The Progressive Revolution in Politics and Political Science:
Transforming the American Regime

Edited by

John Marini and Ken Masugi

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Chapter 1

Progressivism and the Transformation of American Government

Thomas G. West

Since 1900, but especially since the mid-1960s, American government has been changing into a new form that has been called the administrative state. This revolution—which we will call liberalism, as it calls itself—is as radical as was the American Revolution in 1776. It began with a new theory of justice and of government.

What happened over the last hundred years was, first, a vigorous theoretical attack on the Founding principles, followed by a series of practical victories for the new approach to government. Charles Kesler has labeled the key moments in these victories "the three waves of liberalism," corresponding to the three most productive liberal presidents: Woodrow Wilson, Franklin Roosevelt, and Lyndon Johnson. This long battle has also seen liberal retreats and occasionally outright defeats, as the epic struggle between liberalism and the older constitutionalism continues.

We can now look back on the twentieth century as a time of a great contest for the American soul between two strongly opposed conceptions of justice, with the liberal view winning out, but only incompletely. The contest continues in the new century. Meanwhile, the American people remain deeply divided, not just *among* themselves but also *within* themselves, over which of the two fundamentally opposed conceptions of justice is right.

MODERN LIBERALISM AND THE REJECTION OF NATURAL RIGHTS

Enlightenment thinkers like John Locke, William Blackstone, and Montesquieu were the three most cited European philosophers in the political writing of the Founding era. Following the lead of Rousseau, later writers, many of them Germans, developed an approach to politics that turned against the Enlightenment and the American Founding. Thinkers like Hegel and Marx and their students became the teachers of the founders of modern American liberalism.

In the late nineteenth century, educated Americans began to turn away from the natural rights theory of the Founding. Their doctrines of relativism and historicism—the denial of objective truth and the claim that "values" change over time—took its place. Relativism is the view that there is objective knowledge only of facts, but not values. Science can know the truth about the material world, but it cannot tell us how to live. Historicism claims that all human thought is rooted in a particular historical time and place, so that the human mind can never escape the historical limitations of its own time. These two doctrines led men like Henry Adams to dismay and despair over a universe ultimately devoid of meaning.[1] But relativism and historicism were combined by other men (somewhat inconsistently) with an enthusiastic faith in Science and Progress. This rejection of the Founding principles occurred on both the right and the left of the political spectrum.

On the right, for example, Progressive era sociologist William Graham Sumner wrote: "There are no dogmatic propositions of political philosophy which are universally and always true; there are views which prevail, at a time, for a while, and then fade away and give place to other views."[2] On the left, Woodrow Wilson openly criticized the Founding principles as obsolete. In *The State*, Wilson dismissed with scorn the Founders' theory that government is grounded on a social compact and a law of nature. Progressive era liberals like Edward Bellamy, Herbert Croly, and John Dewey were equally hostile to the Founders' approach.[3]

Just as the ground of the Founders' natural rights theory was human nature as a permanent reality, the ground of the modern rejection of natural rights was a denial of human nature. Historian Richard Hofstadter's casual dismissal of the Founders' view in the 1940s was typical among liberal intellectuals throughout the twentieth century,

for whom a Darwinian view of human nature was unquestioned orthodoxy: "But no man who is as well abreast of modern science as the Fathers were of eighteenth century science believes any longer in unchanging human nature."[4]

John Dewey, the most influential founder of modern liberal theory, began writing during the Progressive era but continued to influence the development of modern liberalism over the course of the entire first half of the twentieth century. Dewey expands on the idea that human beings have no nature: they are born as empty vessels, as nothing in themselves. As such, the individual becomes a product of a historical context: "social arrangements, laws, institutions ... are means of *creating* individuals.... Individuality in a social and moral sense is something to be wrought out."[5] There can be no natural rights because there is nothing of any value that human beings possess by nature that they could be said to have a right to. "Natural rights and natural liberties," Dewey insists, "exist only in the kingdom of mythological social zoology."[6] The Founders thought that intelligence was and should be uniquely one's own. Jefferson for example famously argued that "Almighty God hath created the mind free."[7] For Dewey, on the other hand, intelligence is "a social asset," "clothed with a function as public as its origin." That is because society, not the individual, makes the mind. Therefore society, not the individual, is the rightful owner of the human intellect.[8]

Dewey's rejection of human nature was also a rejection of the divine. In the Bible, Paul says that it is in God that "we live and move and have our being." Dewey writes that it is "in the social conditions in which he [man] lives, moves, and has his being."[9] For Dewey, neither nature nor God makes man. Man makes himself, collectively, through "social conditions." Reality is socially constructed.

Most Americans in the Founding era were religious believers. Others at that time, whether believers or not, held that reason is capable by itself of discovering the same timeless truths. It does not matter to Dewey whether they were followers of Reason or of Revelation. They were wrong in either case. "They put forward their ideas as immutable truths good at all times and places; they had no idea of historic relativity."[10]

The repudiation of the idea of natural law and natural rights requires a new understanding of the purpose of government and its

relationship with the people; in short, it requires a new definition of democracy. Dewey argues that human beings *are* "nothing in themselves"; it follows that they can *do* nothing on their own. According to Dewey, intelligence, talents, and virtues, as well as rights—all the things the Founders said humans were born with or acquired through the exercise of their natural talents—are produced by the social order: "The state has the responsibility for creating institutions under which individuals can effectively realize the potentialities that are theirs."[11] In Dewey's view, it is a mistake for government merely to protect people from injuring each other and otherwise to leave them alone. Government must take in hand the actual direction of people's lives.

For Dewey, the old definition of democracy as government by the people through elected representatives is "atomistic" and superficial. Worse, "[o]ur institutions, democratic in form, tend to favor in substance a privileged plutocracy." Securing the right to private property was central to the Founders' understanding of the purpose of government. For Dewey, private property is the enemy of liberty. Today, "private control of the new forces of production ... would operate in the same way as private unchecked control of political power."[12] (Owners of private property were similarly demonized by President Franklin Roosevelt as "economic royalists."[13]) Instead of protecting the integrity of the private sphere, government must invade and transform it. "There still lingers in the minds of some," Dewey writes, "the notion that there are two different 'spheres' of action and of rightful claims; that of political society and that of the individual, and that in the interest of the latter the former must be as contracted as possible." Democracy is redefined as "that form of social organization, extending to all the areas and ways of living, in which the powers of individuals shall ... be fed, sustained, and directed."[14] Consider that final word: "*directed.*" For Dewey, there is in principle no private action or thought that is not a legitimate object of government control and direction.

Dewey's theory reverses the Founders' view of the relationship between the people and the government. For Dewey, people do not delegate power to the government. Instead, the government empowers the people. Dewey viewed people as essentially needy or disabled, unable to function without the substantial help of government programs. In his view, it is precisely when government leaves people alone that this need or disability is greatest.

Early twentieth century liberalism focused on the needs and disabilities of workers. Starting in the 1960s, government turned to the needs and disabilities of racial minorities. Women were added to the growing list of victims in the 1970s, the disabled in the 70s and 80s, and homosexuals in the 90s. In all of these cases, the role of government is to single out those whom it considers most disabled or victimized to receive special programs and treatment so that they too can become "free" in this Deweyite sense of freedom.

Dewey's approach to politics was a liberal variation on Hegel's historicism of progress, with the dogmatic rigor of the Hegelian dialectic abandoned. German political thought swept through American universities in the late nineteenth century. As men like Wilson and Dewey openly acknowledged, the universities were deeply affected by the German attack on the idea of natural right in general, and on the social compact principles of the Founding in particular.[15]

In its American version, this German-inspired denial of human nature leads away from an understanding of equality in terms of natural rights. Equality is now understood as something to be produced by government through *unequal* treatment. President Lyndon Johnson endorsed this view in a speech at Howard University in 1965: "We seek ... not just equality as a right and a theory but equality as a fact and equality as a result."[16] Special programs to take money from haves and give it to have-nots, especially blacks, were greatly expanded to meet this demand.

To achieve "equality as a result," rights had to be redefined. For the Founders, natural rights were rightful claims to one's own talents and possessions. As James Madison wrote in the tenth *Federalist*, there is a "diversity in the faculties of men from which the rights of property originate.... The protection of these faculties is the first object of Government."[17] In the modern liberal view, rights are rightful claims on the talents and resources of others. The Founders spoke of the natural rights to life, liberty, and the acquisition of property. To secure these natural rights, the law must establish civil rights. These included, among others, the right to free exercise of religion, the right to free speech, the right to make contracts and start a business, the right to sue and testify in court, the right to equal protection of the laws, and the right to trial by jury when one is accused of crime. We today tend to speak instead of an expanding list of rights that can be obtained

only through government programs that provide citizens with money, goods, and services. These include the right to a decent wage, to housing, to education, to medical care, to food, to day-care, and even, in Franklin Roosevelt's "economic Bill of Rights," a right to recreation.[18] In practice, "rights" have often come to mean that people who are not as hardworking, as talented, as lucky, or as responsible have rightful claims on the work, talent, luck, and responsibility of others.

The principles of modern liberalism are strongly opposed to the principles of the American Founding, as Dewey and other early liberal theorists knew and sometimes frankly admitted. To see the contrast, consider this typical remark of Jefferson, which could have been authored by almost any member of the Founding generation: "To take from one, because it is thought his own industry and that of his fathers has acquired too much, in order to spare to others, who, or whose fathers have not, exercised equal industry and skill, is to violate arbitrarily the first principle of association, the guarantee to everyone the exercise of his industry and the fruits acquired by it."[19] Jefferson's reference to "the first principle of association" is to the basic purpose of government, the protection of one's natural rights to life, liberty, and property. Those rights include the free use and possession of the fruits of one's own talents and industry. The "association" or civil society formed by the social compact is meant to secure those rights against those who would violate them by taking part of one's own income and giving it to someone else. The Founders, of course, were not cruel, and they believed, as Americans still do, that government must provide for extreme cases of destitution. In this minimal "safety net" sense they acknowledged a right to welfare. But they never opposed wealth as such, nor did they promote the redistribution of income to the poor who were able to provide for themselves.[20]

THE INSTITUTIONAL CHARACTER OF MODERN LIBERALISM

The modern denial of human nature and rejection of natural rights undercuts the Founders' idea of constitutionalism. For them, the purpose of constitutionalism is to direct and limit the operations of government in order to protect equal natural rights. Circumstances may call for constitutional amendments; but if the Founders were right, the basic purpose and duties of government will never change. A written

constitution that is hard to change becomes an impediment when the government seeks to assert a new vision of social justice, one that requires increased control over what was once regarded as the private sphere.

Early theorists of modern liberalism praised democracy loudly, and they spoke constantly of the supposedly undemocratic features of the Founders' constitutionalism. They promoted direct election of senators instead of election by state legislatures. They advocated party primary elections to replace nominations made by a consensus of locally-based elected politicians. The Progressives urged states to adopt the initiative and referendum to allow direct popular participation in lawmaking.

But other favorite Progressive era reforms were not so "democratic" in character. The Progressives enacted registration requirements that cut down on voter participation. Progressives were scathingly critical of democratically elected "politicians," a term that came to be equated with "corrupt" and "narrow" and "backward." The overall effect of the Progressive program took power out of the hands of elected officials—the "bad" politicians—and placed it instead into those of "good" administrators, supposedly neutral, "scientifically" educated "experts." The city-manager form of local government, which transferred effectual power over local politics to officials insulated from electoral accountability, was one of the fruits of this movement. In fact, far from believing in democracy in the Founders' sense, Progressive intellectuals were deeply suspicious of government by the people, except when the people and their elected representatives were kept far from the actual day-to-day operation of government. Even seemingly democratic reforms like the initiative had the effect of removing power from elected officials whose roots were in local communities.

This was a blow to the older American system of local self-government as the core of day-to-day democratic politics. In the Constitution of 1787, there are no national elections, and elections for the crucial legislative body are local or are conducted by locally elected officials. House elections are by districts, and senators were chosen by states. Since members of state legislatures were even more tied to localities than members of the House of Representatives, the national legislature consisted mostly of members of the middle class who had gained the respect of people in their communities. Progressive intellectuals

argued that power should be transferred away from these elected officials, who were often described by Progressive era writers as corrupt and parochial. Instead, power was given to supposedly neutral, scientifically educated "experts." Woodrow Wilson's "The Study of Administration" (1888) argued that America suffers from "the error of trying to do too much by vote." We must learn from the example of Europe, said Wilson, where administrators have far more power than in America. "The cook must be trusted with a large discretion as to the management of the fires and the ovens," and the "cook" is to be a modern university graduate, not a small-town notable or one of his cronies.[21]

James Landis, in agreement with Wilson, attacked the Founders' separation of powers as an obstacle to efficient, scientific government in *The Administrative Process* (1938). This book was a political scientist's defense of the administrative agenda of Roosevelt's New Deal. Landis argued that government expertise will be unable to "control" the "economic forces which affect the life of the community" unless the old separation-of-powers model is discarded. In order for government to direct its powers toward "broad and imaginative ends," the constraints of the rule of law must be overcome. In modern times, Landis writes, government "concerns itself with the regulation of the lives of the people from the cradle—indeed, even ante-natally—to the grave, and being unable itself to deal with all the details, it delegates to the government departments the task of carrying out its policy." Landis explains: "With the rise of regulation, the need for expertness becomes dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency."[22]

Landis' overall point is simple: The rule of law was suited to a condition when government was not expected to do much more than protect people from using coercion against each other. But because of a change in historical circumstances (modern industrialization), that is no longer true. The older view was that government should secure the people's natural rights to life, liberty, and property. But in modern times, when private associations like family, church, and business can no longer be trusted to take care of the daily affairs of the nation (as Landis implies), government must involve itself in the details of

everyday life that were formerly left to local government and private choice. Landis speaks of the regulation of industry; but his argument, like Dewey's, extends the scope of government in principle well beyond the sphere of business and into every aspect of life. Government cannot deal effectively with this vast mass of concerns through laws passed by a collection of amateur citizen-representatives in Congress. Instead, power must be delegated by Congress to professional experts, presumably educated in advanced institutions such as the Ivy League universities, and they must have a free hand to exercise these vast powers at their discretion. These educational institutions that supply the officials of the liberal state are indeed "neutral" in the perspective of their understanding of science and social science. But they are *not* neutral when it comes to the opposition between liberalism and the older constitutionalism. A major part of the agenda of modern social science is to promote the development and growth of the modern administrative state.[23]

The contrast with the Founders' view is striking. Their theory and practice of government rested on a cautious confidence in human nature, qualified by the sober recognition that through the ages, men in power who operate independently of the people have been all too likely to abuse that power. This applies especially to those who have some credentialed claim to "expertise," such as priestly robes, aristocratic blood, or university degrees. The Founders favored competence in government, of course, but they expected experts to be subordinate to the rule of law. In the case of executive branch administrators, they were to be subordinate to the president's direction. That is, the Founders insisted that all important government policymakers be directly or indirectly responsible to the people through periodic elections.

The confidence of modern liberalism in the authority and power of science leads it into what the Founders would have regarded as a naive forgetfulness about the permanent threat of despotism, a threat that is inherent in human nature itself. As Madison writes in *Federalist* No. 10: "The latent causes of faction"—factions are groups that promote their own selfish interests in opposition to the common good—"are thus sown in the nature of man." Liberals, with their faith in progress, tend to believe, with Francis Fukuyama, that the world is inevitably on the way to democratization everywhere, that there is no going back to the bad old days of tyranny and slavery. Woodrow Wilson

frequently affirmed that the question of government had been essentially settled by history. This was on the eve of the century that saw the two most murderous regimes in all human history, Soviet Communism and German Nazism.[24] Had it not been for the United States, one of those two regimes might now be ruling the earth.

The proponents of liberalism did not think of their reforms as undemocratic. Wilson said that it would be a mistake to bring European-style administration to America without keeping it on a democratic leash. But in practice, Landis' proposed transfer of power from private and local control to centralized governmental bodies, substantially insulated from the pressure of elections and responsibility to the people, has proved to be a leading feature of modern government. Indeed, in spite of their democratic rhetoric, the advocates of modern liberalism have often been motivated by their confidence that they alone, free of the supposed bigotry and narrowness of selfish businessmen and fundamentalist Christians, could lead the nation to freedom and justice.

The complete picture of modern government is hard to see, because its scope is so big. But the basic principle is clear. The administrative state is animated by a pervasive distrust of private associations (family, church, business, fraternities, clubs, political parties, and lobbyists) and a corresponding confidence in the capacity of public officials to direct the lives of the people. Government responds to the alleged or real deficiencies of private institutions by setting up agencies, staffed by what it claims to be scientifically trained neutral experts, to oversee the details of one or another of the vast areas of American life that used to be handled by local government or private choice. Since the details of the various activities to be regulated are so extensive, Congress could not pass general laws to deal with them, even if it wanted to. "Once administration was centralized," notes political scientist John Marini, "no legislative body could legislate, in a general manner, all the details of the life of a great nation. Congress had to delegate authority to administrative bodies."[25]

THE ADMINISTRATIVE STATE IN ACTION

Modern liberalism has succeeded in taking over the bulk of the universities, the public schools, the major television networks, the most

influential daily newspapers, and the movie and popular music industries. Yet in spite of all that, America today is only partly governed by liberal principles. In fact, the current system is neither the Founders' constitutionalism nor the liberal administrative state. It is an incoherent blend of both. When it comes to theory or science, incoherence is always a vice. But in practical affairs, incoherence has its virtues. In some respects the governments of the United States—of the towns, counties, states, and nation—operate in pretty much the same way now as they were intended to operate from the beginning. In other respects these governments are run today in ways that would have deeply troubled the Founders and presidents like Jackson, Lincoln, Cleveland, Coolidge, and of course Reagan.

To be sure, the Founders' original understanding of constitutional government is not altogether dead. It can be seen every day in the ordinary enforcement of the criminal and civil law in state courts. The legislative branch passes laws defining injuries and setting the penalties—laws against murder, for example. The executive branch, such as the state or local police, investigates crimes and make arrests. Another part of the executive branch, perhaps a county district attorney, indicts the person who is accused of the crime and prosecutes. The judicial branch, the judge and jury, conduct a trial to determine whether the person is guilty or not guilty.

This older way of governing coexists uneasily with the institutional and legal structure advocated by the theorists of modern liberalism. This development is not consistent with the rule of law in the Founders' sense. Political scientists call this new system the *administrative state*. In America today this administrative state exists side-by-side with—and in tension with—the Founders' constitutional order.

Further, much of the power previously held by towns and counties is now exercised by state governments (e.g., public education) and the federal government (e.g., welfare policy). Power previously exercised by states is increasingly federalized (setting of broad educational policies, public health regulations, workplace safety regulations). Activities that were previously thought to be purely private, such as decisions on whether to hire, fire, or promote employees in private businesses, are increasingly controlled by state and federal civil rights law. Power that used to be exercised, at whatever level of government, by officials accountable to the people directly or indirectly through

elections, is increasingly held by unelected administrators whose accountability to the public is weakened.

David Schoenbrod is an ex-liberal, a Yale Law School graduate, who was a key player in the environmental movement of the 1970s. Here is his description of his involvement with the National Resources Defense Council (NRDC), a major activist group that was instrumental in developing modern environmental law:

> Congress passed the Clean Air Act in 1970 with hardly a dissenting vote, and President Nixon signed it with great fanfare. But the statute took no concrete action to curb lead as a health hazard. All it did was to erect an abstract ideal—healthy air—and delegate responsibility for realizing that ideal to the newly created Environmental Protection Agency (EPA) ... Should the EPA falter in doing its duty, any citizen could bring suit in federal court. At NRDC, we were set up to do just that.
>
> Here was government the way an elitist like me thought it ought to be. Experts were empowered to achieve an ideal, and I was empowered to make sure they did.[26]

This new understanding of government can also be seen at work in the evolution of civil rights law. In the 1964 Civil Rights Act, preferential treatment by race or sex is banned. But in that act Congress set up an agency, the Equal Employment Opportunity Commission, that it later authorized to write regulations and to handle preliminary adjudication of complaints of discrimination in employment law. This agency's regulations quickly turned the original law on its head, requiring de facto quotas and timetables for hiring by race, and banning many employment tests that were demonstrably useful in predicting job performance (and therefore permitted under the language of the 1964 act) but which had a "disparate impact" on members of certain racial and ethnic groups. What this means is that the actual civil rights "law" that the nation lives by was made not in Congress, but in the EEOC and other federal agencies. Federal courts have largely gone along with this de facto rewrite of the law. Actually, civil rights "law" has been made and remade many times over in several different federal agencies, including the Department of Justice, the Office of Federal Contract Compliance in the Labor Department, and the Office of

Civil Rights in the Department of Education, with plenty of input from the federal judiciary (especially at the District Court level) and from individual members of Congress (but not Congress acting in its constitutional lawmaking role).[27]

Nor is *this* all. Not only are the "laws" of the administrative state often created by agencies rather than by Congress, but enforcement and adjudication are also conducted in part by the agencies. The EEOC investigates businesses that are accused of discrimination, and the EEOC can set what it believes to be an appropriate penalty. The business may only get a jury trial after exhausting the cumbersome and expensive administrative process within the EEOC. Thus all the powers of government—legislative, executive, and judicial—which under the Founders' constitutionalism were to be kept separate, are often united in modern bureaucratic government in a single agency.[28]

But this formula is not quite right. In fact, the agencies, which on paper seem all-powerful, are in practice subject to multiple checks and influences by others. Some political scientists like to say that America has "separated branches sharing powers." In the modern state each of the branches has its say in the administrative process. In this sense, all three branches of government share in all three powers of government: lawmaking, executive prosecution, and adjudication. Responsibility in this system is hard to discern, and the policymaking of the national government is rarely understood. I have hardly ever met an ordinary citizen who understands how federal policies are made today.

We should also note that because the "laws" promulgated by agencies are not "laws" passed by Congress; the agencies easily and often make exceptions to their own rules. "Waivers" have long been a feature of administrative law. Influential groups are in the best position to get them, sometimes with the help of a congressman to whose campaign the group has contributed. What appears to be a general rule often turns out to be negotiable, and those with the best lawyers and the most money are often able to get the best deals.

This, of course, was not the intention of liberal theorists when they recommended the transfer of power to expert agencies. But a form of government originally developed to help the disadvantaged seems often to be more a tool of the Ivy League, the rich, and the well-connected, rather than the government originally set up by the

Founders, against which the intellectuals of the Progressive era complained so bitterly.

THE TRANSFORMATION OF THE SEPARATION OF POWERS

In the liberal state, each of the three traditional branches of government continues to exist. Each continues to perform its traditional duties some of the time. But each branch has also taken on an altogether new set of duties as a necessary consequence of the new way of making policy in the administrative state.

Congress

The legislative branch was originally intended to devote the bulk of its time to lawmaking. In the administrative state, with its broad delegation of policymaking to executive branch agencies, Congress spends less of its time on policy, and more on administration. That is, congressmen and senators spend growing amounts of time on "pork barreling" and casework, interventions in the bureaucracy for constituents and major donors or simply for their own ideological reasons. Many political scientists now argue that the administrative process, not lawmaking, is "where the action is" in modern government. "Congress and party politics ... matter less and less."[29]

In order to accommodate itself to this new policymaking process, Congress reorganized itself after 1965 by decentralizing power within the institution. This enabled individual congressmen to influence more easily those administrative agencies and policy areas that they specialize in. Congress also expanded its staff dramatically, for two purposes: to expand their oversight of executive branch agencies, and to expand their ability to provide constituent service by intervening in agency decisionmaking.[30]

The Executive

Under the Framers' Constitution, a single person—the president—was in charge of the executive branch. Under today's administrative state, there are multiple executives. Nominally at the center are the heads of the various federal agencies. Realistically, many people other than the official heads of agencies play a large role in the policy process. These include Congress acting through formal votes, especially

on the agency budget; individual congressmen acting through committees or on their own; courts of law; and lobbyists, who are given broad authority under modern law to initiate enforcement proceedings. The president himself has considerable say in the administrative process, of course, but he is only one player among many. He is no longer the sole or even the principal boss of the executive branch. In many of these agencies the president is forbidden by law or by court order to direct agency activity. Law also in effect forbids him to fire most federal employees, even if they are working actively against the policies of his administration. Thus the president in these respects is no longer able to fulfill his constitutional duty to "take care that the laws be faithfully executed."

The Judiciary

Under the Framers' Constitution, the job of the courts was to take the laws passed by Congress and the fundamental law of the Constitution, and then to apply them to particular cases in which one party claims that another has committed a legally-defined wrong. Under today's administrative state, the courts have taken on a new role of participating actively in the formation of public policy, in effect giving themselves a legislative and executive role along with the traditional judicial role assigned to them by the Constitution.

The judiciary acquired this legislative-executive role because Congress routinely delegates its lawmaking authority to administrative agencies. Courts become involved in the policy process through lawsuits brought by private groups against the government. Beginning in the 1970s, Congress has encouraged this as a means to get "the public" involved in the administrative process. The result is that the courts have become co-legislators. Jeremy Rabkin shows how the law of school desegregation has been made in effect by the federal judiciary more than by Congress or even the Office of Civil Rights over the past four decades.[31] The original 1964 Civil Rights Act explicitly forbids courts "to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils from one school to another." Yet federal courts and agencies have in effect rewritten the Act to mean the exact opposite. One federal court in Missouri has even imposed a tax increase to fund magnet schools in the Kansas City School District. This, as others have noted, violates one of the fundamental

principles of the American Revolution, namely, no taxation without representation.[32]

Examples of courts executing the law can also be found in judicial decisions on personnel, equipment, and other details of local school governance (to achieve racial balance) and similar judicial mandates on the details of the design and facilities of state prison systems (to remedy supposed violations of the Eighth Amendment ban on cruel and unusual punishment by improving conditions for prisoners).

In short, the courts not only adjudicate the law, but legislate and execute as well. The president is able to execute some laws, but he finds his powers confined by a bureaucracy partly beyond his control. Congress still makes laws, but it increasingly administers them as well.

THE TRANSFORMATION OF FEDERALISM

Under the Framers' Constitution, the national government was limited to areas of national concern. One could see this in practice by the fact that when bills were introduced in Congress before 1965, there was often a debate about whether they fell within the constitutional powers of Congress. Under today's "living constitution," hardly anything is out of bounds to the national government. Roads, bridges, and schools are paid for in part by federal money and subject to extensive federal regulation. Such traditionally local activities as city dumps, waste treatment, and elementary education are now heavily regulated by the federal government. Running a major business—sometimes even a small one—requires constant attention to what is going on in Washington, D.C. The authority of state and local governments has been much reduced.

It is true that the absolute number of federal employees has not grown much since 1960. That is because the federal government in effect co-opts state and local bureaucracies to run federal programs. For example, the administration of federal welfare programs is conducted largely by local governments operating under federal mandates. As John Marini writes: "The real growth in the power of the national administration ... has occurred through an administrative centralization that mandated an increase of employment at the state and local levels in response to federal directives reinforced by federal grants."[33]

Up to the 1960s, state and local governments tended to resist the expansion of federal authority. Since that time, however, states and localities have become quite friendly to big government. The change is related to bureaucratic patronage. Federal programs to aid local government projects are quite generous. Local governments have become accustomed to their client relationship to the federal patron. The money is often granted directly to state and local administrators, by-passing elected officials and weakening their authority. Administrators tend to find this relationship quite attractive. It frees them in part from the control of elected officials. For this reason there is little resistance in state and local governments against federal intrusion into local affairs. In fact, as political scientist R. Shep Melnick writes: "State administrations often form a powerful alliance with interest groups, federal administrators, and congressional committees to protect and expand federal regulation.[34]

Melnick sums up the overall transformation of federalism in this example:

> In 1956, for example, Congress established the interstate highway system in an act only 28 pages long; the federal government placed very few constraints on the use of federal funds. By 1991 the law's 293-page successor, the Intermodal Surface Transportation Efficiency Act, required state and federal administrators not just to finish the remaining highways and improve public transit, but to "relieve congestion, improve air quality, preserve historic sites, encourage the use of auto seat belts and motorcycle helmets, control erosion and storm runoff," reduce drunk driving, promote recycling, hire more women, Native Americans, and members of other disadvantaged groups, and even "control the use of calcium magnesium acetate in performing seismic retrofits on bridges." Prior to the mid-1960s the federal government had used its tax dollars to help states pursue projects they had selected. After the mid-1960s it pursues a wide variety of objectives which often conflict with state and local priorities.[35]

This, then, is the consequence for federal-state relations from the rise of the administrative state. It replaces the limited-government constitutionalism of the Founders with the ever-expanding government of the welfare state. Driven by the ideology of modern liberalism, the administrative state proceeds on the presumption that it must assert

control over the ordinary details of daily life because self-governing private associations and local self-government are thought to be incapable of taking care of the ordinary daily needs of the citizens.

CONCLUSION

Before 1965, most Americans were confident that most citizens, acting through self-governing associations such as families, churches, and businesses, could take care of their own daily needs. The job of government was to secure the conditions (peace and order) that would make this possible. In the liberal view that came to predominate after 1965—based on the theories of the Progressive movement—citizens are thought to be unable to manage their own lives without extensive and detailed government regulation of the economy and of social relations. The resulting liberal state has radically altered Americans' way of life. But has it made that way of life better?

It is often said that modern America is too complex to be governed according to an eighteenth century document. As recently as 1965, however, America was already a modern society—wealthy and highly industrialized—and the government was still operating largely under the Founders' Constitution, in accordance with the principles of the Declaration of Independence. It remains a viable choice to return to that way of life today. Whether or not Americans should do so depends on who was right, the Founders of the United States, or the founders of modern liberalism.

Endnotes

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2. "Mores of the Present and Future," in William Graham Sumner, *Essays*, Albert G. Keller and Maurice R. Davie, eds. (New Haven: Yale University Press, 1934), 1:86. This essay was originally published in 1909.

3. Edward Bellamy, *Looking Backward* (New York: Harper and Brothers, 1959 [originally published in 1888]) (describing a future socialist society and denouncing freedom of contract, private property, etc.); Herbert Croly, *The Promise of American Life* (Boston: Northeastern University Press, 1989 [originally published in 1909]), 180-82 (attacking the Founders' principle of individual rights in the name of "drastic criticism of the existing economic and social order"). For Dewey, see below.

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5. John Dewey, *Reconstruction in Philosophy* (Boston: Beacon Press, 1957 [originally published in 1948]), 194.

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19. Letter to Milligan, April 6, 1816, in *Writings of Thomas Jefferson*, Albert E. Bergh, ed. (Washington, D.C.: Thomas Jefferson Memorial Association, 1904), 14:466.

20. See the chapter on poverty and welfare in Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* (Lanham, Md.: Rowman and Littlefield, 1997).

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22. James M. Landis, *The Administrative Process* (Westport, Conn.: Greenwood Press, 1974 [originally published in 1938]), 8, 13, 18, 23.

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25. John Marini, *The Politics of Budget Control: Congress, the Presidency, and the Growth of the Administrative State* (New York: Crane Russak, 1992), 171.

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32. Missouri v. Jenkins, 495 U.S. 33 (1990) (describing the facts of the district court takeover of the Kansas City School District, including the order to increase taxes).

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34. R. Shep Melnick, "Federalism and the New Rights," *Yale Law and Policy Review: Yale Journal on Regulation* (Symposium Issue, 1996): 341. See also Seidman and Gilmour, *Politics, Position, and Power*, 199-200: "the governor ...[is] undercut by federal regulations, which foster the autonomy of program specialists. It is no coincidence that executive power is likely to be weakest with respect to state agencies that are heavily dependent on federal funds." Also useful is Joseph F. Zimmerman, *Federal Preemption: The Silent Revolution* (Ames: Iowa State University Press, 1991).

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