The TRUMP ERA Begins

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Today the crisis of American government is expressed in an ungainly phrase that rarely appeared in conservative vocabulary in the 1950s and 1960s—the “administrative state,” by which is meant the independent “fourth branch of government” that fits nowhere within the scheme of the Constitution as understood by its authors. Conservatives were slow to perceive the full nature and origins of the administrative state. They saw Marxism and radicalism as wholly foreign in character, and the character of Progressive Era and New Deal bureaucracy as primarily economic and narrowly constitutional in nature. They missed the benign-sounding homegrown versions of deeply radical political philosophy behind the administrative state, and especially the key role of Woodrow Wilson and similar Progressive Era intellectuals. If Wilson was mentioned at all, it was usually with a shrug or mild approval of his conventional expressions of Christian faith.

The urgency of the Cold War dominated the attention of conservative intellectuals and activists alike, and with the predations of the New Deal fresh in mind, it was understandable that the conservatism of that time would set the New Deal as the horizon line for their attack on current American politics. Only slowly did it come into focus that the New Deal was not the key turning point toward liberalism, and that socialism is not the chief threat to constitutional government and individual liberty.

The “administrative state” is not a new or recent phrase; it has been around for several decades, but its nature and depth was only recently more fully appreciated. Once confined chiefly to scholars and policy wonks, the term is now in widespread popular use. The administrative state is not the same thing as bureaucracy, with its connotations of wastefulness, inefficiency, red-tape, and rule-bound rigidity, nor is it limited to the post-New Deal welfare and entitlement state. Its character is best described by Alexis de Tocqueville in his famous chapter on “What Sort of Despotism Democratic Nations Have to Fear.” After struggling over what to call it, he could do no better than “soft despotism.”

The administrative state represents a new and pervasive form of rule, and a perversion of constitutional self-government. It has deep theoretical roots that were overlooked for a long time, roots inimical to the Constitution, thereby providing a lesson in the importance of understanding the principles of the Constitution. A chief feature of the administrative state is its relentless centralization, but with a reciprocal effect: its mandates, regulations, distorting funding mechanisms, and elitist professionalism have corrupted our political culture all the way back down to local government. It is the chief reason why Americans increasingly have contempt for government.

Unlike the attacks on the Constitution from Charles Beard, J. Allen Smith, Vernon Parrington, and other Progressive historians of the early 20th century that portrayed the Constitution as an anti-democratic fraud, the most potent part of Progressivism, and its chief legacy for today, was its theoretical attack on the American Founding. Progressivism reduced to the proposition that the principles of the founding were wrong for the 20th century, and needed to be discarded. The swirling currents of Darwinism, Hegelian historicism, and scientific hubris all combined, in the summation of Harvey Mansfield, Jr., to make...
Wilson “the most powerful intellect in the movement” and “the first American president to criticize the Constitution.”

**The Very Definition of Tyranny**

What bothered Wilson the most was one of the central features of the logic of the Constitution as explained especially in *The Federalist*: the separation of powers. Wilson laid out his criticism of the separation of powers in his book *Constitutional Government in the United States*, in which he argued in favor of a “Darwinian” Constitution. Government, he argued, is not a machine, but a living, organic thing. And “No living thing can have its organs offset against each other as checks, and survive.... You cannot compound a successful government out of antagonisms.” Wilson thought the conditions of modern times demanded that government power be unified rather than fragmented and checked. His great confidence in the wisdom of science and benevolence of expert administrators led him to the view that the founders’ worries about concentrated power were obsolete. He exhibited the combination of love for power and unbounded paternalism that is the hallmark of the administrative state today. He wrote in *Constitutional Government* that “I cannot imagine power as a thing negative and not positive,” and on another occasion that “If I saw my way to it as a practical politician, I should be willing to go farther and superintend every man’s use of his chance.” Quite a contrast from James Madison’s views expressed in *The Federalist* on the permanent reasons for suspicion of government power, as well as his specific understanding of the separation of powers: “The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” Wilson explained once that the increased role of the national government could be accomplished “only by wresting the Constitution to strange and as yet unimagined uses.... As the life of the nation changes so must the interpretation of the document which contains it change, by a nice adjustment, determined, not by the original intention of those who drew the paper, but by the exigencies and the new aspects of life itself.”

The legal academy was happy to oblige. Harvard’s Roscoe Pound, for example, remarked that “No one will assert at present that the separation of powers is part of the legal order of nature or that it is essential to liberty.”

The very reason Progressives like Wilson no longer shared the older liberal suspicion of government power was the new view that politics and administration could be neatly and cleanly separated, with administration entrusted to scientifically trained and disinterested experts, who by their very expertise should be insulated from political pressure. Frank Goodnow, a prominent political scientist of the Progressive Era and one of Wilson’s teachers, provides the best short summary of this view in his book *Politics and Administration: A Study in Government*:

The fact is, then, that there is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies. It is unconnected with politics because it embraces fields of semi-scientific, quasi-judicial and quasi-business or commercial activity—work which has little if any influence on the expression of the true state will. For the most advantageous discharge of this
branch of the function of administration there should be organized a force of government agents absolutely free from the influence of politics. Such a force should be free from the influence of politics because of the fact that their mission is the exercise of foresight and discretion, the pursuit of truth, the gathering of information, the maintenance of a strictly impartial attitude toward the individuals with whom they have dealings, and the provision of the most efficient possible administrative organization. The position assigned to such officers should be the same as that which has been by universal consent assigned to judges. Their work is no more political in character than is that of judges.

There is something almost charming as well as comic about this level of naivety, except that so many people in the administrative apparatus of government still believe it.

Unconstitutional Government

Blasting apart the separation of powers is the single most important change that enabled the rise of the administrative state—much more important even than the income tax. In recent years a number of leading legal scholars, such as Richard Epstein and Philip Hamburger, have said openly what would once have been unthinkable and unsayable in serious company: the modern administrative state is unconstitutional. Writing in the Harvard Law Review in the early 1990s, Gary Lawson of Boston University School of Law put the proposition with admirable directness and concision: “The modern administrative state is not merely unconstitutional; it is anti-constitutional. The Constitution was designed specifically to prevent the emergence of the kinds of institutions that characterize the modern administrative state.” And he says “the destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution.”

Lawson offers this illuminating one-paragraph description of the administrative state in action:

Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission. The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission’s rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission’s findings warrant an enforcement action, the Commission issues a complaint. The Commission’s complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semiautonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article
III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.

While legal scholars and policy wonks are devoting increased attention to the structure and methods of the administrative state, the idea that its suspect constitutional foundations will lead to any meaningful rollback has little or no purchase in contemporary jurisprudence. The main reason for this sorry state is that the roots of the problem go deeper than decades of bungled Supreme Court opinions, aggressive presidents, and a compliant or negligent Congress. The problem of the administrative state goes beyond a failure to internalize the insights of public choice theory, the restraints of economic cost-benefit analysis, or the erosion of the non-delegation doctrine. It is another example of what happens when first principles are forgotten or obscured. And the bitter irony of it is how conservatives unwittingly assisted this demolition job.

Follow the Leader

Wilson and most other leading Progressives hated the Declaration of Independence for its principle of individual rights rooted in "the laws of nature and nature's God." The central philosophical proposition of "Progressivism" is that History with a capital "H" or "Progress" with a capital "P" had replaced nature as the ground of political life. As implausible as it might seem today, the idea that science would unlock Newtonian "laws of motion" for history, thus making the course of the future as predictable as the acceleration of a falling object, was surprisingly widespread. And if history is scientifically predictable it is controllable. The world of chance and accident could be conquered. "Progress!" Wilson wrote; "No word comes more often or more naturally to the lips of modern man.

The State, now with a capital "S" to go along with capital "H" History and capital "P" Progress, is the agent of purposeful change. Out of this progressive philosophy the modern understanding of "political leadership" was born—the necessity of what George H.W. Bush unwittingly but correctly mocked as "the vision thing." "Leadership" was a term almost wholly absent from the vocabulary of the founders. Modern "leadership" is distinct from the older understanding of statesmanship. A progressive leader sees ahead, and thus forces the pace of change, whereas statesmanship is more anchored in the understanding of the limits of power which dictates, dominates: the materials yield. Men are as clay in the hands of the consummate leader.

That bureaucratic government is the Democratic Party's partisan instrument is the most obvious yet least remarked upon trait of our time.

There is much else of this ominous character throughout this long, confusing essay, including a studied disavowal that he is any kind of radical or socialist. At the heart of Progressivism is a confusion and contradiction that has always made Progressivism a vague and tricky creed to sort out. Progressivism saw itself as the moderate alternative to revolutionary socialism, but its economic inclinations certainly tended toward the kind of central authoritarian control of the economy that is nearly indistinguishable from socialism. It was not explicitly utopian, but its underlying philosophy ran in that direction. The Progressives were always imprecise about how much or how far human nature might be malleable.

But by far the greatest contradiction was the idea that Progressivism would be more populist and elitist at the same time. Practi-
ly new meanings. (Wilson advocated for what he called "mature freedom," which was very different from traditional understandings of liberty.)

More and More about Less and Less

The first world war and its sequels put an end to the easygoing assumption of inevitable or irreversible progress, but the residue of Progressive theory—most especially the idea of the scientifically-managed administrative state—was firmly in place, to be picked up and expanded by the New Deal after the brief interregnum of the "return to normalcy" in the 1920s. It didn't take long during the New Deal to recognize that the idea of "neutral" or "disinterested" expert administrative government was a farce, that in practice independent bureaucratic entities would become the active agents for discrete interests and ideological impulses, the overwhelming majority being client groups of one party. That bureaucratic government is the partisan instrument of the Democratic Party is the most obvious yet least remarked upon trait of our time (though this lack of public identification can be taken as additional evidence of the incompetence of the Republican Party).

Economists tended to call this phenomenon "agency capture," and while accurate, it goes nowhere near the heart of the matter. A central aspect of so-called "expert" administration beyond organizational self-interest and clientism is the deliberate gnosticism of its operation. Max Weber, the preeminent early theorist of bureaucratic government as well as a progenitor of modern social science, foresaw this in the 19th century. The tragedy of Weber was his inability to shake loose from his positivist fact-value distinction, despite signs that he recognized the inadequacy of a world without the ability to make rational, objective moral judgments and politics without great statesmen.

American Progressives had none of Weber's honest doubts and anguish, chiefly because of their total absorption of historicism (and also because Weber's works were mostly unknown in America at the time). And if Progress and History soon waned as a dominant, driving foundation for Progressive politics, the positivist distinction between facts and values, which corresponds to the distinction between administrative questions and political questions, endured. By mid-century the behavioral revolution came to dominate political science just as much as the rest of social science, replacing History as the ground of mastery. Political philosophy was declared to be dead. Behaviorism was an even more explicitly deterministic outlook than Progress, but it shared with Progressive historicism the same convenient but self-contradictory trait that it preserves for the rulers alone freedom of choice and action. The "scientific" elites of the administrative state were still in business.

Although behaviorism provoked furious debates about methodology and the place of political philosophy in political science around mid-century, it soon waned too. It's embarrassing now to look back upon the cartoonish rigidity of the fact-value distinction and the confidence that science was on its way to unlocking causation in humans and human affairs, while openly placing questions of "value" or the ends of politics—beyond the reach of human reason. One of Leo Strauss's signal contributions was explaining how Weber's fact-value distinction was in the end indistinguishable from nihilism, despite the futile attempt of Weber and his successors to preserve some sphere of objective reality for "values."

The behaviorism of mid-century has been replaced by regression modeling, which is scarcely better, though more modest in its pretensions. Edward Banfield asked: "Would anyone maintain that in the Convention of 1787 the Founders would have reached a better result with the staff of model builders?" Walter Berns thought the detachment from taking moral questions and human excellence seriously made behavioral political science diabolical: "It would be ironic if the science that once made man free, were now to become the instrument of enslavement."

This wasn't just a critique of narrow specialization, of "knowing more and more about less and less," as Strauss put it. Lots of mainstream and left-leaning political scientists also decried the fact-value distinction, precisely because of the moral relativism it imposes like a straightjacket, and the self-limiting obscurity of increasingly technical specialization. In fact, it is hard to say whether the revolt against the fact-value distinction was stronger from the Right or the Left. On any college campus today there is no relativistic hesitation over the categorical moral wrongness of racism, sexism, patriarchy, "heteronormativity," genocide in Darfur, apartheid in South Africa, the historic treatment of indigenous peoples everywhere, and so forth.

None of the current categorical imperatives of the Left can be traced back to a ground of fundamental principle beyond a vague, unlimited egalitarianism, always requiring ever increasing political exertions to achieve. Instead, as noted previously, the moral ground is the "side of history." In other words, what has happened is a revival of the earlier Progressive historicism of Woodrow Wilson, only with objectives borrowed Chiefly from Marxism. The return of historicism along with the revival of the "progressive" label is not a coincidence.

Going Deeper

One might wonder whether we weren't better off in the bad old days of behaviorism and the fact-value distinction. In the new horizon of today's historicism not only is there no rational basis for values, but facts aren't faring very well either. It is a hard call, as the progressive impulse of our time ends up being just as deterministic as behaviorism. The "side of history" may be a gauzy, low-grade form of determinism, but like all determinisms it is the ground of despotism and preserves for the rulers alone freedom of choice and action. Today's progressives evince the same attitude as Wilson: "Resistance is left to the minority, and such as will not be convinced are crushed."

The impulse goes much deeper than the censorious castigation of "hate speech" and the open attacks against freedom of speech that have been steadily gaining ground. It is not a coincidence that the frontier of leftist "critical thinking" questions language itself, holding that language is a subjective and arbitrary tool of power and control, rather than as the tool of human reason and deliberation. This is an indirect way of saying that reason and objectivity are impossible, a view leftists tend to conceal or obscure if they can. (I have occasionally baited leftist "critical theorists" by asking, "If language is merely an arbitrary tool of power detached from any objective reality, is it not only right to wonder why are we having this conversation, but how are we having this conversation?")

Debunking language itself is to attack the very root of human freedom, because it is through speech that we reason together and form opinions on what is just and unjust, good and bad, high and low. It is reason expressed through speech that sets humans apart from the lower animals. Denying the metaphysical nature of speech derives from denying the idea of human nature. (Or if there is a human nature, progressives are intent on changing it.) If language and speech itself can be detached from reason, there is no reason to believe in individual liberty.

The doctrine of power combined with the revived doctrine of History as Progress gives us the insatiable, unlimited administrative state we see today. The administrative state now is aimed less at correcting market fail-
ures than moral failures. This is why the federal bureaucracy without hesitation extends the Civil Rights Act of 1964 to tell North Carolina that it cannot have single-sex bathrooms, and why Title IX is extended well beyond legislative intent to institutionalize the radical feminist ideology of “rape culture” heedless of either facts or due process of law. This is not just limited to government bureaus. As James Burnham argued, the “managerial society” would come to permeate the world of “private” business as much as government. We can see this mentality in the case of Brendan Eich, hounded out as CEO of Mozilla for having once held the same position on gay marriage that Barack Obama and Hillary Clinton held at the same time, or the number of corporations that announced they would cut back business activity in North Carolina over the bathroom bill. “Resistance is left to the minority, and such as will not be convinced are crushed.” And this project is self-perpetuating.

Today’s progressives do not think of themselves as tyrants any more than the Progressives of Wilson’s time, but the underlying doctrines are metaphysically identical to totalitarianism. The earlier Progressivism was modest and relatively restrained compared to its successors today. At least Progressives like Theodore Roosevelt and Wilson were setting after genuine social ills—child labor, workers compensation, substandard housing, public health and safety, economic monopoly power (even if badly misunderstood). If there was a tendency toward utopianism, it was tempered by the perception that socialism didn’t fit the American character. Today’s progressives are more fully utopian, though their utopianism is diffuse or obscured by deliberately obscure theory, and above all any conception of American exceptionalism is hated.

The point is: the problem of the administrative state is much more than a problem of economic illiteracy, decayed constitutionalism, or modernization, which is why the numerous gimmicks to restrain or reform it, such as cost-benefit analysis, affirmative congressional consent to new regulations, rolling back judicial deference, or other legal fixes will not do very much to change the direction of rule today. The problem is more serious than bad policy and bad law. If it is not stopped and reversed, it will result in the end of limited constitutional government.

Restoring the American Idea

As I suggested at the outset of this essay, the modern conservative movement was slow to recognize Progressivism in its fullness. It is clear in hindsight that everyone, especially conservatives, made a mistake 25 years ago in thinking that the collapse of the Soviet Union and the eclipse of Marxism meant that liberal democracy, individual rights, and open markets had achieved an enduring triumph—the famous “end of history” thesis. The late Harry V. Jaffa was one of the few voices at the time who disented from the widespread triumphalism:

The defeat of communism in the USSR and its satellite empires by no means assures its defeat in the world. Indeed, the release of the West from its conflict with the East emancipates utopian communism at home from the suspicion of its affinity with an external enemy. The struggle for the preservation of Western civilization has entered a new—and perhaps far more deadly and dangerous—phase.

The combination of Progressivism’s embrace of historicist philosophy and positivist scientism is neither an exhaustive nor exclusive account of what ails America. Fred Siegel and other historians rightly point to literary and social currents of the time that simply despire middle-class American life and consciously seek its destruction for reasons unrelated to formal nihilism. It is also hard to disentangle from this story other imported and adapted ideologies, such as the Frankfurt School, French linguistics, deconstructionism, and so forth, which have done for American intellectual culture what the British invasion did for rock and roll. But it is hard to see the constitutional deformations succeeding to the extent they did over the last century, the crisis of the Great Depression notwithstanding, in the absence of the conscious Progressive assault on the American Founding. It makes clear that restoring the American republic to something resembling the nation the founders designed requires fighting back through Progressivism at the level of basic political philosophy.

That is a tall order, and not an easy case to make on the retail level. The ordinary or common sense understanding of change and “progress” provides today’s progressives with a superficial home field advantage rhetorically. On the other hand, public confidence in American government is at an all-time low, in part because the administrative state is incompetent at its increasingly ambitious ends, and as its increasingly arbitrary character becomes more evident.

There is also the intellectual exhaustion of the Left. Though the Left still has its celebrity intellectuals, the deliberate obscurity of their thought limits their broader public appeal. The least that can be said of the Progressives and their immediate successors is that they had a number of prominent public intellectuals. Sociologist Robert Nisbet observed: “Royce, James, Dewey, and Russell were household names. Who at this moment would have the slightest interest in what a living philosopher had to say on any subject, cosmological, moral, political, or social?”

Given that the Left today is explicitly obsessed with power, perhaps it no longer needs a pseudo-rational foundation, or feels a need for serious philosophical engagement. But this is among the reasons for the decline of the humanities in higher education, of the evident and growing boredom among the dwindling number of non-radicalized students who wander haplessly into classrooms in the humanities and social sciences, and sensibly come away with the impression that there is nothing important to learn. This provides hope that a return to the older way of studying political things would find a large and eager audience.

Steven F. Hayward is a senior fellow of the Claremont Institute. This essay is adapted from his new book, Patriotism Is Not Enough: Harry Jaffa, Walter Berns, and the Arguments that Redefined American Conservatism (Encounter Books).
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