 1871 about the merits of civil service reform, and opponents succeeded, in part, by arguing that such reforms threatened the republican principles of the Constitution. Henry Snapp, a member from Illinois, argued that "such a scheme is anti-republican and inimical to our form of free government." "[T]he foundations of our Government," he asserted, "are that the people govern, that the people rule….The people make the laws. The people make the lawmakers."[7] Extending the merit system beyond where it existed prior to the Civil War, applied merely to minor and ministerial officers, Snapp and others argued, would threaten the fundamental principle that lawmakers are elected by the people.

These objections were echoed by opponents of the Pendleton Act in the 1883 debates over its passage. The political dynamics had shifted by then, as is well known. The assassination of President James Garfield by a disgruntled office-seeker turned public opinion against the patronage system as a whole. Yet opponents raised the same principled, constitutional objections. As Indiana Senator Daniel Voorhees argued, "This is a people's government, a representative government. We are sent here by the people who own this Government….I am not ready to say that the people who pay the taxes, till the soil, do the work and the voting, shall not have the ear of their representatives and access to their presence anywhere and everywhere."[8] Voorhees' concerns about civil service reform were rooted in the principles of republicanism. He and other opponents of the Pendleton Act were concerned that a civil service system would create an unrepresentative government, where the voices of the people were ignored by officers who were not beholden to them.

These constitutional objections to the idea of a civil service were reflected in the final passage of the Pendleton Act. The Act did not create a new civil service system, but was simply aimed at ending the corruption of the patronage system. In the beginning of 1884, the year following the Act's passage, only 11 percent of the executive civil service was covered by the new system. Most of these positions were clerkships in departments such as the Treasury and the Post Office.[9] Provisions that limited the President's power to remove officials appointed by examination were removed from the Act, an important fact which belies the notion that it aimed to create an apolitical bureaucracy. It was not until the 20th Century that this reform morphed into a civil service system. The Pendleton Act authorized future presidents to expand civil service protections, and subsequent presidents such as Theodore Roosevelt and Franklin Roosevelt used

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[5] Opinion of Attorney General Akerman on Questions Propounded by the Civil Service Commission, August 31, 1871, in THE EXECUTIVE DOCUMENTS FOR THE SECOND SESSION OF THE FORTY-SECOND CONGRESS (1872), at 26.
[6] Id., at 27.
[7] Speech of Henry Snapp, January 17, 1872, in CONGRESSIONAL GLOBE (1872), at 444.
[8] Speech of Daniel Voorhees, December 15, 1882, CONGRESSIONAL GLOBE (1882), at 355.
[9] See Stephen Skowronek, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1979), at 69.

this delegation of power to place policymaking officials in the bureaucracy inside the merit system.

The Limited Powers of the Interstate Commerce Commission

Just as the Pendleton Act did not establish a modern civil service system, the Interstate Commerce Act did not create the first modern regulatory agency. It did create the Interstate Commerce Commission, but the extent of its powers was not as extensive as the term "Commission" might indicate to readers today. Regulatory commissions, of course, were relatively new phenomena in the 1870s and 1880s. Some railroad commissions existed in various states prior to 1887. But the powers granted to these commissions varied. Some of them were merely authorized to inspect railroad accounts and report findings to the state legislature. Others were adjudicatory tribunals empowered to hear disputes, but lacking in rulemaking or enforcement power. And some had power to set railroad rates as well as hear disputes and enforce binding decisions.

The Interstate Commerce Commission, which was created by Congress in 1887, resembled the adjudicatory type of commission. Yet, the very creation of a commission provoked strong resistance, again in constitutional terms, from opponents. John Reagan, an especially influential member of the House of Representatives from Texas, complained that the American people are "not accustomed to the administration of the law through bureau orders."[10] Poindexter Dunn, an ally of Reagan's in the House, also objected to a commission in the strongest terms:

> I believe that the correct principle in government was asserted when the courts, state and national, were ordained and created to enforce rights and prohibit wrong….If we have come upon a time when any law that we enact declaring rights and prohibiting wrongs can not be administered through their agency, then indeed we have reached the end of free government.[11]

"I will never give my consent in this country," Dunn asserted, "to place any body of men, any commission, between the suitor and the court in which his rights are to be adjudicated."[12]

Those who defended the creation of a commission emphasized that its powers would be highly limited. They were not creating a powerful regulatory agency that would make, enforce, and adjudicate law, they responded. As Senator Orville Platt explained during the Senate's consideration of the Act, the bill was "carefully drawn so as to avoid the exercise of judicial powers by these commissioners, so as to deprive it of any constitutional objection."[13] Specifically, the law did not eliminate the right to bring common law suits against railroads to resolve disputes. It also avoided giving the ICC enforcement power. The commission could merely ask the U.S. attorneys to file suit in federal district court to enforce its decisions, and

[10] Speech of John Reagan, INTERSTATE COMMERCE DEBATE IN FORTY-EIGHTH CONGRESS (1884), at 14.
[11] Speech of Poindexter Dunn, Id., at 238.
[12] Id., at 238.
[13] Speech of Orville Platt, May 12, 1886, CONGRESSIONAL RECORD (1886), at 4422.

those decisions would be reviewed *de novo* by courts. The ICC was also deprived of the power to set railroad rates, to avoid the objection that the commission would act as a quasi-legislature.

The ICC that emerged out of the 1887 Interstate Commerce Act debates, in short, was not the first modern regulatory commission, serving as the precedent for the modern administrative state. In contrast to modern regulatory agencies, the ICC did not exercise legislative powers, and did not have the authority to adjudicate disputes and receive judicial deference. Furthermore, it was not insulated from political control. It was initially located in the Interior Department, subject to the President's supervision and control. When Benjamin Harrison, a former railroad attorney, was elected President in 1888, Congress for political reasons limited Harrison's control over the commission by making it independent. Again, it was not until the 20th Century that a positive theory of an administrative state would emerge, laying the groundwork for the creation of modern regulatory agencies.

Progressive Theory, Progressive Reform, and the New Administrative State

Even by 1900, it could still be said that administrative power remained within the confines established in the U.S. Constitution. The Interstate Commerce Act of 1887 had not ushered in a new age of administrative government. Three years after the Act was passed, Congress enacted the Sherman Antitrust Act, which did not set up any regulatory agency but simply declared "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" to be illegal. Enforcement was in the federal courts which applied the (admittedly broad) language of the statute in particular cases.

A sea change was on the horizon, however. A new generation of political theorists who called themselves "progressives" began to question some of the foundational principles of American constitutionalism. Progressives were never entirely clear on what progress entailed, but they tapped into a sense that the Industrial Revolution had opened up new possibilities for society, but also a responsibility to update and even move beyond old, outdated political principles and forms of government. Progressives advanced a new political theory that was skeptical of core principles of American constitutionalism, especially the notion that government should be limited to the negative function of protecting innate natural rights. Instead, progressives argued that government had to take on more positive responsibilities to regulate and control an increasingly interconnected economy. Consequently, they thought the Constitution's safeguards for individual rights and limited government were outdated. Their theoretical arguments paved the way for the real administrative state to emerge in the first decades of the 20th Century.

Direct Democracy, Republicanism, and Administrative "Aggrandizement"

These progressive reformers challenged two constitutional principles in particular: representation and the separation of powers. Republicanism was defined by the Constitution's Framers as "a government in which the scheme of representation takes place."[14] Representation required that the laws be made by the people through representatives that were elected by the people.

[14] James Madison, *The Federalist, no. 10*, in THE FEDERALIST (Liberty Fund, 2001), at 62.

Progressives, in contrast, sought to create a system in which unelected bureaucrats would have significant control over policy, including the writing of rules, so that policy would be the product of scientific expertise. Although they promoted reforms to establish direct democracy in the place of representative democracy, at the same time progressives argued that direct democracy must give up control over policy to administrative officials who were removed from politics.

Herbert Croly, co-founder of *The New Republic* magazine and prominent progressive journalist, advocated direct democracy in his 1914 book *Progressive Democracy*. But he warned readers that "The realization of a genuine social policy necessitates the aggrandizement of the administrative and legislative branches of the government." Consequently, the people must "impose limits on their use of the instruments of direct government."[15] Similarly, Woodrow Wilson's seminal 1887 article on "The Study of Administration" cautioned that "[t]he problem is to make public opinion efficient without suffering it to be meddlesome."[16] Progressives, in short, argued for a more direct democracy, but they wanted the people to be less involved in the particular policy choices that increasingly should be made by experts in administrative agencies.

The New Separation of Powers: Politics and Administration

To accomplish this balance between political control and bureaucratic independence, progressives advocated a new approach to the separation of powers. Frank Goodnow, progressive legal theorist and first president of the American Political Science Association, wrote in his 1900 book *Politics and Administration* that the separation of powers "has been proven to be incapable of application to any concrete political organization. American experience is conclusive on this point."[17] Instead of a division of power into legislative, executive, and judicial power, progressives preferred a two-part division: political power and administrative power. Goodnow explained the division as that between "operations necessary for the expression of [the public] will, or operations necessary to the execution of that will."[18] Political power, residing in the elected branches of the government such as the Congress, would be responsible for expressing the broad goals and aims of the people. Administrative power would be in charge of executing that will.

Two important conclusions followed from the progressives' rejection of the tripartite separation of powers and their advocacy of the new distinction between politics and administration. First, the new distinction between expressing the public will and executing that will meant that some legislative powers would be transferred from the elected, political part of the government to the administrative power. As Goodnow put it, "the organ of government whose main function is the execution of the will of the state," or administration, is "usually intrusted [*sic*] with the expression of that will in its details….That is, the authority called executive has, in almost all cases, considerable ordinance or legislative power."[19] In other words, progressives acknowledged that the administrative power would have to claim legislative power as the means by which the will of the people is expressed in its details. Administration would be not merely executing the

[15] Herbert Croly, PROGRESSIVE DEMOCRACY (1914), at 272, 270.
[16] Woodrow Wilson, *The Study of Administration*, 2 POLITICAL SCIENCE QUARTERLY (1887), at 215.
[17] Frank Goodnow, POLITICS AND ADMINISTRATION (Macmillan, 1914), at 13
[18] Id., at 9.
[19] Id., at 15.

will of the people, but also expressing that will as it applied to technical matters, and thus, in effect, would be legislating in matters where its expertise would be useful in translating the general will of the people into specific rules.

Second, because progressives acknowledged that, in some tension with their promotion of direct democracy, they were transferring legislative powers to unelected bureaucrats, they had to describe the appropriate relationship between the political and the administrative parts of the government. Should administrators be separated from politics, or should they be held accountable by the people through the oversight of the political branches? Progressives offered an ambiguous response to this challenge. On the one hand, progressives insisted on the separation of politics and administration. Woodrow Wilson's "The Study of Administration" made this point most forcefully and notably: "[A]dministration lies outside the proper sphere of *politics*. Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices."[20] This famous statement envisioned a neutral, apolitical bureaucracy that is removed from political oversight and that applies its scientific expertise to resolve policy dilemmas.

On the other hand, progressives also assumed that the people would be able to ensure that the bureaucracy served their wishes, rather than its own, through political oversight and control. Mere pages after asserting a strong separation between politics and administration, Wilson wrote that "large powers and unhampered discretion," the hallmarks of bureaucracy:

> [S]eem to me the indispensable conditions of responsibility. Public attention must be easily directed, in each case of good or bad administration, to the man deserving of praise or blame. There is no danger in power, if only it be not irresponsible….[I]f it be centered in the heads of the service and in heads of branches of the service, it is easily watched and brought to book.[21]

Wilson, therefore, somehow anticipated both a strong separation of politics and administration, and a strong accountability of administration to politics. But Wilson and other progressive reformers were vague on the specifics of how the bureaucracy was to remain accountable. Perhaps not surprisingly, this question of accountability would continue to plague the administrative state in the century following its creation.

Creating the Administrative State: The Contribution of the Progressives

As explained above, the administrative state had not yet emerged in America at the time that the progressives were writing, around the turn of the 20th Century. It took a new political theory, critical of previously accepted core principles of American Constitutionalism, to lay the groundwork for the administrative state. Two presidents, from opposite political parties, applied the principles of progressivism in their founding of the administrative state: Theodore Roosevelt and Woodrow Wilson.

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[20] Wilson, *supra* note 16, at 210.
[21] Id., at 213-4.

During Theodore Roosevelt's presidency, the weakness of the Interstate Commerce Commission, and of administration in general, was a constant source of his frustration. Roosevelt campaigned for legislation that would strengthen the ICC, and finally got his wish with the enactment of the Hepburn Act of 1906. Hepburn vested ratesetting and final adjudicatory power in the ICC for the first time, making it a modern administrative agency with combined legislative, enforcement, and judicial powers. Eight years later, during Woodrow Wilson's first term as President, the Clayton Antitrust Act created a new administrative agency, the Federal Trade Commission, and empowered it to issue injunctions to "prevent unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce." Also, in 1913, Congress created the Federal Reserve, putting the nation's monetary policy in the hands of a new, powerful administrative agency.

As explained earlier, only roughly 11 percent of the federal workforce was initially included in the merit protections of the Pendleton Act when it was enacted in 1883. That number remained relatively low into the 20th Century. As of 1895, according to one estimate, only 29 percent of federal employees enjoyed Pendleton's merit protection. Between 1895 and 1920, that percentage increased dramatically, ultimately reaching 73 percent in 1920. Significantly, the percentage of protected employees did not decline after Warren Harding's election in 1920. Pendleton's legal protections were, in essence, entrenched when they were expanded, protecting employees from future presidents' attempts to reduce the coverage of the civil service system.[22]

In short, the administrative state finally emerged in the period between 1900 and 1920, in its first wave under presidents Theodore Roosevelt and Woodrow Wilson, both of whom embraced the new progressive political theory. They succeeded in creating new administrative agencies and empowering existing agencies to, for the first time, consolidate legislative, executive, and judicial powers in the hands of administrative officers. As the next essay in this series will explain, when Franklin Roosevelt assumed the presidency in the midst of the Great Depression, he would build rapidly on these foundations established in the early 20th Century. This aggressive expansion of the administrative state, however, prompted a powerful reaction which led ultimately to the enactment of the Administrative Procedure Act in 1946.

Conclusion

Previous scholars have traced the beginning of the administrative state back to the late 19th Century, particularly in the 1880s when the civil service system and the Interstate Commerce Commission were created. This chronology gives the impression that the administrative state is simply a logical response to new economic and industrial conditions. However, a closer inspection of this period points to a different conclusion. Reformers of the late 19th Century embraced regulation, as did the political theorists and politicians of the early 20th Century, but they sought to provide for regulation without embracing a new theory of administrative power. They established agencies that were administrative in the traditional sense that had prevailed since the nation's Founding, without vesting them with legislative and judicial powers.

[22] See James P. McGrath, Table 1, "Extension of Competitive Civil Service, 1884-1975," in HISTORY OF CIVIL SERVICE MERIT SYSTEMS OF THE UNITED STATES AND SELECTED FOREIGN COUNTRIES (Government Printing Office, 1976), at 305.

All of that changed in the early 20th Century, not because of new circumstances, but because of a new political theory that was skeptical of previously accepted core principles of American constitutionalism. The administrative state's creation was not inevitable, but was a choice made by reformers who thought the Constitution's safeguards for individual rights and limited government were outdated. The administrative state, in short, was at the moment of its founding based upon principles that were in tension with those of the U.S. Constitution.

The practical consequences of this tension between what became the modern administrative state and the Constitution have been profound. A new field of law, administrative law, has been used to attempt a reconciliation between modern administrative government and the principles of the Constitution. However, this attempt at reconciliation has largely failed, as the next essay in this series will explain.

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