
ARTICLE

THE PROGRESSIVE IDEA OF DEMOCRATIC
ADMINISTRATION

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I. ADMINISTRATION, ANCIENT & MODERN

The first thing to acknowledge about administration is that administration is coincident with governance. Far from being a modern invention or some kind of radical departure from an original political or legal tradition, administration is among the oldest practices of governments. Indeed, it is impossible to conceive of government without administration. Laws need to be enforced, legislation needs to be implemented, and collective goods need to be secured. Governance is mostly a matter of actions and practices, making administration perhaps the most truly reflective aspect of legal and political culture.

Bernard Bailyn found the “origins of American politics” in the formidable and positive administrative tasks of the first colonial legislatures, from land distribution to the building of wharves, roads, ferries, public vessels, and civic buildings to the establishment of towns, schools, colleges, and religious institutions.¹ About 60 percent of the laws passed in colonial Virginia, Bailyn

¹ BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 103 (1968). As Bailyn put it, “colonial legislatures were led willy-nilly, by the force of circumstance . . . to construe as public law what in England was ‘private, local and facultative.’” *Id.* at 102. In South Carolina, examples included the administration of “lawyers’ fees,” city “building codes,” the “conduct of seamen,” the “regulation of merchandising, the tenure of church pews, and a program of farm subsidies.” *Id.* at 103 n.37.

noted, were essentially administrative, “pertaining to social and economic problems.”² Hendrik Hartog followed this trail of administration from colonial legislatures into county courts in eighteenth-century Massachusetts, identifying a “continuum of criminal and administrative action” wherein a court’s responsibilities “were defined less by its formal legal jurisdiction than by the needs of governance”—especially the administration of liquor licensing, poor relief, and road building and repair.³ By the early nineteenth century, Alexis de Tocqueville deemed this pervasive, popular, and local approach to positive administration akin to the essence of democracy in America. Tocqueville drew explicit attention to the array of local administrators, such as “selectmen,” “assessors,” “collectors,” “road-surveyors,” and “tithing-men,” carrying out the administrative policies of “well-regulated” communities, from the “construction of sewers” and the location of “slaughterhouses” to “public health” administration and “licensing.”⁴ Formal administrative boards, commissions, departments, and offices were part and parcel of early American governmental tradition.

Moreover, this early original penchant for administration was hardly confined to local, regional, or municipal governance. In England, as John Brewer and Steve Pincus have most effectively argued, the rationalization and centralization of nation-state administration—especially around fiscal and military prerogatives—was an important harbinger of modernity (and revolution) since at least the seventeenth century. For Brewer, “[t]he late seventeenth and eighteenth centuries saw an astonishing transformation in British government, one which put muscle on the bones of the British body politic, increasing its endurance, strength and reach.”⁵ At the heart of this governmental revolution were the clerks—those “pale and shadowy figures” at “the seat of dullness”—who implemented “the growth of a sizable *public administration* devoted to organizing the fiscal and military activities of the state.”⁶ Pincus summed up the broad administrative trend that upended Europe from the Glorious Revolution to the French Revolution as “state modernization”:

² *Id.* at 103 n. 37.

³ Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 284, 288, 323 (1976).

⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 45, 53 (1838). See also generally STEPHEN SAWYER, *DEMOS ASSEMBLED: DEMOCRACY AND THE INTERNATIONAL ORIGINS OF THE MODERN STATE, 1840–1880* (2018) (giving a breakthrough revisionist account of Tocqueville on administration and police power).

⁵ JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783*, at xvii (1989).

⁶ *Id.* at xvi, xvii (emphasis added).

[A]n effort to centralize and bureaucratize political authority, an initiative to transform the military using the most up-to-date techniques, a program to accelerate economic growth and shape the contours of society using the tools of the state, and the deployment of techniques allowing the state to gather information⁷

Contravening theories of American exceptionalism, this early modernization of national administration did not bypass the early United States. Rather, Jerry Mashaw has now definitively established the long and deep historical origins of American administrative law and a national administrative state. “From the earliest day of the republic,” Mashaw demonstrated, “Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.”⁸ Of the fifty-one major federal administrative agencies at the time of the Administrative Procedure Act (1946), eleven traced their origins to statutes passed before the Civil War, and most of those to the extraordinary creation of federal administration in the very first Congress: the U.S. Customs Service, Veterans Pensions, Patent Office, Office of Indian Affairs, Commissioner of Internal Revenue, General Land Office, Bureau of Marine Inspection and Navigation, Passport Division, Office of the Chief Engineers, Office of the Comptroller of the Currency, and Postmaster General.⁹ Mashaw described the vital activities (and internal administrative rules and practices) of a wide range of administrative officers—from the Attorney General and U.S. Attorneys to Treasury and Customs and Postal officials—culminating as early as 1852 in a national steamboat inspection regime that administratively “combined something of the ‘New Deal’ independent regulatory commission with ‘Great Society’ health and safety regulation”¹⁰ Nicholas Parrillo has supplemented this rich portrait with an even wider accounting of the army of administrative officials enabled by the comprehensive fee, prize, and bounty systems that proliferated before the modern “salary revolution” in American government: district attorney fees for successful prosecutions, tax “ferret”

7 STEVE PINCUS, *1688: THE FIRST MODERN REVOLUTION* 36 (2009). See generally CHARLES TILLY, *COERCION, CAPITAL, AND EUROPEAN STATES: AD 990-1990* (1990) (explaining the central role of administration in the complex history of European state formation).

8 JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 5 (2012).

9 FINAL REPORT OF THE ATT’Y GEN.’S COMM. ON ADMIN. PROCEDURE, 8-9 (1941). For the classic histories of administration in the United States before the Civil War, see generally LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* (1948); LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829* (1951); LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861* (1954).

10 Mashaw, *supra* note 8, at 187.

fees for detecting tax evaders, naval bounties for captured ships, land officer fees for homestead applications, government doctor fees for deciding veteran's benefits, and so on.¹¹ National administration and a surprisingly sophisticated structure of administrative law was entrenched in the United States for a century *before* the so-called invention of modern administration in the Interstate Commerce Act of 1887.

So we now have a new and "long" history of administration to contemplate from 1787 to 1887 and beyond. Clearly administration *per se* is not a recent American invention. The question remains, however, what exactly the relationship is between the sprawling early American regime of administration acknowledged by Bailyn, Hartog, Tocqueville, Mashaw, and Parrillo and the later changes in administrative regulation that took place at the turn of the twentieth century. Are these regimes of a piece—similar, contiguous, and continuous—reflective of an evolution rather than a revolution? Or are there still some dramatic differences and changes circa 1887 that suggest not a move from absence to presence (historians have certainly slain that beast), but perhaps a transformation nonetheless?

Despite deep historical roots in the American governmental tradition, the increased proliferation, professionalization, centralization, and rationalization of administration in the late nineteenth and early twentieth centuries amounted to a change in kind—a transformation nonetheless. While commentators such as Tocqueville long recognized the origins of administration in the practical politics of addressing social problems and meeting collective needs (from poor relief to local infrastructural development), the very nature and conception of those problems and those needs were fundamentally transformed in the era of mass society and mass democracy. The basic direction of change moved distinctly from a political culture of particularity with a wide tolerance of distinction to one of generality with a preference for uniformity. Localized, jurisdictional, and quasi-private rulemaking and office-holding ineluctably gave way to a more centralized, political, and distinctly public vision of administration and administrative law.¹² Just as conceptions of national citizenship and

11 NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 1 (2013); *see also id.* at 198 ("Tax ferrets had the incentive and the will to engage in surveillance in a way the local assessors never had.")

12 Of course, this is one of the key themes of Nicholas Parrillo's work on the "salary revolution" in government. Beyond professionalization and civil service, "[u]niform fee schedules for official services" were part of a movement toward "uniformity," including the trend "to suppress private laws and local laws," "the replacement of special corporate charters with general incorporation," and "the shift in public finance from ad hoc levies . . . toward a general property tax." *Id.* at 92. On a similar trend from private to public prosecution in criminal justice, see ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 1 (1989); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7 (2011).

constitutional rights grudgingly shed an earlier history of localism, particularity, and discrimination, the nature of social representation through democratic politics and statecraft moved just as slowly—but surely—toward more generalized conceptions of social need and public interest. The political culture of generality involved a new vision of a democratic society autonomously responsible for the production of its own collective future as well as a new understanding of positive and purposeful political freedom.¹³ Administration was the primary vehicle of this new vision of state and law—a new public administration and a modern administrative law—committed to serving society’s needs and meeting a redefined general public interest.

Such new and positive ideas of statecraft, law, and administration quickly moved the American polity beyond traditional concerns with the maintenance of public order and early techniques of local-legal policing and fiscal-military organization. A distinctly modern notion of a *public service state* came into being, self-consciously oriented around the significant new obligations of tackling large-scale public problems and satisfying ever-expanding socioeconomic needs. No one apprehended this functionalist shift from “public authority” to “public service” better than the French legal sociologist and state theorist Léon Duguit. Duguit argued that patrimonial and authoritarian forms of state were in decline amid the rise of new forms of social interdependence and democratic political aspiration. As he observed, “Government and its officials are no longer the masters of men imposing the sovereign will on their subjects They are simply the managers of the nation’s business.”¹⁴ Duguit came to the attention of most Americans through the interventions of Harold Laski who counseled Roscoe Pound that “[t]he most striking change in the political organization of the last half century is the rapidity with which . . . the state has been driven to assume a positive character We live in a new world, and a new theory of the state is necessary to its adequate operation.”¹⁵ Laski’s other chief correspondent, Felix Frankfurter, was already building such a new theory of the state around what he called “Public Services and the Public.” Beyond the “traditional governmental functions of police and justice,” Frankfurter identified a new relationship of “The Public and Its Government” structured around the new

¹³ On the political culture of generality, see PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY*, 38-43 (Arthur Goldhammer trans., 2011) (2008); Marcel Gauchet, *Democracy: From One Crisis to Another*, in 1 *SOCIAL IMAGINARIES* 163-87 (Natalie Doyle trans., 2015); Wim Weymans, *Freedom Through Political Representation: Lefort, Gauchet and Rosanvallon on the Relationship Between State and Society*, 4 *EUR. J. POL. THEORY*, 263, 276 (2005).

¹⁴ LÉON DUGUIT, *LAW IN THE MODERN STATE* 51 (1919). See also ROSANVALLON, *supra* note 13, at 39 (“[T]hose who govern are not merely instruments of an authority that looms above the society that instituted it. They are merely the managers of the public’s business.”).

¹⁵ Harold J. Laski, *The Responsibility of the State in England: To Roscoe Pound*, 32 *HARV. L. REV.* 447, 462, 472 (1919).

“tasks of government, the demands citizens make upon government, [and] the instruments by which these demands are executed”¹⁶ Consequently, modern public law added to its purview an ever-expanding body of rules and institutions for the efficient management, organization, and control of public services and policies. As Duguit concluded, “[p]ublic law is thus no longer the body of rules regulating the relation of a sovereign state with its subjects; it is rather the body of rules inherently necessary to the organisation and management of certain services.”¹⁷

This articulation began the road to a reimagined administration. The modern reorientation of a reorganized state around the provision of public services brought increased attention to the science of public administration and the development of administrative law as scholars such as Woodrow Wilson, Frank Goodnow, Ernst Freund, Bruce Wyman, Felix Frankfurter, and James Landis elevated the topics to new heights of analytical scrutiny and self-consciousness. “Administrative law has not come like a thief in the night,” Frankfurter contended, but “general recognition” and “self-conscious direction” were another matter.¹⁸ The phrase “administrative law” first appeared in the U.S. Supreme Court Reports in 1909 and sporadically for the next generation.¹⁹ From Wilson to Frankfurter to Landis, two generations of political and legal scholars worked assiduously, as Ernst Freund put it, to make administrative law “more familiar to the public, and especially to the legal profession,” turning it into one of the more “recognized branches of public law.”²⁰ Modern administration was a central part to what Woodrow Wilson labeled the “New Meaning of Government.” Wilson held that the expansion and rationalization of governmental administration was a necessary product of the increasing functions and demands placed on modern social service states, from conservation to pure food and drugs to labor and price regulation to public health and sanitation by reasoning:

¹⁶ FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 2, 81 (1930).

¹⁷ DUGUIT, *supra* note 14, at 243.

¹⁸ Felix Frankfurter, *Foreword*, 47 *YALE L.J.* 515, 517 (1938).

¹⁹ *American Banana Company v. United Fruit Co.*, 213 U.S. 347, 350 (1909). *See also* Frankfurter, *supra* note 18, at 517. As Frankfurter complained: “To this day administrative law has no rubric in the ordinary digests, and flickering cross-references to the subject first begin to appear in 220 United States Reports. Not until 280 United States Reports does the term appear to have established itself in the index.” *Id.* at 518.

²⁰ Ernst Freund, *The Law of the Administration in America*, 9 *POL. SCI. Q.* 403, 404 (1894). Furthermore, consider that in 1894, Freund was still talking in terms of “law of the administration.” *Id.* Freund lauds FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY* 7 (1893), for popularizing the apt term “administrative law”— “[i]ts subject matter being the administration of public affairs, as distinguished from legislation on the one side and from the jurisdiction of the courts on the other.” Freund, *supra*, at 404.

Nowadays we consider it the duty of statesmen to see that women are not overburdened with work; that children are not dwarfed and stunted by too great a burden of labor; that factories are properly ventilated; that dangerous machinery is properly guarded; that rivers are kept pure and cities clean; that hospitals are provided; that education is put within the reach of everybody, and that the humblest citizen of our country has a full chance to live and thrive.²¹

“Administration is everywhere putting its hands to new undertakings,” Wilson argued in “The Study of Administration” and went on to explain that “[t]he idea of the state and the consequent ideal of its duty are undergoing noteworthy change; and ‘the idea of the state is the conscience of administration.’”²² In “The Task of Administrative Law,” Felix Frankfurter also connected the growth of administration and administrative law to new tasks of state: “[p]rofound new forces call for new social inventions The ‘great society,’ with its permeating influence of technology, large-scale industry, and progressive urbanization, presses its problems.”²³ Leonard D. White defined “public administration” simply as “the management of men and materials in the accomplishment of the purposes of the state[,] . . . the most efficient utilization of the resources at the disposal of officials[,] . . . [and] the most rapid and complete achievement of public purposes.”²⁴

As Wilson, Frankfurter, White, and many others made clear, the turn-of-the-century revolution in administration was very much concerned with efficiency, expertise, professionalization, rationalization, centralization, and scientific and technical management and organization. But it must be underscored the degree to which the self-conscious development of modern administration and administrative law turned on a new generalization of social and public interest. The invention of modern American administration was distinctly connected to a positive reform agenda and the progressive idea of the state as an efficient mechanism of larger social and public purpose. Herbert Croly famously articulated a broad vision of progressive democracy bound to the “expression of a permanent public interest” as “interested in efficient administration as it is in reconstructive legislation.”²⁵ In his path-

²¹ Woodrow Wilson, *The New Meaning of Government*, WOMAN’S HOME COMPANION, Nov. 1912, at 4. Elaborated further, Wilson’s new vision of administration was distinctly tied to a new conception of “democratic government.” *Id.* at 3. “Before the dawn of democracy,” Wilson contended bluntly, “[m]en were allowed to die like flies.” *Id.* at 4.

²² Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201 (1887) (internal citation omitted).

²³ Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 617 (1927).

²⁴ LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 2 (1926).

²⁵ Herbert Croly, *State Political Reorganization*, 6 AM. POL. SCI. REV. 122, 132 (1912).

breaking treatise *The Principles of the Administrative Law Governing the Relations of Public Officers*, Bruce Wyman first laid out his famous basic framework of “internal” and “external” administrative law while simultaneously contemplating the law of public service corporations and the general growth of state regulation at the turn of the twentieth century.²⁶ As Wyman put it, “[s]tate regulation is the prevailing philosophy . . . the spirit of our present age.”²⁷ “The present programme of organized society,” he noted, recognized “that freedom of action may, even in the industrial world, work injuriously for the public, and it must then be restrained in the public interest.”²⁸ For Frankfurter, public service, public interest, and “public trust” were at the very heart of the project of administrative law from the first state railroad commissions to the more omnibus state public utility commissions to the national development of the first independent regulatory commissions.²⁹ The “range and complexity” of these commissions, Frankfurter contended, “constituted new political inventions responsive to the pressure of new economic and social facts.”³⁰ Frankfurter frequently invoked Governor Charles Evans Hughes’s famous 1907 defense of administrative regulation: “There is also need of regulation and strict supervision to ensure adequate service and due regard for the convenience and safety of the public. The most practicable way of attaining these ends is for the Legislature to confer proper power upon a subordinate administrative body.”³¹ “Commodore Vanderbilt’s ‘the public be damned’ had at last a counterpoise” in what Frankfurter called “the quiet work of public administration”—“solid proof that government could meet needs of society at once the most complicated and fundamental.”³²

²⁶ See generally BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903).

²⁷ 1 BRUCE WYMAN, *THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT* vi (1911).

²⁸ *Id.*

²⁹ See FRANKFURTER, *supra* note 16, at 86 (“[N]ew legislation was intended to create governmental instruments and processes through which sound relations between public utilities and the public could work themselves out. To that end, a nonpolitical administrative agency was established . . .”).

³⁰ *Id.* at 88.

³¹ CHARLES EVANS HUGHES, *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906–1908*, at 89–90 (1908).

³² FRANKFURTER, *supra* note 16, at 89, 134. For an excellent book-length examination of these links between progressivism, democracy, and administration, see BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019).

II. THE IDEA OF DEMOCRATIC ADMINISTRATION

With the rapid proliferation of modern public services, the American administrative state—along all of its jurisdictional dimensions (local, state, and federal)—reached an important point of modern development. Positive conceptions of statecraft and law yielded a more pragmatic and instrumental vision of government directed toward the resolution of public problems and the satisfaction of social needs. Public administration and administrative law achieved a new self-consciousness and visibility as the principle vehicles for the general delivery of an ever-expanding array of state services. The period from 1866–1932 was nothing less than an age of administration.

And there is no shortage of political, legal, and historical assessments of this modern administrative revolution.³³ To date, however, the dominant interpretations have been captured by a single, overriding theme—the rise of modern bureaucracy and technocracy. Here, the modern history of the administrative state is subsumed beneath a veritable “bureaucracy fetish.”³⁴ Max Weber contributed the archetype, placing at the very center of modernity “the basic fact of the irresistible advance of bureaucratization,” wherein “the bureaucratic apparatus” concentrates the “means of operation.”³⁵ As Talcott Parsons once put it, “[r]oughly, for Weber, bureaucracy plays the part that the class struggle played for Marx”³⁶ Jürgen Habermas echoed this, stating that “[f]or Weber, bureaucratization is a key to understanding

³³ See generally, e.g., DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001); BRIAN J. COOK, *BUREAUCRACY AND SELF-GOVERNMENT: RECONSIDERING THE ROLE OF PUBLIC ADMINISTRATION IN AMERICAN POLITICS* (1996); JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* (1986); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982); RICHARD J. STILLMAN II, *CREATING THE AMERICAN STATE: THE MORAL REFORMERS AND THE MODERN ADMINISTRATIVE WORLD THEY MADE* (1998); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920* (1967); Louis Galambos, *The Emerging Organizational Synthesis in Modern American History*, 44 *BUS. HIST. REV.* 279 (1970).

³⁴ See William J. Novak, *Beyond Max Weber: The Need for a Democratic (Not Aristocratic) Theory of the Modern State*, 36 *TOCQUEVILLE REV.* 43, 74–76 (2015) (describing the tendency of conflating “the state” with “bureaucracy”).

³⁵ MAX WEBER, *The Bureaucratization of Politics and the Economy*, in *ESSAYS IN ECONOMIC SOCIOLOGY* 109, 110, 114 (Richard Swedberg ed., 1999). The heightened attention to bureaucracy in Weber was only exacerbated by an American reception that first translated and fixated on the “bureaucratic” aspects of his oeuvre. See generally MAX WEBER, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196, 196–244 (H. H. Gerth & C. Wright Mills eds., 1946). Robert K. Merton’s *Social Theory and Social Structure* contained no index entry for “state,” but seventeen separate entries for various discussions of “bureaucracy” and “bureaucratization.” ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 693–94 (2d ed. 1968).

³⁶ 2 TALCOTT PARSONS, *THE STRUCTURE OF SOCIAL ACTION: A STUDY IN SOCIAL THEORY WITH SPECIAL REFERENCE TO A GROUP OF RECENT EUROPEAN WRITERS* 509 (1949).

modern societies.”³⁷ “[P]rogress” toward “bureaucratic officialdom” and the “bureaucratic state” became the “unambiguous yardstick” for assessing modernization and its unambiguous turn toward systems rationality, centralization, professionalization, expertise, and autonomous administration.³⁸ “Routines of administration”—that is, processes of “adjudicating and administering according to rationally established law and regulation”—were necessary accoutrements of a modern system of rule “necessarily and unavoidably” bureaucratic.³⁹ As Theodore Lowi concluded, such rationalized administration “may indeed be the *sine qua non* of modernity.”⁴⁰

Of course, Max Weber was notoriously ambivalent about the normative implications of this modern governmental turn towards bureaucratic administration. His pessimistic assessments of modernity’s “iron cage” and “shell of bondage” have been seconded by a legion of students of bureaucracy who see the administrative revolution as a troubling departure from original traditions of self-rule, popular governance, and political autonomy, raising concerns about technocracy, the relentless conquest of instrumental rationality, and roads to future serfdom and despotism. From propagandistic critiques such as James Beck’s *Our Wonderland of Bureaucracy*,⁴¹ to popular

³⁷ 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 306 (Thomas McCarthy trans., Beacon Press 3d ed. 1987) (1981). Habermas elaborated on Weber’s notion of a modern “society of organizations,” observing that “economic production is organized in a capitalist manner, with rationally calculating entrepreneurs; public administration is organized in a bureaucratic manner, with juristically trained, specialized officials—that is, they are organized in the form of private enterprises and public bureaucracies.” *Id.*

³⁸ WEBER, *Bureaucratization*, *supra* note 35, at 109.

³⁹ *Id.* at 109-110. In *Economy and Society: An Outline of Interpretive Sociology*, Weber expanded these categories into eight more specific attributes of modern “legal authority with a bureaucratic administrative staff”: 1) the continuous rule-bound conduct of official business; 2) the rigorous specification of jurisdictional competence; 3) the hierarchical organization of offices; 4) the governance of offices via technical rules or norms; 5) the separation of ownership and control in administrative decisionmaking; 6) the objective rather than subjective nature of rights in an office; 7) the importance of written documentation of administrative acts, decisions, and rules; and 8) the presence of an elaborate administrative staff-officialdom, bureaucracy. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 218-219 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968).

⁴⁰ See THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 21 (2d ed., 1979) (“The modern method of social control involves the application of rationality to all social relations *Rationality applied to social control is administration.*”).

⁴¹ See, e.g., JAMES M. BECK, *OUR WONDERLAND OF BUREAUCRACY: A STUDY OF THE GROWTH OF BUREAUCRACY IN THE FEDERAL GOVERNMENT, AND ITS DESTRUCTIVE EFFECT UPON THE CONSTITUTION* vii (1932) (originating a persistent Alice-in-Wonderland trope in the history of administration, where “Uncle Sam has many of the child-like and naive characteristics of little Alice, and . . . he, too, is dreaming in a wonderland of socialistic experiments in a government, whose constitution was intended to be a noble assertion of individualism.”); E. PENDLETON HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* xi-xii (1936) (deploying the same Lewis Carroll chapter headings).

explorations like Walter Lippmann's *The Phantom Public*,⁴² to political and sociological assessments like James Burnham's *The Managerial Revolution* and C. Wright Mills's *The Power Elite*, treatments of the modern administration as an anti-democratic bureaucracy and elite technocracy abound.⁴³ For Jürgen Habermas, “the mounting bureaucratization of the administration in state and society” and the rise of planning, distribution, and government intervention by “highly specialized experts” spelled the doom of the “critical publicity” of the bourgeois public sphere.⁴⁴ Like his Frankfurt school colleagues, Habermas fretted about “the lure of technocracy,” the divorce of organized system from ethical life, and the ultimate threat that “the technical means of destruction increase along with the technical means of satisfying needs.”⁴⁵ Even Pierre Rosanvallon assessed these turn-of-the-century administrative developments as bureaucratic, technocratic, and ultimately worrisome: “The emphasis on efficiency and scientific administration revived an old prejudice It was for want of being able . . . to conceive of government democratically that administrative-executive power once more came to be accepted in both France and America as a central element of governmental organization in the guise of technocracy.”⁴⁶ Such elite technocratic administration reflected an inability or at least an unwillingness to think government democratically.⁴⁷ Of course, a flood of late twentieth century neo-liberal critiques of the modern regulatory and social-welfare state loudly echoed such indictments of the dangerous, anti-democratic nature of bureaucratic administration.⁴⁸

⁴² See, e.g., WALTER LIPPMANN, *PUBLIC OPINION* (Macmillan Co. 1961) (1922); WALTER LIPPMANN, *THE PHANTOM PUBLIC* (1925).

⁴³ See generally KENNETH E. BOULDING, *THE ORGANIZATIONAL REVOLUTION: A STUDY IN THE ETHICS OF ECONOMIC ORGANIZATION* (1953); JAMES BURNHAM, *THE MACHIAVELLIANS: DEFENDERS OF FREEDOM* (1943); JAMES BURNHAM, *THE MANAGERIAL REVOLUTION: WHAT IS HAPPENING IN THE WORLD* (1941); C. WRIGHT MILLS, *THE POWER ELITE* (1956); WILLIAM H. WHYTE, JR., *THE ORGANIZATION MAN* (1956).

⁴⁴ JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY*, 233, 235 (Thomas Burger trans., 1989).

⁴⁵ *Id.* at 234-35. See also generally JÜRGEN HABERMAS, *THE LURE OF TECHNOCRACY* (Ciaran Cronin trans., 2015).

⁴⁶ PIERRE ROSANVALLON, *GOOD GOVERNMENT: DEMOCRACY BEYOND ELECTIONS* 62-63 (Malcolm DeBevoise trans., Harvard University Press 2018) (2015).

⁴⁷ See generally *id.*

⁴⁸ See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960) (providing the critique along these lines—taking explicit issue with the entire canon on the modern administrative state); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944) (same). See also generally ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984); DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998); Gary S. Becker, *Competition*

In law, this anti-bureaucratic position has a distinguished (if predominantly Anglo-Saxon) pedigree. Building on a nineteenth century British constitutional literature increasingly aimed—in Henry Maine’s words—at “applying the curb to popular impulses,”⁴⁹ Albert Venn Dicey made the formal legal case against administration as bureaucracy—as Gallican *droit administratif*.⁵⁰ Dicey viewed the historic English rule of law tradition as inherently antithetical to an administrative law that he deemed foreign and dangerous: “the whole scheme of administrative law was opposed to . . . essential characteristics of English institutions.”⁵¹ Dicey saw seeds of tyranny in administrators “who, if not actually part of the executive, are swayed by official sympathies, and who are inclined to consider the interest of the state, or of the government, more important than strict regard to the legal rights of individuals.”⁵² As Felix Frankfurter noted, “Few law books in modern times have had an influence comparable to that produced by the brilliant obfuscation of Dicey’s *The Law of the Constitution*.”⁵³ But despite what Frankfurter described as Dicey’s “sociological sterility” and “misconceptions and myopia,” about the “[r]ule of [l]aw” versus “the development of administrative law,” Dicey’s indictment of administration as foreign statism continued to influence “[g]enerations of judges and lawyers.”⁵⁴

Indeed, today it remains common for discussion of the administrative revolution to take the form of an ongoing duel between bureaucracy and the rule of law. According to a recent influential historical treatment, the struggle over modern administration was “Tocqueville’s nightmare.”⁵⁵ Tocqueville’s alleged nightmare was nothing less than centralized administrative “bureaucracies through which federal officials could impose their will on a dispersed and factious people.”⁵⁶ Should centralized administration and

and Democracy, 1 J.L. & ECON. 105 (1958); THE WORLD BANK, FROM PLAN TO MARKET: WORLD DEVELOPMENT REPORT 1996 (1996).

⁴⁹ SIR HENRY SUMNER MAINE, POPULAR GOVERNMENT: FOUR ESSAYS xi (2d ed. 1886).

⁵⁰ A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 323 (6th ed. 1902).

⁵¹ *Id.* at 349.

⁵² *Id.* at 334. For earlier and later juxtapositions of Anglican versus Gallican liberty, see 1 FRANCIS LIEBER, *The Ancient and the Modern Teacher of Politics*, in REMINISCENCES, ADDRESSES, AND ESSAYS 369-388 (1881); Friedrich A. Hayek, *Freedom, Reason, and Tradition*, 68 ETHICS 229 (1958) (contemplating the twentieth century stakes of this debate: “It was, in the end, the victory of the Benthamite Philosophical Radicals over the Whigs in England that concealed a fundamental difference which in more recent years has reappeared as the conflict between ‘liberal’ democracy and ‘social’ or totalitarian democracy.”).

⁵³ Felix Frankfurter, *Foreword*, 47 YALE L.J. 515, 517 (1938).

⁵⁴ *Id.*

⁵⁵ DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA: 1900-1940 (2014).

⁵⁶ *Id.* at 1.

bureaucracy carry the day, Tocqueville warned, “a more insufferable despotism would prevail than any which now exists in the monarchical states of Europe”⁵⁷ For Daniel Ernst, the answer to the specter of totalitarianism haunting the development of the bureaucratic state was again the rule of law as a cadre of artful American lawyers built into administrative law constitutional curbs protecting a modicum of concern for due process, judicial review, individual rights, and limited government.⁵⁸ For Philip Hamburger, even such legal and constitutional protections were not enough, as he deemed the administrative power underwriting the modern American bureaucracy “absolutist,” “extralegal,” “supralegal,” “unconstitutional,” and basically “unlawful.”⁵⁹ Hamburger’s position is comparable to that of Dicey, who argued: “The words ‘administrative law’ . . . are unknown to English judges This absence from our language of any satisfactory equivalent for the expression *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself.”⁶⁰ Like Frankfurter, Bruce Wyman’s *Administrative Law* deemed a Diceyan position basically out-of-date in America as early as 1903.⁶¹

It is important, however, to underscore how all these approaches to the modern administrative revolution elide one of its foundational premises—democracy. Administration and administrative law were crucial parts of the transformation of public law that created a new democratic state. All of the exclusive emphasis on bureaucracy and the rule of law in this period has come at the expense of what this generation claimed over and over again was actually at stake in these contests and struggles—the making of a new democracy. It would be a mistake of historical interpretation to confuse the modern transformation of American administration with an anti-democratic bureaucratic or technocratic archetype.

As Stephen Sawyer has convincingly shown, Tocqueville himself was no inveterate opponent of administration or administrative law per se. Nor did he see

⁵⁷ ERNST, *supra* note 55, at 1 (quoting Tocqueville).

⁵⁸ *Id.* As Jeremy Kessler points out in a capacious review, Ernst’s approach to the administrative state’s underlying legitimacy is not only “legalistic,” but “antidemocratic”—essentially writing out of the story “New Deal stalwarts” who were more “antiformalist and anticourt, more pro-administration and . . . pro-labor” Jeremy Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 733 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA: 1900-1940* (2014)).

⁵⁹ PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 12-13 (2014).

⁶⁰ DICEY, *supra* note 50, at 323.

⁶¹ BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 2 (1903). Wyman artfully began his treatise with a long excerpt from Dicey and then concluded, “When the highest authority declares in so explicit a manner that administrative law is impossible under the common law system, at all events one thing can be promised in this course of lectures—novelty of subject.” *Id.*

administration as inherently at odds with democracy. To the contrary, his reflections on New England police power, as well as his concerns with inequality and pauperism, made it clear that a certain kind of administration was absolutely necessary to democratic states tending to the social-economic demands of a politically empowered and self-governing people. Tocqueville was concerned about the dangers of a Napoleonic centralization severed from the people such as a consolidated executive power that governed civil society but that no longer arose from it (after all, that was the problem of the Ancien Régime). But he explicitly acknowledged that “[t]he social order was in the throes of a rapid evolution, giving rise to new needs, and each of these was an added source of power to the central government”⁶²: to include “relief measures,” “public works programs,” “social service programs,” control of “money and credit,” economic regulation, etc.⁶³ Such growing social and economic needs—the “care to be taken of the people”—showed no signs of dissipating in modern industrializing societies.⁶⁴ So in the end, Tocqueville understood the positive problem of developing a democratic form of effective state administration to be the central problem of the age: “Our administrative law has generated intelligent and useful commentaries, but it has not been studied or judged as a whole by a great public thinker . . . [T]here is perhaps no other subject in our times that merits more attention by our philosophers and statesmen.”⁶⁵

The founders of modern American administrative law and statecraft were only too aware of Tocqueville’s democratic mandate. As early as 1887, Woodrow Wilson insisted that modern American administration was not about bureaucracy and technocracy: “[T]o fear the creation of a domineering, illiberal officialism . . . is to miss altogether the principle upon which I wish most to insist. That principle is, that administration in the United States must be at all points sensitive to public opinion.”⁶⁶ Wilson’s “new meaning of government” was deeply rooted in a fundamentally democratic aspiration worth quoting at length:

Democratic government has, the world over, had deep and far-reaching results. It has created a new conception of the functions of government. It is not merely that democratic government is based, as the old phrase used to go, on the “consent of the governed,” but that it is based upon the participation in government of all classes and interests; and whenever this

⁶² ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* 59 (Stuart Gilbert trans., 1955) (1856).

⁶³ Louis Smith, *Alexis de Tocqueville and Public Administration*, 2 *PUB. ADMIN. REV.* 221, 236 (1942).

⁶⁴ TOCQUEVILLE, *supra* note 62, at 265.

⁶⁵ SAWYER, *supra* note 45, at 42-43 (quoting Tocqueville).

⁶⁶ Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197, 216 (1887).

conception can be realized, whenever government is disentangled from its connection with special interests and made responsive to genuine public opinion, throughout the length and breadth of the great country, it at once gets new ideals and responds to new impulses. It then becomes an instrument of civilization and of humanity It is part of the new meaning of government, therefore, that its resources are not to be put at the disposal of a governing class or of any limited set of governing influences, but that those who exercise its authority must “keep house” for the whole people It is an interesting circumstance that government is becoming less and less a business for politicians; that minds and energies of every kind are turning towards it as part of the general enterprise of life These changes in the business and character of government are not taking place because of any special knowledge of a few men, the leaders of parties and of public thought. They are, on the contrary, coming from out of the general body of the nation itself. The government is becoming more and more a sensitive, registering instrument. Public opinion has accumulated tremendous force in our day, not only, but it shows infinite richness and variety. Men of many occupations, of many interests, of many aspirations, contribute to it. Neighborhood meetings, city assemblies, state conventions, interstate gatherings, national conventions, are held by people of every sort interested in every kind of occupation The fine result of it all is that the common interest is becoming more and more clear For government is an instrument, not an object in itself. We ought to be interested in it only as it express the purpose of the people of the country.”⁶⁷

Of course, sentiments like these at the very foundation of modern American administration encapsulated the dominant themes of progressive new democracy—from its anti-formalism to its substantive vision of democracy as a “way of life”; from its critique of private power and plutocracy to its endorsement of public interest. While rationalization, systemization, and professionalization were certainly key aspects of modern governmental process, the administrative revolution was born of a radical reform energy and an insurgent self-consciousness concerning the new inequalities, exclusions, oppressions, and acute social needs that threatened the democratic legitimacy of American public and private life. In place of bureaucracy or technocracy—yet along some kind of ancient Whig constitution or “rule of law”—the history of the origins of the modern American administrative state must first be understood in the context of such new democratic principles.

The first thing to note about the architects of modern American administrative law is that they were radical anti-formalists in the new

⁶⁷ Wilson, *supra* note 21, at 3-4.

democratic tradition. Frank J. Goodnow, frequently acknowledged as the “father of American administration,” produced many technical treatises on the subject.⁶⁸ But he was also author of one of the era’s most influential and radical critiques of formal law and conservative constitutionalism.⁶⁹ Joining Charles Beard’s *An Economic Interpretation of the Constitution of the United States*⁷⁰ and J. Allen Smith’s *The Spirit of American Government*,⁷¹ Goodnow’s *Social Reform and the Constitution* carved out a critical legal space for the development of the new administrative state.⁷² Taking note of the “tremendous changes in political and social conditions,” Goodnow advocated a critical, pragmatic, and historicist approach to law and constitution averse to the static anachronisms of formal juristic conservatism.⁷³ Echoing Smith’s chapter titled “The Constitution as a Reactionary Document,”⁷⁴ Goodnow attacked “the superstitious reverence” that accepted the Constitution as “the last word which can be said as to the proper form of government . . . suited to all times and conditions.”⁷⁵ Such constitutional formalism, he noted, imported an eighteenth century political theory of social compact and natural right that presupposed that society was “static rather than progressive in character.”⁷⁶ The unfortunate result was “to fix upon the country for all time institutions, which . . . may in this the twentieth century be unsuitable because of the economic, social, and political changes which have taken place in the last hundred years.”⁷⁷ He embraced Theodore Roosevelt’s critique of the “false but mischievous” view of the Constitution as a “strait-jacket to be

⁶⁸ See generally GOODNOW, *supra* note 20; FRANK J. GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT (1900); FRANK J. GOODNOW, PRINCIPLES OF CONSTITUTIONAL GOVERNMENT (1916); FRANK J. GOODNOW, SELECTED CASES ON AMERICAN ADMINISTRATIVE LAW WITH PARTICULAR REFERENCE TO THE LAW OF OFFICERS AND EXTRAORDINARY LEGAL REMEDIES (1906); FRANK J. GOODNOW, SELECTED CASES ON GOVERNMENT AND ADMINISTRATION (1906); FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905). See also generally ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION: A VOLUME IN HONOR OF FRANK JOHNSON GOODNOW (Charles G. Haines & Marshall E. Dimock eds., 1935).

⁶⁹ See FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION (1911).

⁷⁰ CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

⁷¹ J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT: A STUDY OF THE CONSTITUTION: ITS ORIGIN, INFLUENCE AND RELATION TO DEMOCRACY (1907).

⁷² GOODNOW, *supra* note 69. See also generally LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932) (taking the other truly radical tract in this legal-constitutional tradition).

⁷³ GOODNOW, *supra* note 69, at 1.

⁷⁴ See SMITH, *supra* note 71, at 27-39.

⁷⁵ GOODNOW, *supra* note 69, at 9-10.

⁷⁶ *Id.* at 308.

⁷⁷ *Id.* Like Beard, Smith, and Boudin, Goodnow affirmatively endorsed ongoing criticism of the Court and the Constitution: “In these days of rapid economic and social change, when it is more necessary than ever before that our law should be flexible . . . it is on this criticism . . . that we must rely if we are to hope for that orderly and progressive development . . .” *Id.* at 359.

used for the control of an unruly patient—the people.”⁷⁸ Like Wilson, Goodnow endorsed instead a new positive, progressive, and dynamic approach to the Constitution that would enable a new public law and administration—flexible, responsive to public opinion, and adaptable to the changing needs of modern public life. This was a new democratic vision of constitutional dynamism in the public interest: “[O]ur constitutions are instruments designed to secure justice by securing the deliberate but effective expression of the popular will.”⁷⁹

Modern administrative law emerged directly out of such democratically-oriented antiformalism. The constitutional critiques of reformers like Goodnow, Smith, and Beard provided the intellectual groundwork for a jurisprudential transition away from traditional ideas about quasi-private office-holders and formal constitutional limitations and towards the public law legitimacy of broad-scale legislative and administrative action in the public interest. Such a critical perspective was a key part of Goodnow’s effort to create a generalized vision of public state administrators beyond the highly particularized and partial constraints of the fee system as well as existing common-law rules governing office-holding.⁸⁰ And it was equally crucial to Goodnow’s attempt to create room for administration beyond the formal constitutional conceptions of federalism and separation of powers. Ernst Freund, Goodnow’s student and the other key “pioneer of administrative law,”⁸¹ also emphasized the central “freeing of American public law from what he conceived to be the crippling dominance of constitutional law.”⁸² Realism, pragmatism, and critical constitutionalism were crucial parts of Goodnow and Freund’s bold agenda to expand legislative and administrative powers to meet the demands of social reform for increased legislative regulation, government aid, and even public ownership.⁸³ As Ernst Freund put it, “Professor

⁷⁸ Theodore Roosevelt, *The Right of the People to Rule*, Address at Carnegie Hall (Mar. 20, 1912), in S. DOC. NO. 473, at 7 (1912).

⁷⁹ *Id.* See also GOODNOW, *PRINCIPLES OF CONSTITUTIONAL GOVERNMENT*, *supra* note 68, at 11 (elaborating on Roosevelt’s sartorial metaphor that “the United States Constitution is to the country what a coat too small in size is to a man. If he buttons it up in front he splits it open behind.”).

⁸⁰ GOODNOW, *POLITICS AND ADMINISTRATION*, *supra* note 68, at 39, 82 (condemning the former “evils arising from the partial and interested administration of the law” and endorsing bringing public administration under the same operation of general rules as in the “impartial and upright” administration of justice generally). See also generally FLOYD R. MECHEM, *A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS* (1890); PARRILLO, *supra* note 11, at 117; Karen Orren, *Officers’ Rights: Toward a Unified Field Theory of American Constitutional Development*, 34 L. & SOC’Y REV. 873 (2000).

⁸¹ Note, *Ernst Freund: Pioneer of Administrative Law*, 29 U. CHI. L. REV. 755, 756 (1962).

⁸² Francis A. Allen, *Ernst Freund*, 29 U. CHI. L. SCH. REC. 6, 8 (1983).

⁸³ See GOODNOW, *supra* note 69, at 18–32, 291 (“[C]ourts may . . . conclu[de] that the powers of the state may constitutionally be used to protect the weaker classes . . . from the dangers not

Goodnow expresses a generally recognized view when he says that technical efficiency is not the only and not the first consideration in the administrative organization.⁸⁴ Modern American administration was no mere elite technical project. It was radical, critical, and in the end democratic. In Walter Weyl's words, it involved a "not unreverential breaking of the tablets of tradition" in the midst of "a democratic revolt."⁸⁵ Like Tocqueville, Freund acknowledged the "technical superiority" of existing forms of European bureaucracy, but he made it clear that the task of the age in America consisted of accommodating necessary administration to the historic project of self-government in an "extreme democratic spirit."⁸⁶

Antiformalism created important new room in American law for the emergence of a more generalized and public—rather than particularized and private—conception of administrative action. The second new democratic idea at play in the development of the modern administrative state further extended this general public conception by centering a vision of democratic administration built on the protection of public over and against private interest. Here, substantive issues of economic inequality, political unfairness, and systemic bias and discrimination moved to the very center of the American administrative project. Indeed, one of the leading motivations for the turn to modern administration was an acute awareness of the troubling ascendancy of private special economic interests in turn-of-the-century American politics. Administration was an attempt to reclaim the democratic high ground in a political regime thoroughly beset by plutocracy and corruption. Plutocracy and corruption were the ubiquitous political bywords of the day. And their meaning was clear and unambiguous to all observers—the anti-democratic capture of the public political sphere by corrupting private economic interests. Though "regulatory capture" by special interests is erroneously seen as a problem confined to administrative regulation, it must be remembered that modern administration was originally developed as an explicit response to the overwhelming capture of supposedly democratic legislatures, councils, cities, states, and even courts by dominant economic

merely of disease and unsafe conditions of labor, but as well from those which are attendant upon great economic dependence in an increasingly industrial society.").

⁸⁴ Freund, *supra* note 20, at 424. It is important to acknowledge here Freund's equally significant contributions to administrative law. See generally ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY (1928); ERNST FREUND, CASES ON ADMINISTRATIVE LAW: SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS (1911).

⁸⁵ WALTER E. WEYL, THE NEW DEMOCRACY: AN ESSAY ON CERTAIN POLITICAL AND ECONOMIC TENDENCIES IN THE UNITED STATES 5, 155 (1912).

⁸⁶ Freund, *supra* note 20, at 423-24.

interests. Anti-democratic capture, in other words, was not an unfortunate consequence of administration, it was arguably its *raison d'être*.⁸⁷

“Our resplendent plutocracy,” was Walter Weyl’s moniker for the corrupt and aristocratic alliance of “political ‘bosses’” and “railroad ‘kings’” and “Senate ‘oligarchies’”—the new agglomerations of corporate wealth and political power that produced a dangerous new mixture of the age-old threat of private interest trumping public democracy.⁸⁸ Such “corruption” marked the rise of an “indifference to public concerns” that John Dewey and James Tufts saw as beginnings of an undermining of “the democratic ideal”:

the control of the inner machinery of governmental power by a few who can work in irresponsible secrecy . . . incites to deliberate perversion of public functions into private advantages. As embezzlement is appropriation of trust funds to private ends, so corruption, “graft,” is prostitution of public resources, whether of power or of money, to personal or class interests.⁸⁹

As Vernon Parrington put it, from this “degradation of democratic dogma,” emerged the task of the times “[t]o curb the ambitions of plutocracy and preserve the democratic bequest for the common benefit of all”—to “wrest possession of the government from the hands of the plutocracy that was befouling it, and to use it for democratic rather than plutocratic ends.”⁹⁰ Administration and administrative law were at the center of that new democratic quest.

Now, of course, the corrupting threat of private versus public interest to democratic self-interest was not a wholly modern concern. In Plato’s *Republic*, Socrates noted that “in founding the city we are not looking to the exceptional happiness of any one group among us but, as far as possible, that of the city as a whole.” “Our aim in founding the State was not the disproportionate happiness of any one class, but the greatest happiness of the whole . . .”⁹¹ He bemoaned “the corruption of society” whereby “the guardians of the laws and of the government are only seeming and not real guardians” who “turn the State upside down.”⁹² Aristotle’s *Politics* also decried the corrupting effects of private interest and private vice on the commonwealth, noting, the “true

⁸⁷ See generally William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 25-48 (Daniel Carpenter & David A. Moss eds., 2014).

⁸⁸ See WEYL, *supra* note 85, at 2. See also *id.* at 80 (“The story of our railroad wreckers, of our distributors of worthless stocks, of our gentlemanly, manicured thieves of public lands . . . link[s] the present with the past in one malodorous chain of financial infamy.”).

⁸⁹ JOHN DEWEY & JAMES H. TUFTS, *ETHICS* 474-77 (1908).

⁹⁰ VERNON LOUIS PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT: VOLUME THREE: THE BEGINNINGS OF CRITICAL REALISM IN AMERICAN, 1860-1920*, at 283 (1930).

⁹¹ PLATO, *THE REPUBLIC*, bk. iv 129 (Benjamin Jowett trans. 2012).

⁹² *Id.*

forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many, are perversions.”⁹³ This theme and concern had powerful resonance throughout early American history—from the concerns of the founding generation with faction and corruption to the Jacksonian obsession with private privileges bestowed through corporate charters and other forms of private legislation.⁹⁴

Although concern about private interests corrupting the public welfare was as old as the republic, what was new at the turn of the twentieth century was an acute awareness of the unprecedented threat to democratic politics posed by the arrival of large-scale business and corporate interests in rail, oil, meatpacking, and insurance, whose corruptions were cataloged in a relentless series of muckraking reports and even fictional portrayals from Charles Francis and Henry Adams’s *Chapters of Erie* to Frank Norris’s *McTeague*, *The Octopus*, and *The Pit*.⁹⁵ Historian Richard L. McCormick correctly placed this basic “Discovery that Business Corrupts Politics”—the awakening of the people to illicit private business influence in democratic political life—at the very core of the entire progressive reform movement.⁹⁶ Ida Tarbell, Lincoln Steffens, Ray Stannard Baker and countless other journalists and scholars spent enormous time and energy exposing the various frauds, thefts, bribes, extortions, and schemes that seemed to now permanently link selfish robber barons to corrupt politicians (to use Matthew Josephson’s evocative terms).⁹⁷ As Thorstein Veblen concluded in his chapter “Business Principles in Law and Politics,” “constitutional government has, in the main, become a

⁹³ ARISTOTLE, *THE POLITICS AND THE CONSTITUTION OF ATHENS*, bk. iii 71 (Steven Everson ed., 1996).

⁹⁴ See generally THE FEDERALIST NO. 10 (James Madison); J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119 (1972); Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 WM. & MARY 401 (1982). The Boston Daily Herald complained in 1836, “They are *not* for the public good—in design or end . . . [T]hey are for the aggrandizement of the stockholders—for the promotion of the interest of the *few* . . . We wish to have public good and private speculation more distinctly separated . . .” OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, MASSACHUSETTS, 1774–1861*, at 213 (rev. ed. 1969).

⁹⁵ CHARLES F. ADAMS, JR., & HENRY ADAMS, *CHAPTERS OF ERIE AND OTHER ESSAYS* (1871); FRANK NORRIS, *MCTEAGUE: A STORY OF SAN FRANCISCO* (1899); FRANK NORRIS, *THE OCTOPUS: A STORY OF CALIFORNIA* (1901); FRANK NORRIS, *THE PIT: A STORY OF CHICAGO* (1903).

⁹⁶ Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 247 (1981).

⁹⁷ *Id.* See generally MATTHEW JOSEPHSON, *THE POLITICOS, 1865–1896* (1938); MATTHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861–1901* (1934).

department of the business organization and is guided by the advice of the business men.”⁹⁸

Corruption and the pursuit of selfish private and economic interests in the democratic public sphere was seen as the central problem confronting American democracy at the turn of the century. And time after time, administration was offered up as a distinctly democratic solution.

In the economic regulatory field, the reformer who most clearly articulated the explicit relationship between corruption and democratic administration was Charles Francis Adams. A lawyer, a historian, a regulator, a railroad executive, and a member of one of the most influential families in American politics and letters, Adams was also one of the central pioneers of modern administration as a response to the scandalous economic and political corruption that surrounded the railroad problem. The picture Adams painted was ominous and urgent: in “A Chapter of Erie,” he described the battle for control of the Erie Railroad between the Erie men—Jay Gould, Jim Fisk, and Daniel Drew—and Cornelius Vanderbilt as nothing less than the “Erie war”—so rife with corruption that participants were literally running away with bags of money.⁹⁹ For Adams, the railroad problem involved not just the economic crisis of expensive “natural monopolies” operating in an atmosphere of “ruinous competition.”¹⁰⁰ Rather, anticipating Richard McCormick, Adams contended that the railroad problem involved the explicitly political problem of private business interests corrupting the public body politic; “the sturdy corporation beggars who infested the lobby” of state legislatures.¹⁰¹ As Adams saw it, “our legislatures are now universally becoming a species of irregular boards of railroad direction” creating persistent “scandal and alarm.”¹⁰² “The effects upon political morality have been injurious,” he suggested, adding that “[m]any States in this country, and especially New York, New Jersey, Pennsylvania, and Maryland have now for years notoriously been controlled by their railroad corporations.”¹⁰³

⁹⁸ THORSTEIN VEBLÉN, *THE THEORY OF BUSINESS ENTERPRISE* 287 (1904).

⁹⁹ See generally CHARLES F. ADAMS, JR. & HENRY ADAMS, *A Chapter of Erie*, in *CHAPTERS OF ERIE* *supra* note 95, at 1. In an excellent account of the crucial role of Adams in modern regulatory policymaking, Thomas McCraw drew attention to one of Adams’s many classic depictions of Gilded Age corruption during the Erie war, featuring an interrupted meeting of Daniel Drew in his New York office: “[T]he astonished police saw a throng of panic-stricken railway directors—looking more like a frightened gang of thieves . . . One individual bore away with him in a hackney-coach bales containing six millions of dollars in greenbacks.” THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 16 (1984).

¹⁰⁰ ADAMS, JR., *supra* note 99, at 17. On the complicated economics of railroad regulation, see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 131–148 (1991).

¹⁰¹ CHARLES F. ADAMS, JR., *The Railroad System*, in *CHAPTERS OF ERIE*, *supra* note 95, at 427.

¹⁰² *Id.* at 417.

¹⁰³ *Id.* at 418.

So, here was the original democratic problem posed by the railroads—the capture of the existing elected legislators and officeholders by the newly dominant private economic interests. Adams made it clear that “neither competition nor legislation have proved themselves effective agents for the regulation of the railroad system.”¹⁰⁴ And so, he probed further, “what other and more effective [instrument] is there within the reach of the American people?”¹⁰⁵ Of course, Adams’s answer was administration. Noting that “there is no power which can purify a corrupted legislature,” Adams turned instead to the administrative regulatory commission—independent, permanent, and competent tribunals that he analogized to courts.¹⁰⁶ While it might be tempting to view this turn to an unelected special regulatory commission as inherently undemocratic and technocratic, the original impulse was quite the opposite. Adams noted developments in the Midwest, where administrative innovations like the Illinois Railroad and Warehouse Commission were explicitly demanded by popular uprisings and state constitutional conventions of the people. As Adams put it, “The railroad corporations, necessarily monopolists, constitute a privileged class living under a form of government intended to inhibit all class legislation.”¹⁰⁷ Therein lay the substance of antidemocracy—in the private political-economic aggrandizement of special interests. Democracy required a response in the form of general laws and general regulations administered again so as to re-establish the priority of general advantage. Adams recommended a strengthening of governmental administrative power to vindicate the general interest, arguing that “the task of supervising in some way the railroads of a modern State does constitute one of the necessary functions of government.”¹⁰⁸

Now, at this critical juncture in the historical development of the modern administrative regulatory agency, it must be noted that Charles Francis Adams, Jr. was under no illusion that administration was inherently democratic—forever magically immune from private influence, economic interest, or other forms of special pleading. On the contrary, he specifically anticipated the precise question of regulatory capture as early as 1871: “But it will be said, Who will guard the virtue of the tribunal? Why should the corporations not deal with [the commissions just] as [they did] with the

¹⁰⁴ *Id.* at 414.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 418.

¹⁰⁷ ADAMS, JR., *The Railroad System*, in CHAPTERS OF ERIE, *supra* note 95, at 428.

¹⁰⁸ *Id.* at 417. Adams interestingly relies on John Stuart Mill for this point: when practical monopolies exist, “it is the part of government either to subject this service to reasonable conditions for the general advantage, or to retain such power over it, that the profits of the monopoly may at least be obtained for the public.” *Id.*

legislatures?”¹⁰⁹ Who would guard the guardians? Adams’s answer to such questions went to the pragmatic and historical heart of the new democratic reform project. In a self-governing democracy, there was no final guarantee, no silver bullet, no complete economic or political theory that could forever preclude the capture and corruption of governmental institutions for private gain and anti-democratic purpose. Democratic vigilance was as necessary as it was eternal. In popular forms of government, the only solution was the pragmatic, ongoing, never-ending tradition of, as Adams phrased it, continually developing “all the checks and balances that human ingenuity can devise” to secure more democratic results.¹¹⁰ The solution to the crises of modern democracy, in short, was more democracy—and democracy, like the state, must always be rediscovered.

In the late nineteenth and early twentieth centuries, reformers turned to administration, independent agencies, and regulatory commissions as a new kind of democratic check on private economic corruption and public legislative capture. Rather than endorse bureaucracy as some kind of permanent technocratic response to political modernity, new democratic reformers explicitly emphasized the themes of corruption and democracy as a prelude to their administrative reform proposals. The peak years of muckraking disclosure from 1904 to 1908 were accompanied by a wave of legislative activity specifically designed to curb the influence of private interest and private money in American politics, including federal and state corrupt practices, laws regulating campaign contributions and the solicitation of funds from corporations, laws regulating legislative lobbying, laws prohibiting free transportation passes, and political reforms such as direct primaries.¹¹¹ The development of modern administration (as well as economic regulatory and police power measures) must be understood in this larger context of heightened concern about the susceptibility of existing democratic politics to capture and corruption by new organizations of private economic interest.

So while most discussions of administrative constitutionalism focus on problems of capture and democratic deficit in the creation of administration and bureaucracy, it is important to acknowledge the original democratic justifications for modern administrative reform at its moment of inception. In contrast to historical, legal, and socio-theoretical portraits of the rise of administration primarily as the product of perhaps inevitable modern turns toward professionalism, efficiency, technical expertise, and systems

¹⁰⁹ *Id.* at 427.

¹¹⁰ *Id.*

¹¹¹ See McCormick, *supra* note 96, at 266-267. See generally HELEN M. ROCCA, CORRUPT PRACTICES LEGISLATION (1928); EARL RAY SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION (1928); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011).

rationalization, the architects of modern progressive administration were adamant and explicit that their radical innovations were in the larger service of democracy. The original democratic ethos that animated the efforts of reformers to re-invent public administration and administrative law at the turn of the century was very much part of the creation of a more modern American state capable of effectively recognizing and serving the needs of a democratic public.

In his essay *Democracy and Educational Administration*, John Dewey was most explicit about the democratic aspirations of administrative reform. There he reiterated the new democratic principles that democracy was “much broader than a special political form” or “a method of conducting government.”¹¹² It involved that, surely, but for Dewey the key was the larger democratic “ends” that lie in the development of each and every “human personality”—the “way of life, social and individual,” that included the “participation of every mature human being” in the formation of the values, rules, and social institutions that regulated collective life.¹¹³ To view the public solely in terms of electoral means and to exclude it from actual participation in the governmental determination of public ends was but a “form of coercion and suppression . . . more subtle and more effective than . . . overt intimidation and restraint.”¹¹⁴ Aristocracy was “blasphemy against personality”¹¹⁵—for “[e]very autocratic and authoritarian scheme of social action rests on a belief that the needed intelligence is confined to a superior few . . .”¹¹⁶ Dewey volubly resisted any such anti-democratic tendency in administration whether educational, national, or municipal. A single fact fixed Dewey’s conception of distinctly democratic administration: “It cannot be conceived as a sectarian or racial thing nor as a consecration of some form of government which has already attained constitutional sanction.”¹¹⁷ Rather, democracy was but “a name for the fact that human nature is developed only when its elements take part in directing things which are common.”¹¹⁸ As he

¹¹² JOHN DEWEY, *Democracy and Educational Administration*, in PROBLEMS OF MEN 57, 57 (1946). See also *id.* at 64 (adding that the distinctive traits of “autocratic government” were “the least public spirit and the greatest indifference to matters of general as distinct from personal concern”).

¹¹³ *Id.* at 57-58.

¹¹⁴ *Id.* at 59.

¹¹⁵ JOHN DEWEY, THE ETHICS OF DEMOCRACY 25 (1888).

¹¹⁶ DEWEY, *supra* note 112 at 59.

¹¹⁷ JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 209 (1920).

¹¹⁸ *Id.*; see also ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 25 (1995) (articulating the democratic difference between John Dewey’s conception of administration and Walter Lippmann’s: “Dewey had a firmer grasp of reality than Lippmann . . . [H]e was deeply, almost congenitally opposed to the elitism that Lippmann’s proposals embodied . . . [T]he problem was to make democrac[tic society] . . . both a greater unity and one that reflected the full diversity of its members’ talents and aptitudes.”).

elaborated in *The Public and Its Problems*, the two key ingredients of modern democratic statecraft were: 1) the organization and active participation of the public; and 2) the proper organization of officials and institutions so as to secure those distinctly public rather than personal interests.¹¹⁹

CONCLUSION

In 1930, Felix Frankfurter opened the timely topic of “Expert Administration and Democracy” in *The Public and Its Government* with a prescient one-two punch: “Epitaphs for democracy are the fashion of the day But it is simply not true that the area of democratic government has contracted.”¹²⁰ As scholars and intellectuals have attempted to come to terms with the extraordinary growth of the modern American administrative state, they have most often worked with the highly visible and theorized themes of bureaucracy, technocracy, science, management, and expertise. And more frequently than not, the tendency has been to view those governmental changes as one-dimensional and fundamentally at odds with democratic governance as in *Democracy vs. Administration* or *Man vs. the State*. Just as frequently, scholars have proffered solutions to the “problem of administration” by invoking some kind of intermediating, moderating influence, such as the rule of law, an ancient or original constitution, civil society, the public sphere, social movements, or the market. But historically, we should not forget that the main impulse behind modern American administration was political not teleological or inevitable. The turn to contingent administrative solutions—as John Dewey, Jane Addams, Charles Francis Adams, and Charles Beard constantly reminded us—was part of a broader political-economic struggle and a social contest in favor of more democracy—a new democracy. Reformers witnessed traditional democratic procedures at the national, state, and municipal level too easily manipulated by urban machines, state legislative politicians, and resurgent economic and industrial interests so as to corruptly turn the *res publica* to private service. The administrative state was not emblematic of a “crisis in democracy,” it was the new democratic response. After all, the modern American administrative state was not created for its own sake—for the self-satisfaction of a professional class of technocratic statebuilders. Rather, like the creation of a modern constitution (which was also the product of intense political struggle and contest), the modern American state was created for the service of larger

¹¹⁹ JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 208 (Alan Swallow ed., 1954) (1927). For an excellent application of the architecture of this particular text to the problem of democracy and administration, see Note, *Deweyan Democracy and the Administrative State*, 125 *HARV. L. REV.* 580, 588 (2011).

¹²⁰ FRANKFURTER, *supra* note 16, at 123.

public and human ends. Woodrow Wilson's "New Meaning of Government" was but a first step on the road to the kind of public and social service-oriented state endorsed by Franklin D. Roosevelt in 1935:

[T]o increase the security and happiness of a larger number of people in all occupations of life and in all parts of the country; to give them more of the good things of life; to give them a greater distribution not only of wealth in the narrow terms but of wealth in the wider terms; to give them places to go in the Summertime—recreation; to give them assurance that they are not going to starve in their old age; to give honest business a chance to go ahead and make a reasonable profit; and to give everyone a chance to earn a living.¹²¹

As Roosevelt saw it, the administrative reforms of the New Deal were part of this new democratic tradition: "we have made the exercise of all power more democratic; for we have begun to bring private autocratic powers into their proper subordination to the public's government."¹²²

¹²¹ *Jobs, Security and Chance for Business Restated by Roosevelt as Social Aims*, N.Y. TIMES, June 8, 1935, at 1.

¹²² President Franklin D. Roosevelt, Second Inaugural Address, (Jan. 20, 1937), in S. DOC. NO. 10 (1937), at 2.