

# A Will Independent of Society

Publius, Woodrow Wilson, and the Crisis of Confidence Caused by Administrative State

Charles Correll III

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# Introduction

“Government today,” New Deal architect James Landis remarked in *The Administrative Process*, “no longer dares to rely for its administration upon the casual office-seeker.”<sup>1</sup> Good administration necessitated professional civil servants whose careerist outlook and university training made them reliable and impartial administrators of the law. In this, Landis and his intellectual compatriots partially succeeded. Rather than rely on politicians working through the separation of powers to administer the law, the national government has seized on the separation of politics and administration to centralize political and administrative decisions, and, as a result, created an unelected, bureaucratic apparatus in which legislative, executive, and judicial power is combined in a single set of hands. However, despite the bureaucracy remaining an independent “fourth branch” of government, the political branches, under both Republican and Democratic control, have made concerted, but ultimately unsuccessful, attempts to incorporate it into the tripartite separation of power. The “disjunction between the theoretical and practical dimension of politics, between the principles that legitimize action and the practices of the institutions of government,” has called into question the totality of the separation of politics and administration, with old problems having been left unresolved while new ones having sprouted.<sup>2</sup> The Administrative State, an oft-repeated but commonly misunderstood phrase, is the best attempt at describing the strange, distinctly American regime that has arisen from the incoherent mixture of republican institutions with Bismarckian conceptions of the state. Its development has only

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<sup>1</sup> Donald R. Brand, “The President as Chief Administrator: James Landis and the Brownlow Report,” *Political Science Quarterly* 123 (Spring 2008), 73.

<sup>2</sup> John Marini, *The Politics of Budget Control: Congress, the Presidency, and the Growth of the Administrative State* (Washington D.C.: Crane Russak, 1992), 184.

occasionally challenged the letter of the Constitution, yet in the years since its manifestation it has caused a profound crisis of legitimacy for the national government.

Long confined to the journal articles of political scientists and administrative law professors, the Administrative State entered the public lexicon vis-à-vis the election of Donald Trump to the presidency. Yet, the surrounding public debate focused too excessively on the economic implications of modern administration. After Stephen Bannon, a senior advisor to the President, described the “deconstruction” of the Administrative State as one of the three overarching goals of the Trump Administrations, members of the media inaccurately interpreted deconstruction as code for deregulation. For example, the *Washington Post* defined the “administrative state” (in the lower case) as a “system of taxes, regulation and trade pacts” that “have stymied economic growth and infringed on U.S. sovereignty.”<sup>3</sup> As a result, much of the public debate surrounding the Administrative State became a question of, in the words of one commentator, whether modern life would be “unimaginable without the protection of government regulation.”<sup>4</sup> However, the Administrative State rightly understood encompasses both regulations themselves and the process through which an alphabet soup of administrative agencies and departments write, enforce, and adjudicate them. Its “unlimited, centralized, and delegated” authority comes from four factors: first, the “combination of the three traditional functions of government”—that is, the legislative, executive, and judicial powers—in federal agencies and departments; second, the “delegation of legislative powers to administrative agencies and departments, which possess the authority to make ‘rules’ that are in fact

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<sup>3</sup> Philip Rucker and Robert Costa, “Bannon vows a daily fight for ‘deconstruction of the administrative state,’” *Washington Post*, February 23, 2017, [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html?utm\\_term=.f02b0045ca04](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html?utm_term=.f02b0045ca04).

<sup>4</sup> Peter Shane, “The GOP’s Radical Assault on Regulation Has Already Begun,” *Washington Monthly*, February 27, 2017, <http://washingtonmonthly.com/2017/02/27/the-gops-radical-assault-on-regulations-has-already-begun/>.

indistinguishable from laws;” third, the “staffing of these agencies and departments with ‘impartial experts’ who are not chosen by the people;” and fourth, a “judicial process that prioritizes efficiency and social justice rather than the rights of individual citizens.”<sup>5</sup> These factors suggest that the central question of the Administrative State minimally relate to discrete, economic regulations. Far more critical to ask the extent to which the current process for creating, administering, and judging federal law is consistent with the American tradition of limited government constitutionalism.

What is constitutionalism and what does it mean in the American context? Generally speaking, constitutionalism describes the political principles and legal processes behind fundamental law. Constitutions operate at a philosophical, normative level, prescribing “what ought to be done by individuals and by the community they constitute for their mutual benefit,” and a practical, descriptive level, identifying the “institutional structures, forms, and procedures by which governmental power in a community is organized and the laws and rules of actions that regulate the conduct of government.”<sup>6</sup> In the American context, constitutionalism has meant *written, republican* documents predicated on protecting individual liberty, promoting the rule of law, and advancing the common good through the political interactions of the institutions of government. The advent of written constitutionalism created a new form of constitutional politics in which political actors justified their actions by appealing to the text of the Constitution itself.<sup>7</sup>

However, less well understood is the role that administration was meant to play in American constitutionalism. The lack of understanding is not from lack of trying. In recent years,

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<sup>5</sup> Joseph Postell, “From Administrative State to Constitutional Government,” Special Report 116 (Washington D.C.: The Heritage Foundation, 2012), 5-6.

<sup>6</sup> Herman Belz, *A Living Constitution or Fundamental Law? American Constitutionalism in Historical Perspective* (Lanham: Rowman & Littlefield, 1998), 1.

<sup>7</sup> *Ibid*, 4

legal academics in particular have written innumerable books on the subject of administrative law and its relation to the Constitution. Philip Hamburger of Columbia University has critiqued administrative law as a form of absolutism in *Is Administrative Law Unlawful?*, while, in *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law*, Jerry L. Mashaw of Yale has defended the Administrative State as a natural and necessary outgrowth of the inadequacies of the 1787 Constitution. But as useful as the legal debate has been for understanding the Administrative State, it cannot replace an examination of first principles. To do so requires an examination of the defenders of the Constitution, particular Publius and *The Federalist*, and the advocates of an administrative state, particularly Woodrow Wilson and his essay “The Study of Administration.” If we can understand the clash between the Framers and the Progressives at the level of first principles, then we might be able to better understand the uneasy relationship between the Administrative State and constitutional government.

Publius saw administration as unavoidably, even desirably, linked to politics because government derived all just powers directly or indirectly from the people and neat separation in theory was difficult to maintain in practice. Consent of the governed played a foundational role in the Framers conception of just government, including in the realm of administration. According to one scholar, the Framers believed that administration “must be political because it rests, in the end, on consent.”<sup>8</sup> Administration also offered the desirable possibility that consent might be turned into public confidence in the Constitution. According to Alexander Hamilton, good administration aided public support for the Constitution by making the “aid of violence and

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<sup>8</sup> Jeremy Rabkin, “Bureaucratic Idealism and Executive Power: A Perspective on *The Federalist*’s View of Public Administration,” in *Saving the Revolution*, edited by Charles R. Kesler (New York: Free Press, 1987), 197. Hereafter, *Saving the Revolution* will be cited as *Saving*.

the perilous expedient of compulsion” less necessary.<sup>9</sup> Granted, much of the discussion about administration inherently took place in the context of politics because the Framers never contemplated explicitly their separation. Unlike Tocqueville, the Framers did not distinguish administrative centralization from political centralization. Thus, in order to see a clearer picture of their views, one often has to read between the lines, and consider their statements in the context of the institutional structures of the Constitution, such as the separation of powers.

By contrast, the Administrative State rests on the assumption that good administration requires the separation of administration from politics. The assumption developed during the Progressive Era, when intellectuals active in public and academic life at the turn of the Twentieth Century possessed a heightened trust in the neutrality of administrators and a diminished trust in the reasonableness of the average voter. Progressives showed little reservation about granting broad, unchecked powers to administrators because they believed that expertise by its nature made one knowledgeable about the interests of the community and apolitical and impartial in the means of carrying those interests out. According to one leading thinker, experts could advance the public interest despite (or perhaps due to) their insulation from political control because their “semi-scientific, quasi-judicial and quasi-business” practices exerted “little if any influence on the expression of the true state will.”<sup>10</sup> Enlightenment rather than election connected them to the interests of the people. To continue to hold the public trust, experts needed a clear vision of what the public wanted—a necessity complicated by what Progressives saw as the irrational prejudices of the average voter, which prevented him from truly knowing his own interests. To clarify,

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<sup>9</sup> Alexander Hamilton, *Federalist 27*, in *The Federalist Papers*, edited by Clinton Rossiter, with introduction and notes by Charles R. Kesler (New York: Signet Classics, 2003), 172. Hereafter, all *Federalist* citations will only cite the author, essay number, and page taken. All page numbers correlate to this edition of *The Federalist Papers*.

<sup>10</sup> Frank Goodnow, quoted in Steven F. Hayward, “The Threat to Liberty,” in *Claremont Review of Books* XVII (Winter 2016/17), <http://www.claremont.org/crb/article/the-threat-to-liberty/>.

moderate, and elevate public opinion, Progressives imagined a modern, democratic leader who moved the public in the direction of progress. In his 1890 essay, “Leaders of Men,” Woodrow Wilson said that the “application of force” constituted the central question of democratic leadership. “There are men to be moved,” he wrote, “how shall he move them?”<sup>11</sup> The politics about which Wilson and his Progressive compatriots spoke was not the constitutional politics of the Framers because they recognized no document as fundamental law. Instead, constitutions evolved with the changing needs of history and the changing whims of the people. They were, in Wilson’s phrase, Darwinian rather than Newtonian instruments.

The division of power between the branches and between the federal and state governments made the United States the last industrialized country to centralize its administrative apparatus. The Constitution, written before modern theories of the State gained intellectual prominence, made concepts of the State an uneasy fit in a national government whose powers and administrative responsibilities were few and limited. But as the national government has become increasingly unmoored from the original understanding of administration, the bureaucracy has consolidated its own independent, unlimited source of power.

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<sup>11</sup> Woodrow Wilson, “Leaders of Men” (June 17, 1890), from Teaching American History, <http://teachingamericanhistory.org/library/document/leaders-of-men/>.

# Governing Men over Men

Administration in *The Federalist*

## Introduction

Herman Belz wisely observed that “in the history of constitutionalism the great problem has not been to create power but to define and limit it.”<sup>12</sup> But defining and limiting power has led to two major confusions when confronting the question of administration.

The first confusion springs directly from the Founding itself. Control over administration remains the great unsolved mystery of the Constitution because the separation of powers, the principle upon which competing jurisdictional claims rest, is itself a difficult principle to define precisely. The noteworthy neoconservative William Kristol put it best when he remarked that for Publius the principle of the separation of powers was a “great authority” shrouded in “considerable obscurity.”<sup>13</sup> Although proponents shared with opponents of the Constitution great respect for that sacred political maxim of self-government, they disagreed on whether the prevention of a tyrannical accumulation of power into a single set of hands necessitated rigid and defined constitutional barriers. Prior to his more thorough examination of the separation of powers, Publius had suggested that the Anti-Federalist interpretation overemphasized theory at the expense of practical experience. In the experience of previous constitutional experiments in the thirteen states “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches.” To the contrary, rather than providing wiser answers to the question of how to divide powers between

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<sup>12</sup> Belz, *Living Constitution or Fundamental Law?*, 17.

<sup>13</sup> William Kristol, “The Problems of the Separation of Powers: *Federalist* 47-51,” in *Saving*, 100.

the three branches, practical experience had amplified the “obscurity” to the answer.<sup>14</sup> Should one be surprised that questions related to the powers of administration of the law remain difficult to answer today?

Yet today a worse problem threatens the healthy execution of the separation of powers. Rather than using the separation of powers to protect and defend limited government, the Administrative State has bolstered a case for using its authority and used obscurity to expand government and amplify its own power. Founded to subvert the separation of powers, the Administrative State has enjoyed a level of institutional security for the very principle it seeks to subvert, and acts opportunistically with regards to the separation of powers. In the beginning, when the President “provided the greatest impetus for its creation,” it understood itself as an agent of protecting presidential prerogatives against the “legislative vortex” against which Madison warned. But by the 1960s, when Congress “became its greatest benefactor and defender,” it vigorously opposed attempts by the Executive to limit its size and scope.<sup>15</sup>

This leads us to the second confusion: along the way, as the Administrative State has accumulated legislative, judicial, and executive powers into its apparatus, a branch of its defenders have insisted that it remains a legitimate extension of the theory of blended separation promoted by Madison in *The Federalist*. According to John Rohr, the leading intellectual proponent of the consistency between the Administrative State and the Founders’ original intent, “the mere presence of all three powers of government in one agency is not of itself constitutionally suspect” because the text of the Constitution combined all powers in the Senate.<sup>16</sup> In addition to its primary, legislative function, the Senate participates in executive

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<sup>14</sup> James Madison, *Federalist* 37, 228.

<sup>15</sup> See John Marini, *Politics of Budget Control*, 12.

<sup>16</sup> John A. Rohr, *To Run A Constitution: The Legitimacy of the Administrative State* (Lawrence: University of Kansas Press, 1986), 18.

decisions when it exercises the “advise and consent” power and judicial actions when it serves as the jury of an impeachment trial. Granted, not all defenders of the Administrative State make the case that it sprouts from the seed of the separation of powers planned by Publius. But those that do rely heavily on *The Federalist* typically argue that the Administrative State pragmatically developed as a result of the complexities of modern life rather than maliciously manifested in opposition to the 1787 Constitution.

In this chapter, I first contrast the *Federalist*’s view of an administrator with the progressive view of a bureaucrat, and analyze why Publius failed to envision the threat that administrative centralization posed to constitutional government. Critically important is the fact that not one *Federalist* is devoted to the administration of the law or a federal bureaucracy. Therefore, one must glean these principles from the statements sprinkled throughout the eighty-five essays. Next, I evaluate certain key principles and critical insights of the *Federalist* that could, and in my view should, be applied to the Administrative State. The central point here is that the separation of powers incentivized the branches to compromise on questions of administration for the common good. Finally, I analyze the historical framework of administration in the First Congresses, and how the struggle for control over administration kept government limited. Important to note in this section is how the Framers understood expertise.

## Administrator vs. Bureaucrat

In *The Federalist*, administration is understood in connection to the implementation of the laws. Blackstone’s *Commentaries* defined an administrator as an individual who managed and maintained property during bankruptcy claims or during the distribution of inheritance.<sup>17</sup> But

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<sup>17</sup> Rabkin, “Bureaucratic Idealism and Executive Power,” in *Saving*, 186.

Publius conceived of an administrator beyond the managerial role mentioned in Blackstone and incorporated into his definition political responsibilities associated with the administration of the law. Administration “in the larger sense” involved “all operations of the body politic, whether legislative, executive, or judicial,” while “administration in the “most usual” and “most precise” sense was “limited to executive details,” including foreign negotiations, preparations of financial plans, spending of public monies, and commander-in-chief powers.<sup>18</sup> This double definition of administration was sensible in the context of limited government. According to Rabkin, administration in the larger sense was predicated on the understanding that “‘all operations of the body politic’ are a trust from the people, necessarily limited in their ends.”<sup>19</sup> Publius therefore understood administration as the execution of policy developed through the political interplay of the branches.

By contrast, bureaucracy is predicated on the political rule of the intellectual class or some may say technical class. First employed in the final years of the French *ancien regime*, the term *bureaucratie* was satirical, derived from the French word for desk or office. “When the notion of ‘ruling’ was taken more seriously,” Rabkin contended, “there was something particularly comical and incongruous in the suggestion that a great nation might be ruled in accord with the outlook and interests of desk-bound clerks.”<sup>20</sup> Yet the bureaucracy has deeper roots in the Greek word for political rule, making it an alternative to the other forms of rule articulated by Aristotle in the *Politics*. Under German theorists and their Progressive-era admirers, the word lost its humorous connotation, and came to express a class of individuals justified in ruling the modern state because its members were committed to knowledge for its

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<sup>18</sup> Hamilton, *Federalist* 72, 434.

<sup>19</sup> Rabkin, “Bureaucratic Idealism and Executive Power,” in *Saving*, 186.

<sup>20</sup> *Ibid*, 187.

own sake rather than for the “nature, artefact, or abstractions, as is the case with other classes.”<sup>21</sup> Distinterestedness justified their rule because it ensured “the kind of rationality necessary to carry out the will of the state.”<sup>22</sup> That will, Hegel noted, stemmed from the idea that the state functioned as “both the law permeating all relationships within the state and also at the same time the manners and consciousness of its citizens” because the state itself embodied the “spirit of a people.”<sup>23</sup> Whereas Publius imagined that representatives of the people could also act as the administrators of the law, Progressives tended to view bureaucrats as representatives of the state itself, which, by Hegelian logic, represented not the people themselves but their collective spirit.

Progressivism may have come one hundred years after Publius, but one wonders why Publius failed to anticipate its desire to accumulate all power in the state given that it shared that commitment with absolutism, a danger with which Publius was well acquainted. In *Federalist* 69, Publius expended considerable energy in arguing that the presidency under the then-proposed Constitution would not resemble the powers of the British monarchy. He even goes so far as to mock opponents of the Constitution for claiming that “a government, the whole power of which would be in the hands of elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.”<sup>24</sup> Yet nowhere in the *Federalist* does Publius seem to anticipate that the power of administration might become a force by which unlimited power would be accumulated in the hands of the government. This oversight is peculiar given that Publius was an astute student of political history. Perhaps Publius failed to recognize what Frenchmen like Montesquieu and Tocqueville understood so clearly: namely, that despotism would alter its means of subjugation under a democratic regime. As Montesquieu noted, administration in

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<sup>21</sup> Sholomo Avineri, quoted in Marini, *Politics of Budget Control*, 189.

<sup>22</sup> Ibid, 188.

<sup>23</sup> Quoted in ibid, 187.

<sup>24</sup> Hamilton, *Federalist* 69, 421.

republics lacked the “external pomp that indicates a despotic sway, yet every moment it is sensibly felt.”<sup>25</sup> Tocqueville saw even more plainly that administrative centralization mixed with democratic passions for equality would result in an administrative state wherein the thwarted execution of free will in small matters under it “slowly stifles their spirits and enervates their souls.”<sup>26</sup>

Publius never spoke of the subjugation of men’s souls to the government, as Tocqueville—or even Hegel, who viewed the occurrence more positively—did. Yet European governments had long used administrative law as a form of absolute power, and by the time of the Enlightenment, absolute monarchs such as Frederick the Great of Prussia had already begun to develop a version of soft despotism encompassed in the motto “everything for the people, nothing by the people.”<sup>27</sup> In America, one would have to worry about the motto being altered to “everything for the people, everything by the people,” because, as Publius recognized, majority tyranny, not the rule of a single tyrant, constituted the greatest threat to liberty. Nevertheless, despite ample knowledge of political history and a keen awareness of the danger of majority tyranny, Publius never expounded on the dangers that administration might pose for freedom.

## Administrative Obscurity and the Power of Appointment

The separation of powers provided constitutional stability but administrative obscurity. Publius rightly understood that the tyrannical accumulation of power required stronger, more practical protection than periodic or occasional recurrence to the people themselves to defend the proper separation. A “deliberate give-and-take” between the branches replaced recurrence

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<sup>25</sup> Quoted in Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 413.

<sup>26</sup> Quoted *ibid*, 414.

<sup>27</sup> Quoted *ibid*, 413.

because the Constitution needed public confidence in its justness in order to remain a viable governing political document.<sup>28</sup> Publius recognized that a lasting constitution required not only the rational support of the people but also the “veneration which time bestows on everything,” and as a consequence saw the need to make the Constitution as self-reliant as possible by institutionalizing a blended separation of powers wherein the branches themselves rather than legal codification would defend against the tyrannical accumulation of power.<sup>29</sup> But the system of internal checks and balances came at the price of administrative clarity. In contrast to the British system, where ministers of parliament have clear, unchallenged administrative responsibilities, the American Constitution “obscured responsibility concerning the administration of government.”<sup>30</sup> Although the Constitution excluded the people in their entirety from the administration of the law, it nonetheless required that all the political branches must participate in administration.<sup>31</sup> Therefore, the unique system of separation of powers institutionalized by the Constitution produced as its byproduct a competitive system of administrative responsibility.

Cooperation between the branches, not total control by a single branch, was the intended end-result of administrative obscurity. As the treaty-making clause underscored, not all powers provided by the constitution fit neatly and completely into the advantages of distinct branches. The successful execution of a treaty between sovereign nations required legislative, particularly senatorial, deliberation and information alongside executive energy and secrecy in order to increase the likelihood that the treaty functioned for the common good of the American people

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<sup>28</sup> Charles R. Kesler, “Introduction,” in Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, Edited by Clinton Rossiter, (New York: Signet Classics, 2003), xxviii.

<sup>29</sup> Madison, *Federalist* 49, 311.

<sup>30</sup> Marini, *Politics of Budget Control*, 15.

<sup>31</sup> Madison remarked that the “true distinction between these [ancient governments] and the American governments lies in the total exclusion of the people in their collective capacity, from any share in the latter, and not in the total exclusion of the representatives of the people from the administration of the former.” See *Federalist* 63, 385.

because “the vast importance of the trust and the operations of treaties as law” suggested strongly for legislative concurrence to executive action.<sup>32</sup> Moreover, as the impeachment power suggested, responsibility for good administration extended beyond the discovery and confirmation of men of reputable character and trustworthiness. Jurisdiction for impeachment related solely to the “abuse or violation of some public trust” by public men, making these questions of “peculiar propriety” “political,” not judicial, questions.<sup>33</sup> Obscurity buttressed the view among the branches that they had a partial but continued interest in the good administration of the laws and the proper conduct of administrators. Had the Senate lacked the power to confirm treaties, the Executive could bind the nation into agreements with other nations that carried the force of law but never were approved by the lawmaking body. Had the Senate lacked the impeachment power, agents of the Executive, once confirmed, could reinterpret the laws to their liking without fear of a check on their abuses.

By cooperating with the executive and sitting as jury in impeachment trials, the Senate has not provided an early justification for the combined executive, legislative, and judicial powers exhibited by the agencies of the Administrative State. Given that anarchy would reign in a society that agreed “in no institutions of government, until every part of it had been adjusted to the most exact standard of perfection,” ordered liberty necessitated that some institutions exhibit imperfect, incomplete powers.<sup>34</sup> Prudence dictated that government remained responsible to the people when its branches cooperated when their powers imperfectly aligned with a necessary task, and maintained an interest in seeing the laws administered consistently with the public good. Obscurity facilitated that responsibility by aligning interests and duty so that disagreeable

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<sup>32</sup> Hamilton, *Federalist* 75, 449.

<sup>33</sup> Hamilton, *Federalist* 65, 394.

<sup>34</sup> *Ibid*, 399.

situations among the branches nevertheless looked towards a distance good and had the power to act on their views.

Of all the times Publius mentioned administration, his discussion of administration in the context of the appointment power is perhaps the most important. When Publius remarked that “the trust test of good government is its aptitude and tendency to produce a good administration,” he provided a test without an answer key.<sup>35</sup> But if any topic addressed most nearly his possible answer for the “aptitude and tendency to produce good administration,” it was the appointment power. “If the justness of this observation be admitted,” he said, “the mode of appointing the officers of the United States contained in the foregoing clauses, must, when examined, be allowed to be entitled to particular commendation.”<sup>36</sup> Administration was no exception to the two-pronged method of analysis employed by Publius throughout *The Federalist*—first, the safety of the particular power at issue, and second, the utility of that same power. Indeed, Publius spent the bulk of his time discussing the utility of the appointment power, since he had already discussed the safety provided by the separation of powers. Yet both prongs relate to our discussion because they underscored how Publius imagined the separation of powers working with obscured administration to moderate the branches and incentivize the selection of fit officers to administer the laws.

The appointment power used the creative tension of the separation of powers to prevent the exercise of absolute power, but obscured responsibility over administration by implicitly exerting a type of powerful but understated influence between the branches. Absolute power was neither good nor necessary for the proper execution of administrative responsibilities, Publius recognized. To those who believed that the power to nominate implied the power to appoint, he

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<sup>35</sup> Hamilton, *Federalist* 68, 413.

<sup>36</sup> Hamilton, *Federalist* 76, 453.

responded that limiting executive authority to nomination produced “all the good of that of appointment” while avoiding the evil of the encroaching nature of power.<sup>37</sup> Instead of vesting the whole power of appointment in the executive, the Constitution split it between the executive and the Senate. The separation served as a “considerable and salutary restraint on the conduct of that magistrate” because the Executive was forced to consider the interests and opinions of the Senate in proposing his nominee.<sup>38</sup> Along with the Appointment Clause, the provision preventing sitting elected officials from being appointed to administrative positions further hindered the Executive from accumulating absolute power through the appointment process because legislators could not serve as agents of the President while serving in Congress.<sup>39</sup>

One might be tempted to conclude that the separation of powers *clarified* administrative responsibility, not obscured it, because it divided the process of selecting administrators into discrete tasks—Executive nominated, Senate confirmed. But the possibility of uncontrolled obstacle often causes the strategist to alter his plans to accommodate potential hindrances. The Senate, separated from Executive control though involved in the execution of an executive power, exerted a “powerful though, in general, a silent” influence on the nomination process.<sup>40</sup> The division of labor, then, silently but influentially obscured responsibility over administration.

More importantly and fundamentally, the appointment power used creative tension to heighten the quality of selected administrators. The selection and confirmation of quality administrators stemmed from the clarity with which the public identified fault should the appointment process break down. Whereas the public would blame a bad nominee on the

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<sup>37</sup> Hamilton, *Federalist* 77, 459.

<sup>38</sup> Hamilton, *Federalist* 76, 457

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 456.

President, it would chastise the Senate for rejecting a good one.<sup>41</sup> The likelihood that the political branches would appoint high quality administrators to government positions resulted from the unique advantages that each part possessed over the other. The “livelier sense of duty and more exact regard to reputation” which stemmed from the “sole and undivided responsibility of one man” naturally equipped the President to “investigate with care the qualities requisite to the stations to be filled” with impartiality, fewer personal attachments, and fewer misleading sentiments.<sup>42</sup> On the other hand, the necessity of Senatorial concurrence, Publius contended, prevented unfit characters from becoming administrators by checking “the spirit of favoritism in the President,” including prejudices towards his own state or own connections and his consideration of popularity.<sup>43</sup> Both branches contributed to the stability of administration when they selected and confirmed well.

Interestingly, Publius welcomed obscured responsibility in the appointment process where he cautioned against it elsewhere. Because responsibility for appointments is blended rather than discrete, both the Executive and the Senate held an element of fault for making an unfit nominee a public administrator. They “participate, though in different degrees, in the opprobrium and disgrace” of confirming a bad nominee, Publius said.<sup>44</sup> That Publius explained the combined responsibility as a benefit rather than a defect contrasted to his critique of the plural executive, which had been suggested by some Anti-Federalists as a means of preventing executive encroachment by dividing its power between two individuals. A plural executive, Publius contended, hindered assigning true responsibility for poor administration of the law because each president shifted blame to the other “with so much dexterity, and under such

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<sup>41</sup> Hamilton, *Federalist* 77, 459-460.

<sup>42</sup> Hamilton, *Federalist* 76, 454.

<sup>43</sup> *Ibid*, 456.

<sup>44</sup> Hamilton, *Federalist* 77, 460.

plausible appearances, that the public opinion is left in suspense about the real author.”<sup>45</sup> Why would obscured responsibility be favorable between the Senate and the President but not between two executives? Likely because appointment caused no interference with selecting a fit candidate and maintained some semblance of clear responsibility while the plural executive interfered with energy and vigor, the “most necessary ingredients” of the executive branch, “without any counterbalancing good.”<sup>46</sup> As a polemical work primarily interested in persuading citizens to adopt the then-proposed Constitution, Publius never directly addressed why obscured responsibility produced good administration with regards to the appointment powers but not the plural executive. But generally speaking, Publius favored obscured administration when it caused interest to collide with duty—in other words, when it promoted the branches to “act responsibly” and “take responsibility,” as political scientist Charles Kesler succinctly put it.<sup>47</sup> The plural executive incentivized the opposite action by the individual. Instead of encouraging energetic, responsible action, it encouraged blaming the other president for bad administration. Put differently, it allowed the intentions rather than the results of the president to be the sole standard by which the public could judge his actions. But Publius believed that elected officials remained responsible to the extent that they were judged by their actions not their intentions, regardless of how good those intentions might be. Just as the people often erred in their actions despite intending the public good, so too might representatives err in translating their good intentions into just actions. Therefore, administrative obscurity advanced good government when it resulted in actions by which the public might judge their elected officials.

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<sup>45</sup> Fed 70, 426.

<sup>46</sup> Ibid, 425.

<sup>47</sup> Kesler, “Introduction,” *Federalist Papers*, xxx-xxxii.

## Administering the Power of the Purse: The Treasury Act of 1789

The Appropriation Clause and Taxing and Spending Clause left responsibility for administering the public finances much more ambiguous. The Constitution vests the power of the purse in the House of Representatives by making them the only possible originator of spending bills. By this “constitutional and infallible resource” to the chamber closest to the people, the House possessed the “most complete and effectual weapon,” according to Publius, “for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”<sup>48</sup> But the Constitution also places the “preparatory plans of finance” and “the application and disbursement of the public moneys in conformity to the general appropriations of the legislature” in the realm of the Executive, specifically his administrative duties.<sup>49</sup> Disputed control over administration of the power of the purse came to a head in 1789 when the Congress created the Treasury Department. Unlike the bills that created other agencies, which specifically acknowledge their subservience to the Executive, the “Act to Establish the Treasury Department” merely stated that “there shall be a Department of the Treasury.”<sup>50</sup> The silent but firm implication that the Treasury Department was accountable not only to the Executive but also to Congress caused “the first great Congressional debate on administrative responsibility.”<sup>51</sup> Although the minimal sources of revenue originally limited the total scope of power available, the lack of guidance provided by *The Federalist* opened the door for later abuses of the separation of powers by the Administrative State because executive energy led to the emphasis for knowledge separate from Congress, the Congressional desire for independence led to

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<sup>48</sup> Madison, *Federalist* 58, 357.

<sup>49</sup> Fed 72, 434.

<sup>50</sup> See Frederick C. Mosher, ed, *Basic Documents of American Public Administration 1776-1950* (New York: Holmes & Meier Publishers, 1976), 36. The bill to establish the Department of War, by contrast, said explicitly that “there shall be an *executive* department to be denominated the Department of War.” C.f. Mosher, 35.

<sup>51</sup> Quoted in Marini, *Politics of Budget Control*, 24.

imposing a line-item system of appropriations, and the strict adherence to line-item appropriation proved impossible to maintain in practice.

Minimal sources of revenue originally limited the total scope of power available to the federal government. Given the absence of a personal income tax, revenue sources were largely confined to taxes on duties and the sale of public lands. Even in the early years of the Republic, when Hamilton reigned supreme as Treasury Secretary, executing the details of administration remained confined to four lists of expenditures—one for the Civil departments, one for the Department of War, one for Treasury, and one for miscellaneous items.<sup>52</sup> Administrative responsibilities and specialization became more common in the early Republic as Treasury took on more tasks; but its potential activities remained limited due to federalism as well as minimal sources of revenue. As the largest federal employer, it employed by the time it moved from Philadelphia to Washington D.C. 78 officials and 1,615 field agents, excluding postal workers, who were under the direction of the department. This up from 39 employees, including six principal officers, at the end of 1789, when Congress organized the Treasury.<sup>53</sup> In the context of *The Federalist*, the size of the Treasury Department during the early Republic aligned with the idea that the federal government required unlimited power to execute its assigned tasks, but its overarching scope would be limited by giving each branch the “constitutional means and personal motives” to defend against the encroachment of power by the other branches.<sup>54</sup> Federalism provided a “double security” for the rights of the people by dividing the state governments from the federal government alongside the separation of powers at the federal

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<sup>52</sup> Marini, *Politics of Budget Control*, 29.

<sup>53</sup> Leonard D. White, *The Federalists: A Study in Administrative History 1789-1801* (New York: Free Press, 1948), 122-123.

<sup>54</sup> Madison, *Federalist* 51, 319.

level.<sup>55</sup> Therefore, the ability of the executive to garner absolute power was curtailed by the amount of revenue it had available and its competition for taxpayer money with the individual states.

Executive energy provided the impetus for the debate over the power of the purse, but in part, executive energy meant the energy of the Treasury Secretary, Alexander Hamilton. Hamilton himself stimulated the debate due to his “enormous energy,” “quick perception,” and—in terms familiar to any fan of the Broadway musical, *Hamilton*—“desire to be always at the point where great events were in the making.”<sup>56</sup> So influential was Hamilton as Treasury Secretary that the Congress discharged the Ways and Means Committee two months after its creation in July 1789 and referred all fiscal matters to Hamilton at Treasury.<sup>57</sup> A jealous Jeffersonian put it even better when he remarked that, if “Eloquence [were] personified and reason flowed from her tongue,” she would still lack the ability to challenge Hamilton’s personal magnetism and mastery of executive detail on the floor of Congress.<sup>58</sup> Additionally, the personal effect Hamilton had on the appropriations debate is evident from the lack of influences his replacement held over Congress.<sup>59</sup> In short, characteristics unique to the genius and ambition of Hamilton provided a critical catalyst for the Executive/Legislative clash over administering the power of the purse.

But more broadly and fundamentally, the debate over the power of the purse stemmed from competing interpretations of executive energy that went beyond the views and actions of a single man. Federalists generally believed that the Executive should have the ability to initiate

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<sup>55</sup> Ibid, 320.

<sup>56</sup> White, *Federalists*, 126.

<sup>57</sup> Marini, *Politics of Budget Control*, 28.

<sup>58</sup> Quoted in *ibid*, 26.

<sup>59</sup> See, White, *Federalists*, 73.

fiscal plans in Congress, while Congress would hammer out the details and alternatives presented in the plan, a view of Executive energy they contended increased the orderly interpretation of vital financial data without infringing on the separation of powers. Should Congress have a plan “digested and prepared,” then it would easily judge “its fitness, its combination, and its principles,” thus allowing it “in half the time” to build a financial system from “chaos into order,” Federalist Elias Boundinot said in 1789.<sup>60</sup> The matter came down to whether the legislature or the executive possessed better knowledge about the specific details of public finances and the common interest of the public. The Federalists looked to the Executive to supply the defects of details on public finance. Yet, notably, they saw the Executive staffed not by financial experts in the modern sense, but, as Fisher Ames put it in 1792, by men of “common sense,” whose knowledge of financial affairs stemmed most directly from their duty as prescribed by law and entrusted by appointment and from everyday practice.<sup>61</sup> Nevertheless, the emphasis on adequate knowledge in the management of fiscal affairs makes the Executive branch susceptible to the appeals of expertise at the expense of representation.

Following the departure of Hamilton from the Treasury Department and Republican gains in the House of Representatives, Congress limited Executive discretion by dictating spending using line-item appropriations. Line-item appropriations erected “multiple barriers” against Executive influence over the purse, said future Jefferson Treasury Secretary Albert Gallatin, by denoting “specific sums to every specific purpose susceptible of definition,” rejecting “all applications of money varying from the appropriation in object or transcending it in amount,” and reducing the “undefined field of contingencies.”<sup>62</sup> By downsizing discretion,

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<sup>60</sup> Ibid, 72.

<sup>61</sup> Quoted in *ibid*, 73.

<sup>62</sup> Quoted in Marini, *Politics of Budget Control*, 32.

Republicans hoped to prevent the Executive from becoming corrupt and infringing on civil liberties. Men such as Jefferson, Madison, and Gallatin emphasized the need for an independent legislature leading the crafting of laws, even as they acknowledged the necessity of executive energy. In preserving the legislature “pure and independent” from the Executive, Jefferson hoped “to restrain the administration to republican forms and principles” and “not to permit the constitution to be construed into a monarchy, and to be warped in practice into all the principles and pollutions of their favored English model.”<sup>63</sup> The desire for Congressional independence led to the reassertion of Congressional involvement in administration.

However, the strict application of line-item appropriations failed to work in practice. Executive energy did not disappear as Congress asserted into involvement, indeed its primacy, in administering public funds. Instead, the Executive “found means where necessary or useful, to avoid or to evade many of the fiscal limitations that Congress deemed it proper to impose.”<sup>64</sup> Moreover, since effective administration necessitated discretion at some level, Congress had to provide leeway to the executive for adapting general laws into specific policies. Therefore, strict limitations themselves proved inconsistent in application either because executive initiative actively sought to work around the limits, or good government demanded that discretion remain lodged in the executive. But strict limitations also proved impractical because individual Congressmen ignored them when convenient for their constituents. Congress inconstantly defended against breaches in its administrative and constitutional authority because Congressmen, “who wanted some particular payment made or task undertaken,” differed from and acted contrary to Congressional constitutional interests.<sup>65</sup> The preconditions for the rise of

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<sup>63</sup> Quoted in White, *Federalists*, 95.

<sup>64</sup> Leonard D. White, quoted in Marini, *PBC*, 32-33.

<sup>65</sup> *Ibid*, 33.

the Administrative State were established in the practical impossibility of preventing Executive encroachment through strict allocations of public monies. As John Marini noted, the “seeming rigidity” of line-item appropriations had not interfered with the ability of the branches to function amicably because of the “underlying opinion that the tasks of government were few.”<sup>66</sup> Increase the amount and scope of government tasks, and the relationship becomes less friendly. By predicating amicable relationships between Congress and the Executive on working around the strict impositions Congress placed on Executive discretion, both branches made it possible that their mutual ambition for independence might be exploited for the growth of government writ large.

## Conclusion

In *To Run A Constitution*, John Rohr argued that administrative agencies constitutionally possess and exercise their combined legislative, judicial, and executive powers. His makes two key arguments in support of that claim: first, the “mere presence of all three powers of government in one agency is not of itself constitutionally suspect” because the Constitution combined them in the Senate.<sup>67</sup> And second, administrative agencies only exercise their combined powers over a “narrowly defined scope of government activity.”<sup>68</sup> Based on these two points, Rohr would have us believe that the Administrative State fits, if uneasily, within what he described as the Founders’ expansive, flexible understanding of the separation of powers.

However, the preceding examination of the *Federalist’s* view of administration calls Rohr’s conclusion into question. The combination of legislative, judicial, and executive powers

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<sup>66</sup> Marini, *Politics of Budget Control*, 33.

<sup>67</sup> Rohr, *To Run A Constitution*, 18.

<sup>68</sup> *Ibid*, 27.

into a single set of hands was neither regularly exercised nor simultaneously exercised. While true that Congress exercises a judicial-like function when it invokes the impeachment clause, the high hurdles for impeaching in the House and convicting in the Senate have made impeachment a highly irregular occurrence. By contrast, administrative agencies exercise their judicial powers routinely and in conjunction with their legislative and executive powers. As Gary Lawson noted, the “typical enforcement activities of a typical federal agency,” in his example the FEC, involves adjudication either before the whole Commission or an administrative law judge.<sup>69</sup> Lawson’s example goes further, however, and describes the FEC as simultaneously exercising legislative, judicial, and executive powers. The Commission “promulgates substantive rules of conduct,” considers and authorizes “investigations into whether the Commission’s rules have been violated,” and, with a complaint alleging a violation of the rules having been issued, prosecutes and adjudicates the case.<sup>70</sup> In their routine exercise and simultaneous combination of legislative, judicial, and executive powers, administrative agencies differ from the irregular, extraordinary, and discrete combination provided for in the text of the Constitution.

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<sup>69</sup> Quoted in Hayward, “Threat to Liberty,” *Claremont Review of Books* XVII (Winter 2016/17).

<sup>70</sup> *Ibid.*

# New Ideal of the State

Woodrow Wilson and the Separation of Politics and Administration

## Introduction

The road to the Administrative State began in the realm of ideas, and no one dominated the realm of ideas during the Progressive Era quite like Woodrow Wilson. A Johns Hopkins-trained academic and future President, the bookish, frail, and ambitious Virginian wrote numerous books critiquing the Constitution, particularly the separation of powers. None were more important than his seminal 1887 essay “The Study of Administration.” In “Study,” Wilson argued that “the idea of the state and the consequent ideals of its duty” had undergone “noteworthy change” since the Founding of the Republic.<sup>71</sup> The essay made the case for a new conception of politics, the basis of a new regime. As one scholar put it, “Study” was “the *Federalist Papers* of the administrative state.”<sup>72</sup>

In this chapter, I describe and analyze the conception of administration advocated in “Study,” and how the Hegalian philosophy of history led Wilson to replace the separation of powers with the separation of politics and administration. Critically important here were Wilson’s understandings of efficiency, neutrality, and the role of public opinion in democratic society. Next, I evaluate how the separation of politics and administration altered the role Congress was envisioned to play in the national government. As a strong proponent of

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<sup>71</sup> Woodrow Wilson, “Study of Administration” (November 1, 1886), from Teaching American History, <http://teachingamericanhistory.org/library/document/the-study-of-administration/>. Although Teaching American History lists the date of publication as 1886, “Study” is generally recognized to be published in 1887 because that is when it was published in *Political Science Quarterly*. John Rohr has also referred to “Study” as the “Centennial Essay” because the American Society for Public Administration declared 1987 as the one-hundredth birthday of American Public administration in honor of the essay. See Rohr, *To Run A Constitution*, 59.

<sup>72</sup> Charles J. Cooper, “Confronting the Administrative State,” *National Affairs* 25 (Fall 2015), <http://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state>.

parliamentary democracy, Wilson wanted Congress to become a national debating body for high principle. Rather than legislate, they were to investigate. Finally, I analyze the historical and philosophical reasons that Wilson came to associate administration closely, but not exclusively, with the President and the Executive Branch.

### “The Study of Administration”

The first point Wilson made in “Study” was that, in the face of modern political and economic challenges, democratic people could not be trusted to govern themselves successfully through constitutional institutions. The focus on constitution-making, broadly defined as the period in which self-governing people engaged in “lawmaking and political criticism” to limit executive power, placed democracies at a “signal disadvantage” compared to countries that inherited their administrative practices from absolute rulers.<sup>73</sup> Absolute rulers provided their nations better administrative systems, Wilson argued, because they had been “organized to subserve the general weal with simplicity and effectiveness vouchsafed only to the undertakings of a single will.” By contrast, in democracies predicated on responsiveness to public opinion, government had too many masters to organize itself simply and effectively. The public “can agree on nothing simply” and the constitutional division of powers required that all advancements “be made through compromise, by a compounding of differences, by a trimming of plans a suppression of too straightforward principle.” Organization was complicated all the more by the fact that the “bulk of mankind”—that is, the majority of individuals—voted, despite the fact that they held “rigidly unphilosophical” political opinions.

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<sup>73</sup> Wilson, “Study of Administration.” In this section, presume hereafter that all quotations to have originated from “Study” unless otherwise noted.

Wilson proposed elevating university-trained civil servants to guard and guide democratic sentiment as the solution to the organizational problems caused by the dominance of public opinion. Under his vision of administrative government, public opinion was cast to “play the part of authoritative critic.” It served as the “superintending force of formative policy alike in politics and administration” rather than “directly exercising, in the oversight of daily details, in the choice of the daily means of government.” Administrators, by contrast, both directed and appeared in the production. Wilson described the ideal civil servant as “cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with popular thought, by means of election and constant public counsel, as to find arbitrariness of class spirit quite out of the question.” So confident was Wilson in the disinterested neutrality of university-educated civil servants that he proposed replacing constitutional forms that prevented them from reeducating public opinion: “if we are to put in new boilers and to mend the fires which drive our government machinery, we must not leave the old wheels and joints and valves and bands to creak and buzz and clatter on as best they may at bidding of the new force.” Therefore, the elevation of university-trained administrators amounted to an effort to replace what Wilson viewed as an anachronistic Constitution.

In separating the politics of public opinion from the administration of public policy, Wilson was not positioning the bureaucracy as a bulwark against the “excesses of democracy,” contrary to Rohr.<sup>74</sup> Wilson mainly objected to democracy because its spontaneous organization of public opinion, at best, progressed only sporadically along the predetermined path of History. “In government, as in virtue,” he said, “the hardest of things is to make progress.”<sup>75</sup> He presented his objection in its clearest form in his critique of constitutions as time-bound documents that

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<sup>74</sup> Rohr, *To Run A Constitution*, 74.

<sup>75</sup> Wilson, “The Study of Administration.”

“saddled” the people with the “habits of a long-period constitution-making,” despite his insistence that “we have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments.” He viewed consent of the governed as problematic for progress because of the difficulty of persuading the supposedly rigidly unphilosophical bulk of mankind to vote for a certain policy position. Common people would only vote for certain positions if the truth about its necessity had “become not only plain but also commonplace.” Even then, however, they would not undertake political action until “great and pinching inconveniences” pushed them towards acting. Wilson supported the rule of organized intelligence because he doubted that public opinion formed and spurred action quickly enough to keep a society marching along the path of progress. As political scientist R.J. Pestritto noted, “Study” made the case for “freeing administration from the confines of constitutional law.”<sup>76</sup> Therefore, the separation of politics and administration was not an updated form of the separation of powers—predicated on, as Madison noted, “the reason, alone, of the public” controlling and regulating government, while government “controlled and regulated” public passions.<sup>77</sup> The separation of politics and administration left little room for the public reason found in public opinion controlling and regulating government.

The second main point of “Study” was that the distribution of constitutional authority, as advocated by the Founders, could not be expected to efficiently execute the law. Progressives generally believed that the “rigid, superficial, self-interested, and outdated” political science of the Founders needed “debunking and innovation” so that government could energetically act in

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<sup>76</sup> Ronald Pestritto, “The Birth of the Administrative State: Where It Came From and What It Means for Limited Government,” Heritage Report (November 20, 2007). <http://www.heritage.org/political-process/report/the-birth-of-administrative-state-where-it-came-and-what-it-means-limited>.

<sup>77</sup> Madison, *Federalist* 49, 314.

the positive interests of the people.<sup>78</sup> The separation of powers seemed to them particularly anachronistic. Wilson, convinced that “Montesquieu did not say the last word,” imagined that the study of administration would provide an “invaluable service” to constitutional studies by discovering “the best principles upon which to base such a distribution.”<sup>79</sup> Rather than dividing power among the branches, Wilson favored centralizing power in the heads of single departments. “There is no danger in power,” he said, “if only it be not irresponsible.” Power, to be efficient, needed the “simplest arrangements” to make public officials responsible. Through simplified forms, the public would have its attention “easily directed” to the official “deserving of praise or blame.” Unlike the Founders, Wilson had unequivocal trust in centralized, discretionary, and unlimited power serving the public interest. Whereas limited, obscure power allowed corrupt officials to advance their private interests at the expense of the public interest, powerful leaders were less likely to abuse their power because they were “nerved and sobered and elevated” by the responsibility of wielding so much authority. In short, far from corrupting absolutely, absolute power caused enlightened individuals to rise to the occasion. Wilson placed enormous importance on the feeling that leaders had to the public in using their power. This feeling, plus their enlightened status due to their university education, made them trustworthy, and therefore above the suspicion inherent in the separation of powers.

By separating executive independence from the Constitution and the separation of powers, Wilson revolutionized the relationship between the Executive Branch and the law. Prior to the Progressive Era, the President could “rise above the law for the sake of the law.”<sup>80</sup> During times of crisis, the Constitution reserved for the President extraordinary prerogative powers to

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<sup>78</sup> Wilson Carey McWilliams, quoted in Marini, *Politics of Budget Control*, 40.

<sup>79</sup> Wilson, “Study.”

<sup>80</sup> Douglas A. Jeffery, “Executive Authority under the Separation of Powers,” in Gordon S. Jones and John A. Marini, eds, *Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books, 1988), 48.

defend the country. But as the presidential oath of office suggests, his prerogative powers were connected to the protection of the Constitution as the highest duty of the office. This “constitutionalized” the prerogative powers described by Locke as unlimited, making them a force for preserving republicanism because they were contingent not on the will of the President himself, but “on that of those for whom he acts.”<sup>81</sup> Moreover, although the prerogative powers were expansive during an emergency, they remained within the larger system of checks and balances because the president was still liable to reelection and impeachment.

The prerogative of administrators, by contrast, recognized no such checks on its unlimited authority. Wilson described their prerogatives as perpetual and unconnected to the Constitution. An administrator needed to possess “a will of his own” and went unchecked by the possibility of impeachment and reelection because administration existed separately from the political branches. In doing so, he rejected Publius’s distinction between a president “subordinate to the laws” and “dependent on the legislative body,” with the former comporting to, and the latter violating, “the fundamental principles of good government.”<sup>82</sup> As Charles Kesler observed, Wilson did not consider the Constitution as “part of the public good”—as Publius did—but as a hindrance to it.<sup>83</sup>

The final main point made in “Study” was that importing monarchial administrative practices would not endanger American liberty. Wilson dismissed traditional American fears, rooted in its republican habits and political institutions, about monarchical intrusions into the American system as at best misplaced. Comparative studies inherently aided the “crude democrats” of the United States by showing them the “weaknesses” and “virtues” of their system

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<sup>81</sup> Ibid, 49.

<sup>82</sup> Hamilton, *Federalist* 71, 431-432.

<sup>83</sup> Charles A. Kesler, “Separation of Powers and the Administrative State,” in Gordon S. Jones and John A. Marini, eds, *Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books, 1988), 37.

of government.<sup>84</sup> Particularly on the question of administration, Americans needed to compare themselves with Europe because its “organization on the basis of modern ideas and conditions” remained an “unaccomplished work,” despite the fact that democracy, as an organizing system for political society, had existed since the Ancient Greeks. Europe earned Wilson’s extensive praise because it offered not only practical examples of the organization and skills necessary to run a centralized, administrative state, but also a philosophical explanation of the ideas that accompanied the new regime. Wilson viewed American fears as the result of a misconception that democracies and non-democratic states required different administrative practices. Far from it, he insisted. Despite radical different political institutions, the administrative practices of both regimes “*must* have a strong structural likeness” because administration was an inherently neutral, business-like activity (emphasis in the original). Public administration could insist on their similarities without threatening liberty because the abuses of power were “easily exposed and arrested, in countries like our own, by a bold, alter, inquisitive, detective public thought and a sturdy popular self-dependence such as never existed before.” In line with his other contentions, Wilson trusted the combination of administrative neutrality, centralized power, and proactive public opinion to keep government responsible to the public interest.

Yet even with the alleged similarities between democratic and monarchial administrative structures, Wilson never claimed that ideas about the State were ready-made for American consumption. In fact, he believed that as “foreign science, speaking very little of the language of English or American principles,” the science of administration needed to be “radically” Americanized in language, “thought, principle, and aim” by American “constitutions.” That he referred to constitutions in the plural suggests that Wilson had something else in mind besides

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<sup>84</sup> Wilson, “Study.”

the federal Constitution of 1787. Given that “Study” primarily focused on the question of centralizing administrative authority, it is highly unlikely that Wilson meant the constitutions of the individual states. Instead, he meant that a constitution constantly evolved so as to make it into multiple documents. As dynamic documents, constitutions expressed the “historical form of the organic life of a particular people.”<sup>85</sup> Unlike the Founders, Wilson viewed constitutionalism as a historical and philosophical question, not a legal one. The evolving view of constitutions meant an evolving view of their duties towards the people, particularly with regard to their rights. The Progressive view to which Wilson subscribed viewed government, not nature, as the source of rights, and the collective good of the nation, not individual happiness, as their purpose.<sup>86</sup> In a sense, then, Wilson fundamentally understood that the need to Americanize European ideals of the state required an alteration of the fundamental principles that underwrote a constitutional, republican regime.

Having established that the ideals of the state meant a transformation of the American regime away from constitutionally limited government, the question becomes: what new role do the political branches assume?

## Congress in the Administrative State

Of all the aspects of the Constitution, the separation of powers bothered Wilson the most. Throughout his professorial and political careers, he attacked the separation of powers as an antiquated protection of minority power at the expense of the will of the national majority. In particular, he trained his guns on the congressional committees that governed legislative activity because the committee system perpetuated government by “at best only a limping compromise

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<sup>85</sup> Quoted in Rohr, *To Run A Constitution*, 64.

<sup>86</sup> See Postell, “From Administrative State to Constitutional Government,” 7.

between the conflicting interests of the innumerable localities represented.” Congress cannot “speak for the nation,” Wilson sneered.<sup>87</sup> Given his desire to identify and govern in the name of a national majority, he proposed two solutions for undermining the power of minority interests in Congress. In his book *Congressional Government*, Wilson proposed the elevation of party government in order to create something akin to parliamentary government. In his later work *Constitutional Government*, by contrast, he advocated for strong presidential leadership. With Wilson having supported at one point or another both Congress (transformed into a parliamentary-like government) and the President as the rightful representative of the national will, one may be tempted to draw the conclusion that Wilson altered his criticism of the American Constitution as he evolved in his views. Yet, even as his views changed, his guns stayed trained on the same fundamental target. Wilson never reneged on his belief that the separation of powers inhibited the accountability of the political branches to the people.<sup>88</sup> He always considered them the “radical defect” of the 1787 constitutional order.<sup>89</sup>

Wilson did, however, imagine a role for Congress in the constitutional order he envisioned. “The informing function of Congress,” by which he meant oversight, “should be preferred even to its legislative function.”<sup>90</sup> Wilson wanted to minimize the power of the decentralized standing committees, which he believed had caused public administration to follow disjointed directions, and turn Congress into a unified, debating body.<sup>91</sup> He preferred congressional oversight to legislating because the latter required self-interested compromises, which he viewed as prejudiced to local or special interests, while the former promoted public

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<sup>87</sup> Quoted in Marini, *Politics of Budget Control*, 42.

<sup>88</sup> See William F. Connelly Jr, *James Madison Rules America: The Constitutional Origins of Congressional Partisanship* (Landam, Maryland: Rowman & Littlefield, 2010), 112.

<sup>89</sup> Quoted in *ibid*, 119.

<sup>90</sup> Quoted in *ibid*, 117.

<sup>91</sup> Rohr, *To Run A Constitution*, 61.

knowledge. Wilson shared with Lincoln the view that public sentiment was everything in republican government, and therefore sought to promote political activity as a form of civic education.<sup>92</sup> Congress, as the deliberative body, best served as an educational institution by facilitating national conversations about the general ideas that govern society.

Like the Anti-Federalists, Wilson imagined that deliberation promoted republican virtue, which as Herbert Storing defined as “an enlightened understanding of the objects of government, a degree of public-spiritedness, [and] a participation in citizenship as distinct from a merely private life.”<sup>93</sup> But Wilson’s support for centralization put him at odds with the localism (some might say parochialism) of his Anti-Federalist intellectual compatriots. The Anti-Federalists believed in keeping government strictly confined to the dead letter of a constitution. As a result, they tended to trust “parchment barriers” as sufficient for keeping government from becoming tyrannical. But Wilson, as a propagator of living constitutionalism, believed constitutions evolved to address the needs of a particular society at a particular moment. Therefore, Wilson saw congressional oversight less as a check on the accumulation of power in the executive branch, but rather a means for promoting public attachment to the state and its governing ideals.

Wilson expressed little fear of the possibility of demagoguery resulting from political activity predicated on public discussion. As a proponent of a parliamentary-styled legislature, he believed that “it is natural that orators should be the leaders of a self-governing people.”<sup>94</sup> In isolation, however, deliberation insufficiently counteracts the dangerous byproducts of the factional nature of man because language often inflames and struggles to inform. Publius

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<sup>92</sup> cf. Abraham Lincoln, Ottawa Debate (August 1858): “In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who molds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed.”

<sup>93</sup> Quoted in Connelly, *James Madison Rules America*, 116-117.

<sup>94</sup> Quoted in *ibid*, 117.

recognized that politicians often engage in “artful misrepresentation” to advance their self-interest.<sup>95</sup> Unlike Wilson and the modern proponents of deliberative democracy, he lacked the “false optimism” that “public deliberation will routinely purify discourse” regardless of the constitutional system in which the discourse occurred.<sup>96</sup> But Publius also understood that language itself imperfectly communicates ideas, thereby hindering the likelihood that deliberation alone can produce just laws. In *Federalist* 37, he notes with a hint of humor that “when the almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.”<sup>97</sup> Deliberation, then, requires more than disorderly discussion to counteract the effects of factions. Yet Wilson, whose concerns centered on enacting the general will of the majority, never seriously considered how deliberation might court demagoguery. Instead, he wanted to prevent minority or local interests from gridlocking the powers of the national government.

The transformation of Congress from a legislative to an oversight body paved the way for the growth of the Administrative State. As John Marini noted, the reorganization of Congress made it more “compatible with the requirements of an administrative state.”<sup>98</sup> By willingly relinquishing its legislative prerogatives, Congress lost a sense of its role in the republican structure of the Constitution. As a result, “the separation of powers no longer functioned as the principal means of ensuring a republican, or constitutional government.”<sup>99</sup> Marini would be the first to admit that Congress did not transform itself overnight. Until the regulatory explosion of

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<sup>95</sup> Madison, *Federalist* 63, 382.

<sup>96</sup> Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Cambridge: Harvard University Press, 2014), 27.

<sup>97</sup> Madison, *Federalist* 37, 225.

<sup>98</sup> John Marini, “Congress in Search of Itself,” March 1, 2017, *Library of Law and Liberty*, <http://www.libertylawsite.org/liberty-forum/congress-in-search-of-itself/>.

<sup>99</sup> *Ibid.*

the 1960s and 70s, administrative authority remained decentralized enough so that Congress still existed, in some capacity, as a legislative body.<sup>100</sup> But the ideas that underwrote the transformation began with Wilson and the separation of politics and administration.

## Presidential Leadership and the Role of the Executive Branch

If Wilson showed little fear about the rise of demagogues in the legislature, then he showed even less concern for the president becoming demagogic.<sup>101</sup> The President provided the political leadership necessary to intuit the needs of the nation and energize the government towards progress. Wilson envisioned the president as the moral leader and teacher of the nation. Although he initially viewed the President as “too silent and too inactive” to combat Congress in the public arena, the mobilization of public opinion against Congress and large, private corporations during the presidency of Theodore Roosevelt demonstrated to Wilson that the bully pulpit provided the President the platform he needed to lead the nation.<sup>102</sup> Wilson, then, saw charisma as the driving force of presidential energy. The need for charismatic leadership related to Wilson’s larger understanding of how democratic governments needed to act in order to function in the interest of the people. Leadership moderated the unrefined will of the masses by channeling it through enlightened statesmen whose education and intellect allowed them to “distinguish the faint but swelling notes of progress from the background noise of history.”<sup>103</sup> Presidential leadership therefore required a constant element of campaigning. The most important task of the modern president, Wilson believed, centered on the creation of a political movement that articulated a unifying vision for the future.<sup>104</sup> As a result, a system of separated

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<sup>100</sup> Ibid.

<sup>101</sup> See generally Woodrow Wilson, “Leaders of Men.”

<sup>102</sup> Quoted in Connelly, *James Madison Rules America*, 115.

<sup>103</sup> Kesler, “Separation of Powers and the Administrative State,” in *Imperial Congress*, 33. Cf. Federalist 10.

<sup>104</sup> Ibid, 34.

powers, designed to prevent ambitious men from seizing the reins of power, was unnecessary because the ambitious and enlightened could benefit the nation by providing it a unifying voice.

Wilson associated the administration of the law most closely with the Executive Branch. Wilson defined administration as “government in action,” making it part of the “executive, the operative, the most visible side of government.”<sup>105</sup> The purpose of administrative studies was to save the execution of the laws from the “costliness and confusion” caused by the separation of powers. Wilson defined this purpose broadly to include “every particular application of general laws” as acts of administration, including the “assessment and raising of taxes,” “hanging of a criminal,” the transportation and delivery of the mails,” and the “equipment and recruiting of the army.” Notably, the Constitution invested Congress with the power to authorize all these activities. Wilson seems to be making the argument, therefore, that writing the “broad plans of government action”—in other words, the law—gave Congress no authority to influence the details of administration. The Executive Branch was preferable to Congress because it possessed the energy necessary to administer the law, and its leader, the President, could have blame or praise easily directed towards him. In this sense, the President stood at the center of the separation of politics and administration, with one foot in each.

Yet, Wilson understood the State to exist unbound by the traditional limitations of Executive power. Wilson imagined that administrators maintained the direct connection of a society to the “lasting maxims of political wisdom, the permanent truths of political progress.” This made them both “removed from the hurry and strife of politics” and “raised far above the dull level of mere technical details.” Wilson viewed separation as inherently required in the differentiation of administrative and political questions. Politics could “set the tasks for

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<sup>105</sup> Wilson, “Study of Administration.”

administration” but it “should not be suffered to manipulate its offices.” Wilson made these comments in the background of Civil Service Reform, which replaced the Merit System with a permanent, university-trained civil service exam, which Wilson viewed as a “moral preparation for what is to follow.” Even the President, the most trustworthy political official, ought not fully control the execution of the law—not that he could if he wanted to do so. According to Wilson, the President “cannot execute the law” in any real sense of the term without administrators.<sup>106</sup> This reinforced the idea that administrators operated as more than “mere passive instruments” of political policy.<sup>107</sup> Instead, the power of the bureaucracy was intertwined with the very existence of the State itself. Its power was not derived from the law necessarily because it possessed “a life not resident in statutes.”<sup>108</sup> Presidential prerogative power, by contrast, derived from the obligation to protect the Constitution as the highest duty of the office. Ultimately, administrators were intended to operate outside the law. As Gary Lawson famously noted, the “modern administrative state is not merely unconstitutional; it’s anti-constitutional.”<sup>109</sup> The legal scholar Philip Hamburger called administrative law a form of absolutism.<sup>110</sup> The distinction between unconstitutional and anti-constitutional significantly impacts how one understands the threat of the Administrative State. Challenging the Administrative State as unconstitutional, notes Marini, misses the point because it “did not violate in any way the letter of the Constitution.”<sup>111</sup> But its foundational principles are profoundly anti-Constitutional, for they promote a form of absolutism that allows them to accumulate judicial, executive, and legislative powers.

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<sup>106</sup> Quoted in Kesler, “Separation of Powers and the Administrative State,” in *Imperial Congress*, 34.

<sup>107</sup> Wilson, “Study of Administration”

<sup>108</sup> Wilson, quoted in Rohr, *To Run A Constitution*, 68.

<sup>109</sup> Quoted in Hamburger, *Is Administrative Law Unlawful?*, 16.

<sup>110</sup> See generally, *Is Administrative Law Unlawful?*.

<sup>111</sup> Marini, *Politics of Budget Control*, 183.

## Conclusion

Both Congress and the President received new roles in the administrative government imagined by Wilson. The former became understood less in terms of its legislative and deliberative function, and more in terms of promoting civic participation. In this, Congress adopted a quasi-judicial function as an oversight body. The latter became the political and administrative leader of the nation. The altered roles of the political branches altered the relationship between the branches, thus injuring the ability of the separation of powers to keep the growth of government in check. Ultimately, neither the President nor Congress understood itself in terms of its original, Constitutional function.

# Conclusion

The phrase the “Administrative State” offers perhaps the best description of the strange, distinctly American amalgamation of republican, constitutional principles and monarchical administrative practices. More than the growth of executive power, economic regulations, or the welfare state, the Administrative State encompasses and emphasizes the idea that the bureaucracy, in order for it to be effective, must exist outside society. Subsequently, the Administrative State describes the independence of the bureaucracy from the traditional limitations of government caused by the separation of powers. Predicated on a heightened trust in the neutrality and public-spiritedness of bureaucrats, the Administrative State has perpetuated the separation of politics and administration, originally an ideal promoted during the Progressive Era, and accumulated legislative, judicial, and executive power into its administrative apparatus of federal agencies and departments. Although it has only minimally violated the letter of the Constitution, it has caused a profound crisis of confidence in national government. Ultimately, the unmoored, unlimited powers of the modern bureaucracy starkly contrasts with the limited duties and authority of the administrators of the early American Republic.

Confidence in the national government has declined because the Administrative State jeopardizes the amicable relationships between the branches. Although Publius never contemplated that administration itself becoming a danger to political liberty, he recognized administration required the creative tension of the separation of powers to motivate cooperation between the political branches. With each of the political branches possessing a stake in the administration of the law, administrative obscurity made the branches responsible in both senses of the term to the proper execution of the law. As exemplified by the treaty-making clause, not

all powers provided by the Constitution fit neatly and completely into the advantages of a discrete branch, and therefore required the unique attributes of each of the political branches to advance good government. In the case of treaty-making, success required senatorial deliberation and information as well as executive energy and secrecy. But given that the Administrative State has altered the manner in which the branches understand their role in government, achieving amicable relations between the branches has become increasingly difficult. During the early battles over the Treasury, Congress understood itself as defending its legislative prerogative to control the power of the purse, while the Executive fought for the preservation of energy, unity of command, and discretion. Under Wilson's view of the branches, however, Congress focuses on oversight rather than legislation, while the Executive and the bureaucracy are divided between political and administrative goals. Thus, the confusion of the political branches has made achieving the common good difficult because the battles for control over administration no longer connect to the original ends of the branches.

Additionally, the Administrative State has upended confidence in the administrative operatives responsible for carrying out the law. During the early Republic, the Framers recognized that government needed some level of specialization in executing administrative detail, but they placed substantial emphasis on practical knowledge, as opposed to the technical knowledge of the modern bureaucrat. Fisher Ames said of financial experts in the executive branch that their expertise came from their "common sense" and their direct experience in executing their duty as prescribed by the law. By contrast, Wilson's ideal bureaucrat acquired years of academic and university training before entering the civil service. The need for ample education stemmed from Civil Service Reform, which attempted to root out partisan or incompetent administrators by requiring all permanent bureaucrats to pass the Civil Service

exams. Simply put, Wilson prized standardized, credentialed candidates as the ideal administrator, while the Framers favored practical experience. Brian Cook has charged that the Federalist Party's preferred administrative system shared a great deal in common with the Wilsonian merit system because both relied on a "better sort" to apply their advanced knowledge to the administrative issues of the day.<sup>112</sup> But Cook oversimplifies these commonalities, making them superficially true at best. As detailed above, the Framers and Wilson fundamentally conflicted over source, type, and ends of knowledge required for good administration. The preference for rational knowledge over practical experience has contributed substantially to the crisis of confidence caused by the Administrative State because supposedly neutral administrators have unjustifiably accumulated unchecked power and expectedly acted self-interestedly. Modern administrators have become a faction unto themselves. This brings me to my third, and final, point

The Administrative State has caused a profound crisis of confidence in the national government because it functionally operates as a will independent of society. Displayed in all governments rooted in "hereditary or self-appointed authority," wills independent of society are antithetical to a wholly-popular republican government.<sup>113</sup> Publius first described a "will in the community independent of the majority—that is, of the society itself"—in *Federalist* 51, but ultimately rejected its creation because this mixed regime provided merely "precarious security" against the injustice of majority tyranny.<sup>114</sup> He reasoned that such a will might adopt the unjust views of the majority, thus coercing the minority to follow them, or, alternatively, would develop an interest entirely separate from either majority or minority opinion. His rejection was in line

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<sup>112</sup> See generally, Brian J. Cook, *Bureaucracy and Self-Government: Reconsidering the Role of Public Administration in American Politics* (Baltimore: Johns Hopkins University, 1996), 24-48, 65-97.

<sup>113</sup> Madison, *Federalist* 51, 321.

<sup>114</sup> *Ibid.*

with his larger view towards human nature and ability. In contrast to the optimistic trust of Wilson in powerful, educated administrators, he thought that “enlightened statesmen” would labor “in vain” to “adjust these clashing interests and render them all subservient to the public good.”<sup>115</sup> Thus, he famously advocated for a “republican remedy to the diseases most incident to republican government.”<sup>116</sup> Publius displayed exceptional foresight in describing the dangers of a will independent of society. As a violation of the principle that government needed to control itself, such wills threatened to upend the wholly popular basis of the American republican government. But critically, Publius made no distinction between a government entirely independent of society or merely partially independent of society. Put differently, both the mixed regime of Parliamentary England and the absolutist regime of Russia or Prussia violated the obligation of government to control itself.

Wilson would strongly object to the characterization of the Administrative State as a will independent of society. Anticipating that critics might accuse him of advocating for “bigoted officialism,” he wrote in “The Study of Administration” that a reliance on public opinion prevented bureaucrats from becoming a “distinct, semi-corporate body.”<sup>117</sup> But the central points of “Study” undermine the validity of his claim. For one, public opinion offered no tangible control for enforcing the public will. As Wilson knew, civil service reform had insulated the bureaucracy from political control, and gave them tenure akin to judges who served during

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<sup>115</sup> Madison, *Federalist* 10, 75.

<sup>116</sup> Ibid, 79. The republican remedy included the “extent” and “proper structure” of government, or, in other words, the federalism of an extended republic and the separation of powers in the national government. Some proponents of the Administrative State have argued that the Madisonian republican remedies, particularly the separation of powers, have failed to cure the disease of factions. This line of argumentation heavily emphasizes the problems caused by special-interest, i.e., minority, politics. See Brian J. Cook, “Curing the Mischiefs of Faction in the American Administrative State,” *American Review of Public Administration* 46 (2016). Cook suggests jettisoning the tripartite separation of powers and elevating administrative departments and agencies to the level of a constitutional branch.

<sup>117</sup> Wilson, “The Study of Administration.”

“good behavior.”<sup>118</sup> More importantly, in order to enable bureaucrats to serve as a society’s connection to the “permanent truths of political progress,” Wilson advocated removing administration from “the hurry and strife of politics” and raising it “far above the dull level of mere technical details.”<sup>119</sup> Wilson explicitly contemplated the separation of the bureaucracy not only from the electoral process, but also from politics entirely. Over time, he imagined that they would become intertwined with the existence of the State itself. Thus, Wilsonian ideas of administration contributed to the separation of the Administrative State from society.

The Administrative State has only partially succeeded in replacing the Constitution and the tripartite system of separated powers. As a result, a great deal of confusion surrounding the legitimacy of the Administrative State and its relationship to constitutional government has arisen. But by examining both the Constitution and the Administrative State at the level of first principles, one gets a clearer view of this relationship. Despite attempts by both parties and both political branches to gain control over modern administration, the antithetical relationship between the Constitution and the Administrative State will ultimately ensure that the latter remains outside the direct control of the former for as long as they uneasily persist.

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<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

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