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Public administration and the American Constitution

Schaefer, Robert Martin, Ph.D.

University of Dallas, 1992

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PUBLIC ADMINISTRATION AND THE AMERICAN CONSTITUTION

by

Robert Martin Schaefer

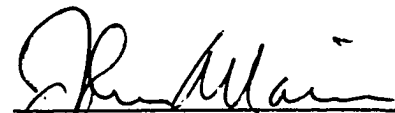
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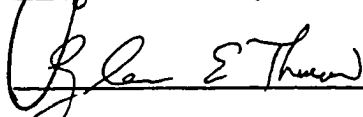
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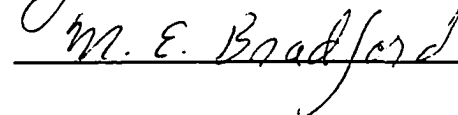
A dissertation submitted to the Graduate Faculty of the University of Dallas in partial fulfillment of requirements for the degree of Doctor of Philosophy in Politics in the Institute of Philosophic Studies.

May 4, 1992

Approved by the Examining Committee:







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PUBLIC ADMINISTRATION AND THE AMERICAN CONSTITUTION

Robert Martin Schaefer, Ph.D.

University of Dallas, 1992

Dr. John Marini

The purpose of this dissertation is to examine the origin and nature of modern "public administration" and its relationship to the American Constitution. In Chapter I and II, I discuss the birth and growth of bureaucracy. I argue that the growth of the national bureaucracy has occurred in response to the claim that America is not "just." Modern day public administrators see themselves as the champions of the underclass; for they wield their strong regulatory arm in alleviating America's suffering and inequities. Through public administration, the end of government is seen in terms of social equality: an end opposed by traditional American politics.

In Chapter III, I make comparisons between the moral foundations of bureaucracy as discussed by John Rohr and the moral foundations of the American republic articulated by the Founders.

The Federalist understanding of the American founding is examined in Chapter IV. The problem of tyranny as explicated by the Founders is also addressed. Specifically, the threat of tyranny is ignored by contemporary academics and politicians. Proponents of modern public administration

argue that the American polity has "progressed" into being a powerful and efficient democratic machine.

Finally, in Chapter V, the question of bureaucratic accountability is addressed. One asks: to whom does the modern day public administrator owe his allegiance--to the executive? Congress? The courts? Or to the people themselves? One discovers that no branch has complete control over the bureaucracy. A discussion of the energy and efficiency of government is coupled with a comment on Tocqueville's understanding of public administration.

While the debate continues between those in favor of centralized public administration and those who argue otherwise, one fact is irrefutable: the bureaucratization of the American regime is occurring. This paper attempts to address some of the problems resulting from this bureaucratization. In short, I consider the question: Is the bureaucratization of America in keeping with the intention of the Founders to promote the common good?

To
T. K. S.

sine qua non

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PREFACE

Little men look at their shadows and feel proud
Great persons have no horizons although they feel ashamed
Friends, stare with the eyes of your soul
and perhaps everything will appear beautiful...¹

Who are we as a people? That is, in what way can it be said that Americans form a specific community that has clear goals, habits and traditions? Such an inquiry, I propose, is necessary if we choose to pose another, and more pertinent, question: is the United States a healthy and just regime? Such deliberations do not fall merely within the realm of academics, pundits and other esoteric creatures. Rather, most members of our community, at one time or another, naturally consider these questions.

In turning to our regime, the United States, one unavoidably notices important and far-reaching changes taking place. Our "form" of government, a constitutional government based on the rule of law, is being altered. As will be argued below, the American Constitution is being replaced with a new type of authority: that of bureaucracy and the managerial state. But these changes are not

¹N.E. Alexandrakis, "Little Men," *Abyss* (Fiji, 1991), p. 5.

necessarily taking place in an orderly and conscientious fashion; rather they seem to be occurring almost without notice by the populace as a whole.

The purpose of this dissertation is to examine the origin and nature of modern "public administration" and its relationship to the American Constitution. Since Woodrow Wilson, there have been many defenders of modern public administration or bureaucracy. Implicitly or explicitly, the defenders of public administration reject the separation of powers as articulated by the Founders. Wilson suggests that constitutional government has failed the people. Simply put, according to current theory, our current Constitution is incapable of fulfilling the modern day needs of the American people.

The growth of the national bureaucracy has occurred in response to the claim that America is not "just." In order to achieve justice, goods must be redistributed and the lives of American citizens regulated, ensuring fairness and equality. President Johnson articulated this belief when he declared that the new purpose of federal government was to alleviate the trap of poverty. The modern day American bureaucracy has as its goal reduction of the suffering prevalent in America, making equitable the "capitalist economy with its attendant inequalities...(or the) historicocultural legacies of racism and sexism that plague us today." Hence, the regulatory revolution of the 1960s

and 1970s. Not only did the number of agencies increase dramatically, but the quantity of "regulations" also increased. As Theodore J. Lowi points out, "the number of pages in the *Federal Register* increased from 14,479 in 1960...to 86,000" by 1979.² The "major" regulatory agencies increased from twenty-eight in 1960 to fifty-six by 1980. Numerous other regulatory programs (well over 150) have also been created. Consider the following table which lists only a few of the programs passed by Congress in recent years.³

Federal Regulatory Laws and Programs Enacted since 1970

Year Enacted	Title of Statute
1969-70	Child Protection and Toy Safety Act Clear Air Amendments Egg Products Inspection Act Economic Stabilization Act Fair Credit Reporting Act Occupational Safety and Health Act Poison Prevention Packaging Act Securities Investor Protection Act
1970	Economic Stabilization Act Amendments Federal Boat Safety Act Lead-Based Paint Elimination Act Wholesale Fish and Fisheries Act
1972	Consumer Product Safety Act Equal Employment Opportunity Act

²Theodore J. Lowi, "Liberal and Conservative Theories of Regulation," in *The Constitution and the Regulation of Society*, Gary C. Bryner and Dennis L. Thompson, eds. (Utah: Brigham Young University, 1988), pp. 11-13.

³Lowi, p. 12.

	Federal Election Campaign Act
	Federal Environmental Pesticide Control Act
	Federal Water Pollution Control Act Amendments
	Motor Vehicle Information and Cost Savings Act
	Noise Control Act
	Port and Waterways Safety Act
1973	Agriculture and Consumer Protection Act
	Economic Stabilization Act Amendments
	Emergency Petroleum Allocation Act
	Flood Disaster Protection Act
1974	Atomic Energy Act
	Commodity Futures Trading Commission Act
	Consumer Product Warranties/FTL Improvement Act
	Council on Wage and Price Stability Act
	Employee Retirement Income Security Act
	Federal Energy Administration Act
	Hazardous Materials Transportation Act
	Housing and Community Development Act
	Pension Reform Act
	Privacy Act
	Safe Drinking Water Act
1975	Energy Policy and Conservation Act
	Equal Credit Opportunity Act
1976	Consumer Leasing Act
	Medical Device Safety Act
	Toxic Substances Control Act

If the end of government is to ensure equality, then, perhaps it should be argued that public administration is necessary. However, is the end or purpose of the American regime to be understood simply in terms of equality? Not surprisingly, the debate over centralized public administration--and of most debates in American politics--either stems from or are centered upon the notion of equality. Is equality merely a "taste" or is it a true principle upon which all politics can and should be

grounded? This is, I believe, the fundamental issue of modern politics. In a curious way this issue is not sufficiently considered. Most academics simply accept as mandate the prevailing politically correct definition of equality. Yet, the idea of equality goes far beyond the question of equity.

It is most curious to note the intellectual dilemma underlying public administration. Contemporary proponents of bureaucracy are incessantly faced with unsolvable problems. They suggest that the bureaucrats can rule unimpeded by law. Yet, whatever their official passion, bureaucrats are inevitably motivated by self interest. So, as a check, it is suggested that the executive should control the numerous regulatory agencies. But...our proponents of public administration are then reminded of Richard Nixon and his efforts to limit the size and scope of modern bureaucracy. Many a bureaucratic heart is stilled when the name of Richard Nixon is spoken. So now what? Perhaps *all* the branches of government should control the agencies. But, again, what is discovered is that if all branches attempt to rule, confusion abounds as to the direction and purpose of the administrative state.

Bureaucrats claim to be guided by scientific principles. "Values" are incidental. While a contemporary defender of public administration asserts that "...Administrators should use their discretionary power in

order to maintain the constitutional balance of powers in support of individual rights," there is little evidence that the public administrator is capable of inculcating or enforcing virtue through regulatory practice.

Traditionally, the basis of American politics was understood to be grounded upon those principles inherent in the Declaration of Independence. Issues would be resolved in light of these principles, the Constitution and the prudence of the elected leaders. However, proponents of bureaucracy claim that society can simply be regulated by the "science" of public administration. Yet, public administration never talks about the "good," but rather about power. Bureaucrats can, and sometimes do, impose their "values" on a particular policy, or interpret the values current in society. However, their understanding of "values" is not grounded in the principles of the American regime. The principles articulated in the Declaration and implied in the Constitution are negated as being impossible to understand. This conclusion creates a chaotic view of our polity. And it is this prevailing view that I have attempt to investigate.

It is appropriate and necessary to acknowledge my appreciation to those who assisted me in this project. Specifically, to Professors John Marini, Glen Thurow and M.E. Bradford I must say: thank you. I am indebted to my friend and colleague, Peter A. Lawler, for his insightful

comments. Finally, I offer my gratitude to Terri Schaefer,
a special friend.

CHAPTER I

The Advent of Public Administration

No more vital truth was ever uttered that freedom and free institutions cannot long be maintained by any people who do not understand the nature of their own government.¹

Introduction

The purpose of this essay is to examine the origins and nature of modern "public administration" and its relationship to the American Constitution. Over the last five decades, the rise of public administration has dramatically altered the nature of American constitutionalism. Many argue that the transformation of American constitutionalism as affected by public administration was inevitable as well as necessary and good. Others suggest that public administration has perverted the nature of American constitutionalism and will eventually lead to the destruction of the American regime. Those who are anti-public administration argue that as a result of

¹Quoted in Woodrow Wilson's *Congressional Government* (Ohio: Meridian Books, 1964), p. 57.

public administration, liberty is being replaced by a government that is not only expensive, but also aimless, arbitrary and despotic. While the debate rages on between centralized public administration and decentralized public administration, one fact is irrefutable: the bureaucratization of the American regime has occurred and will continue to occur. The contemporary bureaucratization that is being witnessed is not simply an enlargement of constitutional government. Rather, modern public administration is the result of a radically new theoretical assumption: that is, that the state, qua state, is not only capable of but responsible for reforming the nature of the American political order. In other words, the belief that constitutionalism is a legitimate and prudent form of government is being replaced by the post-constitutional view that the state is a comprehensive entity which can function more justly, more adequately, more fairly than the traditional political order.

It is in this sense, then, that we consider modern public administration. While "bureaucracy," in the traditional sense, is necessary for good government, the very nature of bureaucracy has altered. It has been changed to such a degree that modern bureaucracy now denies the effectiveness of law and with this denial, supplants it.

One is forced to ask in response to this unmistakable trend: is the transformation of bureaucracy truly for the

common good? But, before this question can be answered satisfactorily, we must be certain as to what is public administration. One must proceed by examining the events which fostered the birth of public administration--and the philosophy which animates it--and then make comparisons with the essential American regime as articulated by the Founders. In addition, one must examine the problems created by modern public administration and the problems aggravated by from the growth of public administration, including the solutions to those problems as articulated by both the opponents of public administration and the advocates of modern bureaucracy.

It is important to point out here that the argument which follows presupposes that the American Constitution is integral to our way of life. In other words: who we are as a people, what we believe, is important in our lives; and most importantly our well-being is dependent, in many ways, on the Constitution. Such a statement might strike the reader as simplistic or "old-fashioned." Or, some readers may consider it completely unwarranted and inappropriate in light of contemporary political thought. However, one must admit that a constitution, or better, the rule of law, necessarily forms and directs the people it is intended to govern. Whether a people remain free or enslaved, educated or ignorant, virtuous or base, depends upon their fundamental laws. And, since the American Constitution is

our "supreme Law of the Land," we must give serious consideration to the effects of public administration, because the very nature of modern public administration allows for a transformation of the Constitution. Hence, one must devote serious study to the nature and effect of modern public administration as an alternate form of government.

What is Public Administration?

It is nearly impossible and superfluous to pick a specific date for the birth of American public administration or "bureaucracy." Some argue that the origin extends back to reconstruction, if not further.² Still, a specific definition of bureaucracy or public administration is difficult to find: there are volumes of texts describing public administration with little agreement among their authors. This lack of agreement is not accidental or coincidental to public administration. Numerous writers have attempted to formulate a specific definition of (American) bureaucracy over the last century yet have failed. For our purposes, we will define it as the efficient and rational rule of public affairs by unelected and "expert" officials. Interestingly, this definition makes no presupposition regarding the specific nature of

²John Wettergreen suggests that the rise of modern bureaucracy occurred after 1965. Although I do not dispute his argument, one must consider the intellectual stage of rationalizing bureauacracy, which was set during the Progressive Era.

public administration, though it does insist upon efficiency and rationalism. The type of government, or better, way of life, administered by this public administrator is strangely absent. To create a specific definition presupposes an agreement on a specific type of life, one that ought to be chosen and followed. Agreement among writers on this weightier topic is strangely absent. The explanation for this curious lack of interest in the "best life" may be due in part to an underlying assumption that the study of the best life is impossible. Modern scientific methodology--an offspring of modern social science and the basis of public administration--denies that such value questions can be addressed adequately. Therefore, they are dismissed as irrelevant. Nonetheless the study of public administration does assume that one type of life, while not the best, may be choiceworthy. But, even then, since there is no general agreement as to what type of life is choiceworthy, confusion necessarily abounds when one attempts to narrow down a specific definition of bureaucracy.

"Bureaucracy," as discussed in these pages, is limited to public administration at the federal level in the United States since the founding. For it is obvious that all "organizations" are bureaucratic in one sense or another. Churches, families, corporations and educational systems are forms of private administration. Public administration can be distinguished from private administration, at least

initially, in that public administration often desires to make public, e.g. the family, which has hitherto been considered private.

What is not considered in this essay is the relationship between the 80,000 state and local "governments," their specific functions and their interaction with the federal bureaucracy. Instead, this paper examines the thought or science which attempts to understand bureaucracy as a whole, make it rational and change it, supposedly, for the better. I follow, in this respect, Publius who notes that: "The administration of government, in its largest sense, comprehends all the operations of the body politic...." Again, although government naturally is concerned with "administration," this ought not be confused with the modern bureaucracy that has been artificially created and imposed on the American political order. This is not, to reiterate, simply an outline of how "public administration" works, but rather an exegesis of two alternative governments: constitutional and bureaucratic.

We have become a regulatory society which traces its origins back to the late 1800s. Indeed, the first regulatory agency created was the Steamboat Inspection Service in 1837. Still, by 1900 only five regulatory agencies were in existence. In the early 1930s there were fifteen such agencies. Today there are over eighty

regulatory agencies, which compete, and not surprisingly, often conflict. In the words of Lloyd Cutler, this growth leads to confusion. He states:

Every school child learns about the separation of powers. The Federal Government has three branches--legislative, executive, judicial. Right? Wrong.

Oh, yes, we forgot the regulatory branch. The ICC, the CAB, the FCC, the SEC, the FTC, the NLRB, the FEC, the CPSC, and about a dozen other agencies operate under laws that make them independent of the legislative and executive branches. So there are really four branches. Right? Wrong, because each of these independent agencies is also independent of every other agency. So that makes about 23 branches? Careful, you may be wrong again.

For there is a new theory abroad in the land that even regulatory agencies *within* the executive branch are also independent of the President and of one another. There are over 60 such agencies, many of them parts of a cabinet department.³

The growth of regulatory agencies and their subsequent confusion over boundaries and roles inevitably results in contradictory policies. Consider this:

A recent and more serious example of regulatory overlap lies in the administration of cancer policy. At least five Federal agencies (EPA, CPSC, OSHA, FDA, USDA) have the authority to regulate carcinogenic substances. Prior to 1979, they were unable to agree on the scientific principles to be used to determine when a substance could even be classified as carcinogenic. Even though these differences have now been partially resolved, the regulatory approaches of the five agencies still vary

³Lloyd N. Cutler, "Who Masters the Regulators?" *Washington Post*, October 17, 1978. Quoted in Robert E. Litan & William A. Nordhaus's *Reforming Federal Regulation* (New Haven: Yale University Press, 1983), p. 50.

considerably.⁴

Keeping these thoughts in mind, let us now delineate the nature of bureaucracy. One must consider, initially, two contemporary definitions of bureaucracy.

The first and the most traditional usage corresponds to a concept of political science: bureaucracy is government by bureaus. In other words, it is government by departments of the state staffed by appointed and not elected functionaries, organized hierarchically, and dependent on a sovereign authority. Bureaucratic power, in this sense, implies the reign of law and order, but, at the same time, government without the participation of the governed. The second usage originates with Max Weber and has been propagated especially by sociologists and historians: bureaucratization is the rationalization of collective activities. This bureaucratization is brought about by, among other means, the inordinate concentration of the units of production and in general of all organizations and the development within these of a system of impersonal rules, as much for the definition of functions and the separation of responsibilities as for the ordering of careers.⁵

The dominant thread which runs throughout these definitions includes the notion that the bureaucrat ought to live according to "work rules" and not normal social actions. Rationality and technical superiority replace passions and self-interest. More importantly, leadership--essential for the preservation of a regime--is replaced by "management". Furthermore, there is little consensus

⁴Litan and Nordhaus, *op. cit.*, p. 48. The authors also note that "The steel industry has to comply with over 5,000 regulations, administered by twenty-five federal agencies and numerous state and local agencies."

⁵Michael Crozier, *The Bureaucratic Phenomenon* (Chicago: University of Chicago Press, 1964), p. 3.

regarding the goals of public administration. According to two popular textbooks, public administration

...may be defined as all processes, organizations, and individuals (the latter acting in official positions and roles) associated with carrying out laws and other rules adopted or issued by legislatures, executives, and courts.⁶

and

...the structure and personnel of organizations rooted in law, that collectively function as the core system of U.S. government and that both determine and carry out public policy using a high degree of specialized expertise.⁷

Hence, public administration can be understood as regulation of public affairs. The question which remains is whether or not public administration simply implements policy or creates *and* implements policy. If the latter is true, then public administration is above law. Indeed, it is the law. Secondly, one must consider that since the Constitution already regulates public affairs, how, why and when was the Constitution deemed inadequate? What is most curious about the bureaucratic revolution in America is that it did not occur accidentally or as a result of a crisis. Instead, modern bureaucracy was, and is, promoted by the intelligentsia and, therefore, it is a revolution from "above". It is appropriate, now, to turn to the writer who first articulated the need for a study of administration,

⁶George J. Gordon, *Public Administration in America*, 3rd ed. (New York: St. Martin's Press, 1986), p. 7.

⁷Richard J. Stillman, II, *The American Bureaucracy* (Chicago: Nelson-Hall, 1987), p. 2.

Woodrow Wilson. By so doing, one may come to understand the nature of public administration more clearly.

Toward Efficient Government

Woodrow Wilson is generally credited with the initial study of American public administration. His essay, "The Study of Administration," is considered a classic in this field. Published in 1887, Wilson's work has had considerable influence. Wilson claims that his study had "been so late in coming" due to a general concentration on issues such as the nature of the state and prerogative. Such questions are important, but not as important since, according to Wilson, the question of "running" a constitution has now surfaced. In other words, according to Wilson, all the political questions have already been answered. Issues such as equality are no longer debated. The fight being over, one need consider only the practical elements of administering society. For Wilson the eternal questions are supplanted by the desire to actually implement the principles which are outlined by the Constitution. To do so properly, though, one must separate politics from administration. Curiously though, Wilson argues, virtually in the same breath, that the Constitution, which forms and informs American politics, is no longer valid because it does not deal effectively with the problems current in his

day.⁸

Wilson begins his study with an affirmation of G.W.F. Hegel's dictum that political philosophy is "nothing but the spirit of that time expressed in abstract thought." That is, we are shaped by our times yet, at the same time, we are evolving. Consequently, the principles of our time are "time-bound" and not necessarily eternal. Since the principles of our time are predicated by the notion of equality, the responsibility of our government is to ensure that such rights actually come into being. To accept the notion of time bound truths, as it were, presupposes that there are no enduring principles which men can follow or live by. Therefore the Constitution ought to be viewed as an "organism" which is constantly changing and progressing. There can be said to be two types of principles underlying the Constitution: the principle of equality and the principle of separated powers. Wilson believes that the principle of his day is equality. His time-bound constitutional organism has evolved to the degree that the idea of a separation of powers now interferes with good administration. Therefore, the principle of separated powers must be ignored: it no longer is relevant.

Wilson believes that the separation of powers, and the committee system only debilitates "good" government.

⁸Wilson, Woodrow. "The Study of Administration," in *The Papers of Woodrow Wilson*, Vol. 5, 1885-1888 (New Jersey: Princeton University Press, 1968), p. 367.

Accordingly, the American president cannot act like a prime minister; instead the executive must ultimately rely on Congress, the people and, to a degree, chance.⁹ Wilson seeks to change the executive from one who works within the framework of the Constitution to one dependent on public rhetoric for authority. Wilson, though, considered public rhetoric to be based on high moral principle.

Wilson believed that an efficient administration could wipe out extreme inequalities. While Thomas Jefferson argued that men, aside from natural differences, have equal opportunity to achieve, Wilson bluntly states that "equality is healthfulness." That is, men not only ought be given the chance to achieve, but that government should ensure certain ends. And, hitherto, these rights, according to Wilson, have only been spoken about, and never enacted.

To understand the significance of Wilson's thoughts, one must reflect on the Founders' understanding of the executive. The Founders chose to moderate the executive by causing him to act within a constitutional framework and thereby giving him limited "energy". Further, he is chosen by an electoral college, not the populace, and given four year terms from which he cannot be removed except through extraordinary procedures. Moreover, treaties are subject to Senate approval and a declaration of war is subject to

⁹Cf. George Anastaplo, *The Constitution of 1787* (Baltimore: The Johns Hopkins University Press, 1989), p. 89 ff.

Congress. Interestingly, in an important respect the Founders did not expect the executive to rely on the public at all. The executive's power is from the Constitution, not the people. And, the executive is limited by the Constitution, insofar as he can do very little without Congressional approval. "Ambition" is called upon to animate the executive. Still, the ambition of Congress provides another check against excesses.

Wilson, though, believes that public opinion ought to be shaped by the executive. It is the executive who determines the will of the people. Wilson states that "Living political constitutions must be Darwinian in structure and in practice."¹⁰ Mankind, for Wilson, continually undergoes fundamental changes. Although the Founders required a government with separated powers and checks and balances, Wilson argues that democratic government could now be shaped by a leader who directs the nation through his own moral insight. Wilson claims that the executive is he who "rightly interprets the national thought and boldly insists upon it, he is irresistible."¹¹

It would seem, then, that for Wilson the executive's

¹⁰From Woodrow Wilson, *Constitutional Government in the United States*, as quoted in *American Political Rhetoric*, ed. Peter Lawler and Robert Schaefer (Maryland: Rowman and Littlefield Publishers, Inc., 1990), p. 108.

¹¹Quoted in Jeffrey Leigh Sedgwick's "Executive Leadership and Administration," *Administration and Society* 17 (February 1986), p. 426.

power would be based on popular opinion--and the emotions that animate popular opinion--and not the principles enumerated by the Constitution. One must conclude that modern "Presidential leadership thus appears to be, of necessity, extrarational in its aim; it speaks to the unreasoning, nondeliberative portions of the soul."¹²

Wilson is the first modern president who sought to achieve "some combination of personal integrity, oratorical skill, and democratic moral vision," making "the president the articulator of American political principle."¹³ Wilson found it necessary to go beyond constitutionalism in order to achieve his goals. Wilson's vision saw "the meaning of life" as being constantly re-interpreted by the executive.¹⁴

Wilson, in his first inaugural address, states:

This the high enterprise of the new day: to lift everything that concerns our life as a nation to the light that shines from the hearthfire of every man's conscience and vision of the right...We know our task to be no mere task of politics but a task which shall search us through and through, whether we be able to understand our time and the need of our people, whether we be indeed their spokesmen and interpreters, whether we have the pure heart to comprehend and the rectified will to choose our

¹²Sedgwick, p. 427.

¹³Peter A. Lawler, "The Federalist's Hostility to Leadership and the Crisis of the Contemporary Presidency," *Presidential Studies Quarterly* XVII, 4 (Fall 1987), p. 711.

¹⁴Lawler, p. 712.

high course of action.¹⁵

Wilson concludes that philosophy simply reflects current opinion. Furthermore, "The 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."¹⁶ The idea that the state is created to serve the people is rejected. Now, an individual's responsibility is to serve the state. Wilson, and the Progressives are necessarily dismayed by individualism and free enterprise. Thus, Wilson is indebted to Theodore Roosevelt's theory of "stewardship" which promotes a paternalistic form of government. It was Roosevelt who first announced that he, and not the Constitution, was responsible for the well-being of the people.

With Roosevelt's statement in mind, Wilson claims that history demonstrates that a progressive evolution has occurred within America's constitutional government. Wilson claims history has progressed in this way--for originally there were absolute rulers who ruled the administrative system. In the second period, at the time of the American founding, popular rule became dominant, yet no administrative system was in place. The third period, which

¹⁵Woodrow Wilson, *The Papers of Woodrow Wilson*, ed. Arthur S. Link (Princeton: Princeton University Press, 1966-1985), 27:151. This quote is repeated in *The American Presidency*, Sidney M. Milkis and Michael Nelson (Washington, D.C.: Congressional Quarterly Press, 1990), p. 224.

¹⁶Wilson, "Study," p. 367.

was yet to be realized in 1887, would be the time of popular rule with an administrative state.¹⁷ Wilson hopes to see the day when the executive/bureaucracy can rule in accordance with the people's will unhampered by the Constitution. In other words, the executive interprets the will of the people and thereby instructs the bureaucracy to implement his policy. The bureaucracy, though powerful, is subject to a "higher authority."

In *Congressional Government*, Wilson argues that American politics has evolved through four political periods. The first is the era of "great architects and master-builders," followed by "the period of constitutional interpretation," followed by the issue of abolition. The fourth, and final, period consists, or rather does not yet completely consist, of efficient and responsible administrators who tend to the "peaceful development" of American politics.¹⁸ Congress is characterized by ineptitude, driven by a cacophony of voices ignorant of the common good. Wilson points to a future time where "administration" can efficiently carry out policy which ensures equality. Wilson insists that the problem is that the separation of powers, which underlies our great, yet still undemocratic, regime, no longer benefits the progress of democracy. The Founders, it seems, acted during a time

¹⁷Wilson, p. 14.

¹⁸*Congressional Government*, pp. 139-40.

when democracy was distrusted. Yet, Wilson claims, we have entered a new era, one where politics can be taken "out of politics." Wilson notes that we are "the first to think of remodeling the administrative machinery of the federal government, and of forcing new forms of responsibility upon Congress."¹⁹ Since government has grown, we must not ask what theories guide the government, but attempt to see exactly where the power lies. Wilson constantly criticizes government for being omnipotent. Ironically, the answer to this problem, for Wilson, is more power; power in the hands of a visible leader allowing for a unified government which is responsible. Wilson desires a government that is not less aggressive, but more so, and ultimately responsible at the national level. But, one asks, what happens to the idea of federalism? Wilson believes that federalism remains only in the textbooks since the Civil War destroyed all vestiges of federal restraint. Wilson bemoans the current situation, noting that

An effective representative body, gifted with the power to rule, ought, it would seem, not only to speak the will of the nation, which Congress does, but also to lead it to its conclusions, to utter the voice of its opinions, and to serve as its eyes in superintending all matters of government, - which Congress does not do.²⁰

Using a militaristic metaphor, Wilson argues that the

¹⁹*Congressional Government*, p. 27. Wilson claims that the Founders, unfortunately, followed Montesquieu's teachings "rigidly." Compare this with *Federalist* 47.

²⁰*Congressional Government*, p. 195.

issue of administration takes precedence over mere legislative issues. He says, "The discipline of an army depends quite as much upon the temper of the troops as upon the orders of the day."²¹ In keeping with Walter Bagehot's thesis, Wilson asks us to move toward a more parliamentary form of government.

To understand the importance of Wilson's argument, one must consider what inspired the American Founders. The major problem, for the Founders was creating a government, a national government that would not become corrupt and fall into a tyranny. Rights were understood as the protection of life, liberty and property. To actuate such protection while at the same time avoiding tyranny requires separated powers. Equality and liberty, for the American Founders, could only be understood coterminously. That is, liberty can only be understood in light of equality, and vice versa. *Federalist* 47-51 indicate the nature and severity of the problem: we are attached to our own, self-interested, and, if unchecked, are capable of acting in a beast-like fashion. Furthermore, we are not philosophers. The Founders argued that a rule of law should be created to form and guide the people. Yet, this "paradigm" is rejected whole-heartedly by modern scholars who, echoing Wilson, claim that the Constitution is based upon eighteenth century "truths". Specifically, Publius' assumption that men are not angels

²¹*Congressional Government*, p. 198.

and that therefore politics is necessary, is replaced with the belief that politics can be replaced by administration. Most importantly, according to Wilson and modern scholars, these eighteenth century truths do not apply to us today. In fact, these "ancient verities" lead only to "an enfeebled, even nonexistent state" which does not deal with "the awesome tasks faced by this nation at the end of the twentieth century."²² Therefore, many today believe that the "eighteenth century" Constitution is "nostalgic stuff of elementary school civic texts."²³

Wilson argues that democracy is no longer the rule of the majority (as the Founders assert), but "the rule of the whole." "It is the nation come to its majority, conscious of its authority, and in clear sight of its aims."²⁴ Wilson sums up his view of modern democracy with this exclamation: "The nation cannot be corrupted, and we have ceased to fear a Caesar, because a nation whose people are its army cannot be defeated at all."²⁵ Wilson firmly believes that the American people of his day, however imperfect they may be, fundamentally differ from their

²²Richard J. Stillman, II, "Ostrom on *The Federalist* Reconsidered," in *Public Administration Review*, 49, No. 1 (January/February 1989), p. 82-84.

²³Stillman, p. 84.

²⁴Woodrow Wilson, "The Modern Democratic State," in *The Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1968), V. 5, 1885-1888, p. 76.

²⁵Wilson, p. 79.

predecessors. It seems, then, that Wilson's faith in progress is unshakable. Modern democracy becomes like an organic body where all the elements work together to ensure that "perfect" democracy will last forever.²⁶ The will of the people will coincide with the deeds of government. For the end result promised by Wilson's ruminations is the complete cleansing and separation of "politics" from administration. Politics, which is eternally disorderly and full of conflict--specifically the conflict between equality and liberty--is replaced by administration which is orderly, efficient and unified. As Kent Kirwan points out

The prime tendency of Wilson's argument is not that the historical process is merely democratizing politics: it is that it is gradually eliminating the need for politics. It is this elimination of politics--and this alone--which provides the basis for a science of administration which underlies the structure of his reform.²⁷

The issue should be restated as follows: Is it possible to create a science of administration that applies to all cities? Or rather, can there be a universal science of administration? The answer is yes, if politics--politics being understood as a polity with specific

²⁶Curiously, Wilson later claims in his essay "Responsible Government under the Constitution," that human nature does not change, therefore written constitutions are necessary. Nonetheless, he claims that the mature "legal conscience" of our country will ensure responsibility in the proposed ministerial government.

²⁷Kent Aiken Kirwan, "The Crisis of Identity in the Study of Public Administration," *Polity*, Spring (1977), p. 330.

characteristics--can be dismissed as no longer being important. If politics cannot be wholly dismissed, as Wilson seems to suggest elsewhere,²⁸ then the "science" of administration cannot be wholly scientific. Recall that according to Wilson the process of administration must take into account, and act according to, the political order.²⁹ Nonetheless, Wilson does attempt to separate and limit the influence of politics on the purer science of administration. Yet, what can the end result be if one attempts to separate politics from administration and simultaneously attempts to make administration responsible to the electorate? Wilson's resolution of this dilemma is to create a strong executive who, ultimately, is not responsible to the Constitution. To be responsible to the Constitution requires that the executive--the leader--to be limited in his scope. And this, for Wilson, is unacceptable.

Bureaucracy Considered

As we have seen, the new purpose of government--and therewith public administration--is to ensure that "equality" is the prevalent principle in American society.

²⁸Wilson notes that "Our own politics must be the touchstone for all theories. The principles on which to base a science of administration for America must be principles which have democratic policy very much at heart." "Study," p. 379.

²⁹Cf. Kirwan, pp. 334-336.

To enable this to occur, technical administrators are needed. However, it was immediately clear to the early proponents of public administration that a true separation of politics and administration, one which allows for more efficient government, requires an artificial control over the administrators.

In *Politics and Administration*, Frank J. Goodnow insists that politics must be separated from administration. He claims that "Politics has to do with policies or expressions of the state will. Administration has to do with the execution of these policies."³⁰ Goodnow, and Wilson, suggest that the issues of government no longer center upon constitutional questions (separation of powers) but on the implementation of the "state will" as interpreted by the political leaders. The only restraint on government is the desire of the people. The necessity of law as moderator, as promoted by the Founders, is replaced by the administration of policy. Nonetheless, Goodnow clearly sees the danger of creating an independent bureaucracy. To create an independent bureaucracy would allow for an unchecked and tyrannical class of administrators. Goodnow suggests that the party system be allowed to rule the bureaucracy "extra-legally." With such restraints, there

³⁰Frank J. Goodnow, *Politics and Administration: A Study in Government* (New York: Russell & Russell, 1900), quoted in *Classics of Public Administration*, Jay M. Shafritz & Albert C. Hyde, eds., 2nd ed., (Chicago: The Dorsey Press, 1987), p. 26.

may be "harmony" between the desires of the people and government. The only remaining problem is the creation of a truly scientific method of administration.

The task of creating a scientific administration is discussed by Leonard D. White. He states that the

...administration has become the heart of the modern problem of government...The problems which crowd upon legislative bodies today are often entangled with, or become exclusively technical questions which the layman can handle only by utilizing the services of the expert...These men are not merely useful to legislators overwhelmed by the increasing flood of bills; they are simply indispensable. They are the government.³¹

Government, then, is being transformed from a tripartite division of branches to a division between government and administration. Government will set the boundaries within which administrators will function; while at the same time, they will function uninhibited by government.

Furthermore, recalling the original impetus of public administration, one recognizes that the notion of a laissez faire economy would necessarily be outdated from the viewpoint of such authorities. Accordingly, White states that free enterprise has been "abandoned by philosophers and statesmen alike, and a new era of collective activity has been ushered in by the twentieth century."³² After all, the industrial state, i.e. free enterprise, cannot give to

³¹Leonard D. White, *Introduction to the Study of Public Administration* (New York: Macmillan Publishing Co., 1926), quoted in *Classics of Public Administration*, op cit., p. 59.

³²White, p. 60.

each fairly--a principle clearly accepted by today's leaders, making the need to regulate the airline industry, railroad, telephone, postal service, etc., a primary function of government. To quote White again: "The state becomes therefore an important means by which the program of social amelioration is effected."³³ Equality is the underlying goal of modern public administration. In fact, equality informs and animates most discussions of administration made by defenders of bureaucracy.

Progressive Politics

To fully understand the nature of the equality which underlies Progressive politics, Woodrow Wilson's thought, and modern public administration, one must carefully consider one of the more influential writers of the Progressive era, Herbert Croly. In 1909, Herbert Croly published *The Promise of American Life*. Although few copies were sold, "it had immediate and extensive influence on what historians have come to call the Progressive era."³⁴ Indeed, Croly greatly influenced Theodore Roosevelt's formation and articulation of his New Nationalism. The *Promise* addresses numerous seemingly unrelated subjects (e.g. labor unions, slavery, Jefferson, foreign policy and

³³White, p. 69.

³⁴Croly, Herbert. *The Promise of American Life*, Arthur M. Schlesinger, Jr., ed. (Cambridge: The Belknap Press of Harvard University Press, 1965), p. v.

state's rights). His treatment, though, of these subjects reveal an acceptance of Wilson's vision for public administration.

Croly outlines what he considers to be the pressing problems of America in his day. First, after the Civil War industrialization grew at an enormous rate in the United States. Because of this increased industrialization, many large corporations sprang into existence. Secondly, numerous problems arose due to this industrialization, namely, mass urbanization, the success of powerful groups of businessmen and depressing working conditions coupled with poor housing. Croly contends that the Jeffersonian style democracy preceded America's current dilemmas. Jefferson, he argues, was concerned with extreme equality. Thus, by letting equality become the dominant factor in America, extreme individualism spread throughout the country; hence the common good--"the national good"--was neglected. Croly continues:

The existing concentration of wealth and financial power in the hands of a few irresponsible men is the inevitable outcome of the chaotic individualism of our political and economic organization, while at the same time it is inimical to democracy, because it tends to erect political abuses and social inequalities into a system.³⁵

Croly's greatest complaint is that democracy as an "ideal" has been consistently misunderstood. The American

³⁵Croly, p. 23.

public "still believes that democracy is a happy device for evading collective responsibilities by passing them on to the individual."³⁶ Democracy as an "ideal" was necessarily distorted in 1787: after all, the Founders did not then realize the importance of a people's "collective responsibilities". Croly adds, "Unfortunately Jefferson's conception of democracy was meager, narrow, and self-contradictory."³⁷ Jefferson understood democracy as the equivalent of extreme individualism and this, Croly states, is an unforgivable sin. To ignore the "national good" is to neglect one's responsibility to help create a better society. For Croly, the crux of the issue is this: men, when left alone, will not "progress" as they otherwise would under a national government with strong leadership. Good government receives its direction from public opinion and only then asserts its will on the whole people. The "improvement" of society is possible only through a strong government which promotes a strong public policy that has as its ultimate purpose a better society. It is the task of government to articulate the opinions of the people--opinions which are implicitly good--and then "persistently" will that these ends be achieved. This, then, according to Croly must be the goal of an ideal democracy. Democracy, for Croly, is not an adherence to abstract principles of

³⁶Croly, p. 417.

³⁷Croly, p. 43.

liberty and equality. Rather, liberty and equality are human rules (positive law) which government adheres to in order to achieve "human brotherhood." Liberty is, in Croly's words, "positive intellectual and moral achievement," whereas equality is understood as legally constituted rights. "Liberty" is not to be understood as the freedom to do what one desires, or a natural end independent of the city, but to act in a way that ensures a continuous striving toward the perfection of both oneself and one's fellow countrymen. Liberty and equality become useful only as long as they promote social improvement. In other words, the city and man become one. Croly insists that it is the responsibility of government officials to ensure that this occurs; that is, if need be, government officials must force unwilling citizens to better themselves.

Croly complains that the friends of federalism were economically self-interested. Liberty, for these "friends," was understood in terms of private property. Croly tells us that at the beginning of our national experience this corrupt understanding was so pervasive that it was accepted, even by the ordinary American democrat who was "self-reliant, undisciplined, suspicious of authority, equalitarian, and individualistic."³⁸ It was the responsibility of the Founders to teach the American people

³⁸Croly, p. 31.

what was truly good for them. According to Croly, the Founders failed. It appears, then, that although the people might know implicitly what a good society is and the aims that it has, they can be easily lead astray in their opinions. Hence, government has an obligation to provide the proper opinions, inculcate them into the people, and rule them accordingly. Government should "possess the power of taking any action, which, in the opinion of a decisive majority of the people, is demanded by the public welfare."³⁹

Croly continues by stating that "a democracy certainly cannot fulfill its mission without the eventual assumption by the state of the many functions now performed, and without becoming expressly responsible for an improved distribution of wealth."⁴⁰ Croly wants to instill new economic policies, ensuring that men no longer will pursue money for its own sake, but rather for a higher purpose, namely, universal human brotherhood.

Croly's arguments concerning man's perfection sound strikingly similar to those of Karl Marx. In fact, Croly addresses the Marxist doctrine and accepts it except for the "international" stance that Marx takes.⁴¹ A sense of nationalism, for Croly, is essential for the realization of

³⁹Croly, p. 75.

⁴⁰Croly, p. 209.

⁴¹Croly, p. 209.

the ideal society. Croly admits that men are attached to their own and this attachment is difficult to destroy. Instead of hoping that the classes will become united throughout the world, Croly contends that it is easier to establish a goal of brotherhood within the bounds of one's own country. Croly, like Marx, argues that a transformation in human nature can take place. But for Croly, the state does not wither away; rather it strives to "improve human nature" while acting as a very efficient "machine" that tends to the needs of the people. Ultimately "what a democratic nation must do is not to accept human nature as it is, but to move in the direction of its improvement."⁴²

Croly insists that "the non-union industrial laborer should...be rejected...as ruthlessly as the gardener rejects the weeds in his garden."⁴³ Croly distinguishes between self-interest and "individuality" in terms of the communal good. Individuality is the pursuit of an excellence by a worker that, when achieved, benefits the community as a whole. Self-interested individuals are not concerned with the well-being, or advancement, of their fellow citizens. Ultimately, Croly contends, a good society "becomes an enlarged individual whose special purpose is that of human amelioration, and in whose life every individual should find

⁴²Croly, p. 413.

⁴³Croly, p. 387.

some particular but essential function."⁴⁴

America, for Croly, must be guided by its collective consciousness. This is possible through officials (bureaucrats) who articulate the "ideal" and also through public education. Education is stressed because Croly believes that it can persuade the citizens to give up their self-interested desires and replace them with a new collective purpose. The citizens will neither be individualistic (in the Jeffersonian sense) nor nationalistic; rather they will become "selective individuals; men will perform jobs which they are best suited for. Each will work according to his ability but consequently be compensated according to his need. This, then, is Croly's concept of an "ideal" government.

In an important respect, Croly's desire for human perfection becomes a political religion. Man's motion toward an angelic state is supported and promoted by the heroic actions of the demi-god of good government: the intellectual/politician. This leader--rational, fair, god-like and omniscient--will rule with only the common good in mind. This "democratic evangelist," who is "some imitator of Jesus who will reveal to men the path whereby they may enter into spiritual possession of their individual and social achievements, and immeasurably increase them by

⁴⁴Croly, p. 414.

virtue of personal regeneration."⁴⁵ This leader, be it the executive and/or bureaucrat, will become the new Jesus; and the Messiah will lead us from the disorderly and irrational state of politics to a new and higher level of existence. It is this belief, this religion, that underlies public administration.

⁴⁵Croly, quoted in Richard J. Bishirjian, *A Public Philosophy Reader* (New York: Arlington House Publishers, 1978), p. 54.

CHAPTER II

Contemporary Views of Public Administration

Though man resembles the animals in many respects, one characteristic is peculiar to him alone: he improves himself, and they do not. Mankind could not fail to discover this difference from the beginning. So the idea of perfectibility is as old as the world; equality had no share in bringing it to birth, but it has given it a new character.¹

Brownlow

If the intellectual basis of public administration is found in the writings of Wilson and fellow Progressives, when did this thought formally insinuate itself into American politics? The answer can be found in Franklin D. Roosevelt's New Deal. For it is in this period that public administration is promoted at the national level. For this reason, we must consider the Brownlow report. I would suggest that this report, a product of the New Deal, set the stage for the bureaucratization of America.

¹Alexis de Tocqueville, *Democracy in America*, George Lawrence, trans. (New York: Doubleday & Company, Inc., 1969), p. 452.

How, though, are we to understand the New Deal period? Was it a time of major reform and radical change? To quote Hiram Catton: "The New Deal interpreted democracy to mean approximating social and economic equality through the instrumentality of government."² John Wettergreen, though, asserts that the New Deal was simply Roosevelt's defense of liberalism. In other words, FDR sought to preserve the moral order established by the Founders (liberty and equality) yet while responding to a crisis, was forced to create programs that sought to find a mean between individualism and socialism. The dilemma, for FDR, is that pure individualism actually undermines good government and socialism provides both moral confusion and economic chaos. Still, the New Deal was FDR's solution to the crisis of free government.³

To consider how the Brownlow report, and thereby the New Deal, altered American politics, it is necessary to first examine four perspectives of "liberal" politics. The first perspective considers the U.S government as a protectorate of laizze faire economics. That is, the primary (and final) purpose of government is to allow for

²Hiram Catton, "Progressivism and Conservatism During the New Deal: A Reinterpretation of American Political Traditions," in *The New Deal and its Legacy*, ed. Robert Eden (New York: Greenwood Press, 1989), p. 180.

³John A. Wettergreen, "The Regulatory Policy of the New Deal," in *The New Deal and its Legacy*, op. cit., pp. 199-214.

unimpeded business. The highest purpose of government is to act as a limited referee where the forces of the free market rule. A second perspective of liberal government is a slightly altered view of the first. The purpose of the Constitution is to allow for unimpeded free trade, with the national government more active in a negative sense. For example, monopolies, the natural result of laizze faire economics, are prohibited. Congress determines which corporate actions inhibit the "common good." The third perspective views the national government as an active agent in promoting commerce and the welfare of the people. This type of government acts, according to Maynard Keynes' view of politics, by creating a system of redistribution. Yet, this state would not be bureaucratic insofar as the laws created by Congress would aim only to redistribute wealth, not wholly to regulate daily life. Finally, the fourth perspective on government is one which seeks total control over the everyday affairs of its citizens--social and economic. This control is handled by unelected officials, acting outside the rule of law.

How, though, does the Brownlow report understand American government? In 1937, the Brownlow report was submitted to FDR and then presented to Congress.⁴ The primary purpose of the report indicates a need for

⁴The formal title is the "Report of the President's Committee on Administrative Management," 74th Cong., 2d sess. (Washington, D.C.: Government Printing Office, 1937).

reorganization at the federal level to facilitate the workings of government. Government, as FDR and the report tell us, is inefficient, awkward and incapable of "action." Constitutionally speaking, FDR claims that he is not asking for more power, but simply the "tools of management." The two overriding themes within the report include the need for a stronger executive branch and a greater responsibility of government to foster and implement social change. The report states that "There is room for vast increase in our national productivity and there is much bitter wrong to set right in neglected ways of human life."⁵ Louis Brownlow continues, noting

There is but one grand purpose, namely, to make democracy work today in our national government; that is, to make our government an up-to-date, efficient, and effective instrument for carrying out the will of the nation. It is for this purpose that the government needs thoroughly modern tools of management."⁶

Brownlow suggests that the "fourth branch" is uncontrollable, requiring an executive who manages and accepts all the responsibilities for its power. Brownlow's concern can be stated as follows: the creation of an independent fourth branch will not result in a unified and stable organization. Rather, this fourth branch will act sporadically and inefficiently because of its lack of managerial leadership. Brownlow wanted a more powerful

⁵Brownlow, p. 2.

⁶Brownlow, p. 4.

bureaucracy, but one at the service of the executive. However, the executive would not rule alone. Rather, Congress will create policy (open-ended laws) and the policy will be implemented by the executive and his administrative powers.

The five goals of the report are as follows: 1) expansion of the White House staff, 2) greater control over the budget and managerial agencies by the executive, 3) expansion of the Civil Service, 4) the re-organization of 100 agencies currently in existence into 12 departments, and 5) the revision of the fiscal system.

The report recommends relatively innocuous changes in government procedure. The report also suggests, albeit subtly, that there will be "new major fields of activity of the National Government." These include "five great categories: Public welfare, public works, public lending, conservation, and business controls."⁷ Congress is to pass sweeping laws (e.g. Federal Trade Commission) and the executive is to carry out these laws ("fair trade"). Moreover, these laws will be general in nature, allowing for great latitude and interpretation by the executive.

To make government more responsible, though, the executive--in conjunction with the enlarged bureaucracy--will discharge these open-ended laws. Congress reviews the executive department periodically via its budgetary

⁷Brownlow, p. 34.

controls. If, according to Brownlow, Congress does not approve of the actions of the executive branch, then Congress may penalize the executive by denying appropriations. Congress becomes an overseer, and their main focus is the prevention of executive tyranny. As a result, Congress becomes less of a lawmaking body in the traditional sense.

The goal of "making democracy work" forces Congress into actually supporting an increase in regulatory lawmaking. Indeed, Congress must allow regulatory lawmaking on a grand scale. The report suggests that "rulemaking", though, had in fact been occurring since the beginning of the republic. For example, President Washington was authorized by Congress "to give all such orders to the officers of the United States, as may be necessary to carry (an embargo) into full effect."⁸ Based on this ostensible tradition of rulemaking, the report defends an extensive broadening of executive powers to address the "modern" problems of government.

What are the modern problems of government? As noted above, the primary issue, here, is the relationship between the government and the industrial society. Wettergreen argues that FDR's New Deal programs were a moral response intended to save liberalism. Although I do not necessarily disagree with Wettergreen, one must keep in mind that the

⁸Stat. L. 372. Quoted in the Brownlow Report, p. 322.

New Deal pointed beyond mere immediate economic salvation. In short, making "democracy work" requires a transformation of the constitutional government created by the Founders.

Brownlow and FDR promise to stay within the bounds created by the Constitution. Yet, they know that their quest necessitates the transformation of the social and moral fabric of America. That is,

Public service is the service of the common good in peace or war and will be judged by this standard. Not merely lower unit costs but higher human happiness and values are the supreme ends of our national life...Good Management will promote in the fullest measure the conservation and utilization of our national resources, and spell this out plainly in social justice, security, order, liberty, prosperity, in material benefits, and in higher values of life.⁹

This instrumental vision of government is a radical departure from the traditional goals of American constitutionalism.

The Brownlow report, as well as many of the other New Deal proposals, was rejected by Congress. Nonetheless, the thoughts and ideas which underlie the report soon became entrenched in the American polity. Congress did not intend to create a strong, unified executive/bureaucracy. Ultimately, though, the bureaucracy was strengthened. And this more powerful bureaucracy had two masters, Congress and the executive. These two masters, with their bureaucratic servants, produced what many post-war commentators believed

⁹Brownlow, p. 53.

to be a disastrously ineffectual public administration.

Bureaucracy Reconsidered

After World War II, commentators began to reconsider the nature of public administration. Specifically, the purpose of public administration and its methodology, hitherto universally accepted, began to be questioned. In one sense, the whole American bureaucratic project was under fire. Scholars sought desperately to give a unified meaning and understanding to the field of public administration. The groundwork for the bureaucratic state had been created; yet, even the administrators remained divided over the principles which guided their efforts. Numerous problems arose which could not be answered "scientifically." In order to clarify this post-war intellectual confusion, we must now turn to the most prominent modern authors and their articulation of the nature of both the internal divisions among the advocates of public administration and the dilemmas caused by bureaucratic growth.

Paul Appleby, a defender of the New Deal, claims that the bureaucracy of a national government is not by nature the same as other simpler bureaucracies. To wit: it is incorrect to assume that governmental bureaucracy is similar to a bureaucracy of private business. The same rules do not apply. Ultimately, government, Appleby asserts, is political and one cannot reasonably expect that politics can

be separated from administration. Politics at the highest level, for Appleby, is a type of "art," and not strictly a science. Consequently, only a "politician can be president." Appleby's writings demonstrate the problematic crux of the politics and administration dichotomy: the denial of the value of the art of politics by administration leaves a void in the political order. In short, without a deliberative governing body, government becomes arbitrary and tyrannical.

Appleby claims that "administration is, within wide limits, this application of policy generally formulated in law."¹⁰ Yet to suggest this, within the framework set up by Appleby, indicates that the public "will" must be interpreted by administrators. This will is reflected by current law. Such law, then, is open ended, requiring interpretation to secure its authority. Furthermore, all aspects of human life must be directed by administrators. In other words, administrators must "reconcile and mesh the functions of politicians and the functions of experts in the service of society."¹¹ Administration is ultimately understood as "government in direct action on behalf of and in restraint of citizens; policy-making in administration is

¹⁰Paul H. Appleby, *Policy and Administration* (Alabama: The University of Alabama Press, 1949), p. 89.

¹¹Appleby, p. 47.

the exercise of discretion with respect to such action."¹²

Robert A. Dahl, like Appleby, openly denounces the existence of a separation of politics from administration. In an influential article in *Public Administration Review*, Dahl claims that the true problem with public administration is its attempt to become a value-free science.¹³ He claims that values cannot be ignored or dismissed. Ultimately, what occurs is that values sneak in the back door. He continues:

Science as such is not concerned with the discovery or elucidation of normative values; indeed, the doctrine is generally, if not quite universally, accepted that science cannot demonstrate moral values...Much could be gained if the clandestine smuggling of moral values into the social sciences could be converted into open and honest commerce.¹⁴

Dahl believes that the whole issue culminates in a democracy's natural concern for "ethical considerations". The issue of economic rights animates the discussion of administration. Public administration, being "public," requires the articulation of certain ends (e.g. free government, redistribution, etc.) before it can be effective. The issues, that is, the political questions, must be answered outside the realm of administration.

¹²Appleby, p. 15.

¹³Robert A. Dahl, "The Science of Public Administration: Three Problems," in *Public Administration Review*, v. 7, Winter 1947, No. 1, pp. 1-11. Quoted in *Classics of Public Administration*, op. cit., p. 181 ff.

¹⁴Dahl, p. 181.

Administration, according to Dahl, is limited for as a science, it is incapable of answering the most important questions. If the "science" of public administration is truly value free, who or what chooses one set of values above another? Hence, Dahl's dilemma.

The agreement about and understanding of values are the primary *political* activities. And these activities, although eschewed by administrators as political in nature, were returned to the realm of public discourse in the post-war years. If values presuppose public administration, is it possible to create a universal science? Dahl insists that moral ends (which were hitherto not spoken of or simply denied by public administrators) must be installed formally into the discussion and study of public administration. Dahl raises an interesting question: If bureaucrats are to assert values, what values will be promoted? Again, Dahl points out that the science of public administration poses certain problems. The primary one is that "science cannot demonstrate moral values, that science cannot construct a bridge across the great gap from 'is' to 'ought.'"¹⁵ The science of public administration is a confused one. Is the end of public administration efficiency as many have claimed? Efficiency, though, has no purpose independent of its implementors. Dahl states "Belson and Dachau were

¹⁵Dahl, p. 181.

'efficient' by one scale of values."¹⁶ To assume that scientifically articulated expediency at the hands of public administrators makes for good government, as many previous proponents of administration claim, is not only ludicrous, it is dangerous: for expediency by its nature is unprincipled.

Dahl adds that "We cannot afford to ignore the relationship between public administration and its social setting."¹⁷ The city is particular, therefore universal principles cannot (immediately) be thrust upon all governments. All governments are based, in part, on historical circumstance or chance--which is why they cannot be replicated. Are there, though, "any principles independent of their special environment?" Dahl suggests that there might be universal principles which apply to public administrators; for without a guiding principle, it is nearly impossible for public administration to have any sense of constancy in its purpose.

With these issues in mind, Norton Long, in 1949, presented an alternative view of public administration. Long believed that politics and administration must be forged in such a way as to ensure that policies (i.e. values) are properly implemented. To achieve this, Long asserts that until the "happy time" when we have a

¹⁶Dahl, p. 182.

¹⁷Dahl, p. 188.

"responsible two-party system," we must accept that "our present system" is faulty and work to transform it. It is faulty because the system spreads power directly between the president, courts, Congress and indirectly between the above branches and the administrative branches, interest groups and parties. The problem, then, is the Constitution, for it inhibits the centralization of administration.

Long notes:

It is clear that the American system of politics does not generate enough power at any focal point of leadership to provide the conditions for an even partially successful divorce of politics from administration... (Therefore) administrative rationality demands that objectives be determined and sights set in conformity with a realistic appraisal of power position and potential.¹⁸

Let us suppose that full control of the bureaucracy were given to the executive, in accordance with the Brownlow proposal. Would this solve the problem of "power"? Long asserts that, no, power is still problematic because Congress, as an interest group, would share some of the power. The same is true of the Courts and other various groups mentioned. Furthermore, Long argues the concentration of powers in the president's hands could easily lead to another "Bonapartist experience."¹⁹

So, what is to be done? Long asserts that we must hope

¹⁸Norton E. Long, "Power and Administration", *Public Administration Review*, 9 (Autumn 1949), pp. 257-264. Quoted in *Classics in Public Administration*, op. cit., p. 204.

¹⁹Long, p. 212.

that someday our present form of government is replaced by a party government where all the power is held by a group of responsible "representatives" (or better administrators) chosen via the electoral system. That is, constitutionalism, American style, is incapable of fulfilling the requirements of maintaining a modern government.

Long suggests that good government, in the future, must be comprehensive. He adds that "Marx, Keynes, and their followers by denying the validity of the self-regulating economy have endowed the state with an over-arching responsibility in terms of which broad coordination of activities is not only intellectually possible but theoretically, at least, necessary."²⁰ One wonders where Long would place the intellectual and theoretical responsibilities of government.

Long's arguments are important for two reasons. First, he clearly indicates that the goal of public administration is, to use Leonard White's phrase, social amelioration. Secondly, Long contends that administration cannot occur in conjunction with constitutionalism. In so far as the relationship of administrative government with constitutional government is an uneasy one at best, Long's analysis of administrative government is relevant; for, as one quickly discovers, the problems created by a partly

²⁰Long, p. 210.

administrative, partly constitutional government are irresolvable.

The Circle Unbroken

In the recent Minnowbrook II findings, the modern dilemmas of public administration are restated. Minnowbrook II, a 1988 conference on the current state of administration, describes the perspective brought to early studies of public administration. While important changes have occurred since Wilson first published his seminal work on public administration, one aspect of his subject remains constant: there is a great deal of confusion surrounding the ends and means of public administration. There is, however, a consensus regarding the role of the administrator: the administrator is, above all else, a lawmaker.

Steven Maynard-Moody, a Minnowbrook participant, openly admits that "vague legislation requires administrators to become de facto lawmakers. The major issues about who is qualified for assistance and the nature of the (food stamp) program were determined not by congressional committee or during floor debate, but by bureaucrats. *No one else was willing to take responsibility.*"²¹ Such a conclusion is

²¹Steven Maynard-Moody, "Beyond Implementation: Developing an Institutional Theory of Administrative Policy Making," in *Public Administration Review*, v. 49, March/April 1989, No. 2, p. 137. Emphasis mine.

inevitable, Maynard-Moody suggests, because the "politics-administration dichotomy" still haunts us. It haunts us, I suggest, because public administration, qua public administration, is contradictory to constitutionalism.

Mary Ellen Guy concludes--or one might say returns us to the beginning--by happily noting that the discipline of public administration has accepted "social equity" as the goal most appropriate for public administrators. In sum, the discipline exhibits "a disdain for business as an enterprise;" for business, it seems, leads back to the problems of individualism and, ultimately, is at odds with "democracy."²²

What the above authors appear to accept without question is that constitutions "do evolve, do grow, and do decay."²³ Of course written constitutions do change, via the amendment process, yet these authors believe in the idea of a "a living constitution" which evolves to such a degree that the modern Constitution barely resembles the old.

We return, then, to the beginning. The continuing dilemma seems to be the implied separation of politics and administration. Politics and administration are not, nor can ever be truly separated; defenders of public

²²Mary Ellen Guy, "Minnowbrook II: Conclusions," in *Public Administration Review*, v. 49, March/April 1989, No. 2, pp. 219-220.

²³Richard J. Stillman, II, "Ostrom on *The Federalist* Reconsidered, in *Public Administration Review*, 49, No. 1 (January/February 1989), p. 84.

administration inevitably strive to maintain a separation in order to prevent governmental corruption. Indeed, this corruption can be seen easily in modern day government.

R. Douglas Arnold's extensive study confirms what should be apparent to all regarding the perpetuation of public administration: namely, public administration owes a large part of its growth to the natural tendency to protect one's livelihood. That is, bureaucrats naturally seek to preserve their own.²⁴ Arnold concludes with the following:

Ordinarily, bureaucrats choose to allocate disproportionate shares of benefits to members of those committees that have jurisdiction over their programs. But these extra shares do not come automatically. They accrue to members who have performed important services, who control resources bureaucrats desire, or who threaten in some way the achievement of bureaucrats' goals.²⁵

Congressmen themselves have become irresponsible insofar as they act to benefit their districts, or, in more recent

²⁴R. Douglas Arnold, *Congress and the Bureaucracy* (New Haven: Yale University Press, 1979). Arnold gives extensive "evidence" (chapters 6-8) supporting his theory. The proof is based on a model of how Congress acts in light of statistical data. What is curious about Arnold's methodology is that he attempts to explain the motions of the soul via statistical analysis (i.e. mathematics). However, such methodology cannot answer questions of prudence (the ought) and therefore such questions are many times left unasked. In other words, only that which can be "proven" statistically is true. Is it not possible that common sense--or any Shakespearean play--can say more about man and politics than statistics?

²⁵Arnold, p. 207.

times, PACs and other interest groups.²⁶ The patronizing tendencies of congressmen are less deleterious than the fact that they no longer understand, or even bother to understand, the numerous regulations that they create each year. In their effort to control the details of everyday life via the bureaucracy, congressmen have lost control. Even the normal bills that pass through Congress are voted upon unread, or given only a cursory glance. Gordon Tullock, none too humorously, adds that "The Congressmen would, in fact, exercise more control over the nation, if they attempted less."²⁷

The "crisis" of modern public administration is thoughtfully worked out in Vincent Ostrom's *The Intellectual Crisis in American Public Administration*. The crisis, he claims, is due to a lack of understanding on the part of public administrators as to their origin, methods and, more importantly, their goals. Ostrom states:

Dare we contemplate the possibility that the contemporary malaise in American society may have been derived, in part, from the teachings of public administration? Have our reform efforts to eliminate fragmentation of authority and overlapping jurisdictions so altered the basic structure of American government that many of its

²⁶At times they are outright mean-spirited. Consider John Wettergreen's "The Regulatory Revolution and the New Bureaucratic State, Part II," *Heritage Lecture No. 181*, 1989, pp. 6-10.

²⁷Gordon Tullock, *The Politics of Bureaucracy* (Lanham, MD: University Press of America, 1987), p. 223.

benefits have been eliminated as well?²⁸

Ostrom, following Tocqueville, makes the distinction between democratic administration and bureaucratic administration. Ostrom judiciously points out that modern administrators desire to implement reforms, yet remain ignorant of the nature of American government, either from a historical perspective or as it stands today. Consequently, confusion reigns: an attempt is made to apply theory without a firm basis in knowledge and failure is misinterpreted as a failure due to method rather than lack of (or mistakes in) theory.

Rule based upon theory or rational principles may at times appear slow, inefficient and tedious. Involving the people in politics is not intended to be the means whereby the most efficient government is instituted. It is, however, a means for guaranteeing liberty. Bureaucratic administration aims at efficiency, but ensures the destruction of liberty. Moreover the selfish behavior of the bureaucrat is a form of despotism. Citizens are transformed into little men, without hope for happiness, morality, or strength. Tocqueville states:

Each of them, living apart, is a stranger to the fate of the rest; his children and his private friends constitute to him the whole of mankind. As for the rest of his fellow citizens, he is close to them, but he does not see them; he

²⁸Vincent Ostrom, *The Intellectual Crisis in American Public Administration* (Alabama: The University of Alabama Press, 1973), p. 113.

touches them, but he does not feel them; he exists only in himself and for himself alone.²⁹

Man is alive, though not human. The essential spirit of modern administration aims at the destruction of human spirit. While democratic administration, Ostrom insists, "depends upon elections, representation, and open deliberation in common councils for reaching collective decisions,"³⁰ the development of a "single overreaching bureaucracy" only ensures the creation of "political masters."

Ostrom suggests that the disorderliness of America's politics (the "80,000 communities") actually benefits her citizens. Indeed this "appearance of disorder" suggests a healthfulness that is efficacious. With Ostrom's remarks in mind, why does confusion remain prevalent among administrators regarding the proper goals of administration? Writers such as Herbert Simon and Woodrow Wilson have attempted to provide an answer.

The desire for "organization," first studied by Herbert Simon, was meant to augment the fact-value dichotomy. The prevailing belief then (an underlying current today) is that organizational theory can solve the problems of management. Simon adds, however, the following guidelines: certain "values" must be accepted prior to any discussion of good

²⁹Tocqueville, p. 318.

³⁰Ostrom, p. 129.

administration. In other words, one must first know what the people (via the legislature) desire before an efficient hierarchical structure can be created. Consequently, if the choices to be made are varied, Simon asserts, it is better if the hierarchical structure is less rigid.

Contrary to Simon, Woodrow Wilson openly accepts the belief that "administration" is universal, hence the need to determine what these universal rules are before applying them to our own situation. However, it must be made clear that Wilson did not openly urge the divorce of politics from administration; he believed that some administrative rules in France, Germany or England could simply be transplanted in part in the United States. Nor does Wilson desire to separate values from administration. Recall that Wilson believed that administrators would be loyal to the values articulated by the executive officer and Congress.

To return to Ostrom, whose conclusions are centered upon the following propositions: 1) human beings, including bureaucrats, are capable of corruption and therefore need some guidelines set down; 2) public administration necessarily lies within the realm of politics, for its value choices determine the type of administration being conducted at a given point; 3) and one large bureaucratic structure cannot account for the "diverse preferences among citizens."³¹ Defenders of the administrative state cloud

³¹Ostrom, pp. 111-112.

the issue of administrative principles by referring to the United States simply as a state. The "will of the majority" cannot be easily defined in light of the fifty sub-states and numerous other associations which were consciously given a place at the founding. The "will" of the United States can only refer to those issues which clearly affect all: defense, treaties, currency and commerce. The "will of the state" is otherwise undefinable because there are numerous definitions. The attempt to create a universal will, Ostrom argues, would result only in the destruction of majority rule. In place of majority will, the will of those ruling presides. Yet, if no one authority rules, then disparate and conflicting interests attempt to rule. This is neither good nor bad government in the traditional sense; it is the absence of government. Hence, advocates of bureaucracy return to this overriding theme: good government is in fact good administration. In other words, government becomes unprincipled, but is, nonetheless, efficiently managed.

CHAPTER III

The Moral Foundation of Public Administration

In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by the frame of government, to cause their public officers to return to private life, and to fill up vacant places by certain and regular elections and appointments.

1780 Constitution of Massachusetts

Democratic Morality

The above passage from the 1780 Massachusetts Constitution affirms the necessity of creating a government where the rulers are not omnipotent, but instead subject to the people. The Massachusetts constitution makes the further claim that a "Government is instituted for the common good...and not for the profit, honor, or private interest of any one man, family, or any one class of men."¹ These "old-fashioned" lawmakers believe that prudence dictates the creation of a government which will benefit the whole of society. The key to this prudential choice was

¹1780 Constitution of Massachusetts, Part I, Art. 7.

their resistance to developing an independent class of rulers.

Why, though, is it not desirable to create an extended and independent bureaucracy? Specifically, what is undesirable about a large un-elected professional group of administrators, if their purpose is to regulate the lives of the citizens for their own benefit? The answer, in part, can be understood in light of the fact that the Massachusetts Constitution, as well as many of the other original state constitutions, promised to promote "piety, religion and morality" in order to ensure "the happiness of the people, and the good order and preservation of civil government." Government serves to promote happiness. It does so, in part, by promoting religion: indeed, religion has a two-fold purpose. The first is that a good and stable government requires a moral basis which moderates its citizens. Secondly, the happiness of the citizens requires morality and religion. That is, human happiness presupposes morality. Apparently these eighteenth century Americans did not believe that a regulatory bureaucracy, at the state or national level, could achieve this end.

Today, numerous politicians, academics and commentators claim that bureaucracy promotes greater justice in society. As Charles Goodsell notes, "In the 1960s yet another collective decision was made: to assign all important

social problems to the federal government for solution."² To develop a better understanding of contemporary bureaucracy it is helpful to consider the moral claims of the proponents of bureaucracy. At the heart of bureaucracy lies, as we shall see, no substantial moral basis or "values" which animate or guide the city. Such values must be created or agreed upon by the members of the community. Emmette S. Redford claims that as a democracy, we are guided by a "democratic morality." And, accordingly, our morality inspires our values. Thus, Redford states, "Man is, for man, the ultimate measure of all human values."³ Because we choose to be a democracy, we necessarily must agree that there are no unequal classes and that the goal of society is "human dignity." In other words, because we choose (will) to live within a democracy we must necessarily accept that there are no groups who have a "vested position."

To say that man is the measure of values implies that there is no standard or measure. For different men, at different times, animated by different desires, create different values. For example, while slavery is antithetical to democracy, it cannot be considered simply wrong. This type of reasoning leaves the legitimacy of morality open. In other words, if we accept Redford's view,

²Charles T. Goodsell, *The Case for Bureaucracy* (New Jersey: Chatham House, 1985), p. 61.

³Emmette S. Redford, *Democracy in the Administrative State* (New York: Oxford University Press, 1969), p. 6.

there can be no true morality, only that which is created through agreement or contract.

At the heart of the modern bureaucratic state is the desire to reshape and alter the nature of man and politics. Self-interest, exemplified by the spoils system, is an illness which must be overcome. Bureaucracy reduces suffering and makes equitable our "capitalist economy with its attendant inequalities...(or the) historicocultural legacies of racism and sexism that plague us today."⁴ Bureaucracy animates and guides the city. An ultimate function of bureaucracy is the regulation of human behavior.

Interestingly, our modern bureaucratic state seems primarily concerned with gender and race discrimination. In a very real sense, every aspect of life is affected by this adopted function, including academic institutions, conventions, small businesses, towns, corporations, etc. Bureaucracy is concerned with, for example, health and human services, education, energy, labor, equal employment, urban affairs, agriculture, housing, welfare and environment. And, if an end of bureaucracy is to redistribute wealth, many would agree that in this at least bureaucracy is efficient. As Goodsell points out, bureaucracy

actively helps to alleviate (inequity)...More income is probably redistributed by American revenue collection and human service bureaucracies every year...The writing of 36 million checks monthly by Social Security is itself a staggering

⁴Goodsell, p. 136.

achievement that only a modern bureaucracy could achieve.⁵

As an end in itself, bureaucracy is capable of remarkable feats. The question, though, is whether these 'feats' are really necessary or actually good for the American citizenry. On a more fundamental level, one must ask the following question: Is it possible to eradicate self-interest, corruption and all things political? In *Ethics for Bureaucrats*, John Rohr attempts to answer this question.

Rohr argues that it is possible to instill correct "values" in one's bureaucrats. Furthermore, Rohr claims, the dangers of corruption and self-interest are replaced with "regime values." Rohr contends that the "method of regime values" (those values upon which the regime is grounded) rests upon three considerations:

1. That ethical norms should be derived from the salient values of the regime;
2. That these values are normative *for bureaucrats* because they have taken an oath to uphold the regime;
3. That these values can be discovered in the public law of the regime.⁶

Rohr continues by noting that:

The purpose of regime values is not to make all bureaucrats march in lock-step. There is no one "authoritative" interpretation of the American experience that all bureaucrats must adopt. What is important is that they accept the moral obligation to put themselves in touch with the values of the American people through the values

⁵Goodsell, p. 137.

⁶Rohr, *Ethics for Bureaucrats* (New York: Marcel Dekker, Inc., 1978), p. 59.

of the American regime. Just how those values are interpreted is a decision only the bureaucrat can make.⁷

In other words, bureaucrats should be required to reflect upon the "values" of the people and rule accordingly. Since bureaucrats, according to Rohr, are for the most part decent individuals, they will appreciate and accept the values within the Constitution.

Rohr adds:

The method of regime values eschews metaphysics and addresses the students in the existential situation in which it finds them--persons who have taken or are about to take an oath to uphold the values of a particular regime. It admonishes them that taking such an oath presupposes an acceptance of the fundamental justice of the regime but does not inquire into how the students arrived at the conclusion that the regime is just.⁸

By values, Rohr means "beliefs, passions, and principles that have been held for several generations by the overwhelming majority of the American people."⁹ How, though, is a bureaucrat to interpret the current values of the regime? Rohr suggests that reading Supreme Court decisions will help form the opinions of the bureaucrats. In so doing they will be able to understand the current trends in society and thereby promote and defend them.¹⁰

⁷Rohr, p. 84.

⁸Rohr, p. 61.

⁹Rohr, p. 65.

¹⁰Rohr adds an illuminating footnote in *To Run a Constitution*, which is repeated here: "In the Sermon on the Mount, the poor, the weak, and the merciful are declared

Rohr continues reminding the citizenry to

"trust the bureaucrats who govern us. We must trust them to take our values seriously and to try to let these values have some influence upon the decisions they make. We want to be governed by persons responsive to our values, but we also want to be governed by persons who are imaginative, creative, and free."¹¹

For Rohr, ethics consists of first interpreting the desires of the many, and, second, fulfilling them. The only restraint is that of equality. That is, equality must be preeminent in the minds of the bureaucrat. While Rohr admits that moral virtue cannot be institutionalized, that is, taught at universities, he still claims that if purpose and duty are properly instilled by the teacher, the actions of bureaucrats will be better guided.¹² In short, education will in fact provide the necessary "restraints."

Frederick Mosher points out, in *Democracy and the Public Service*, that in the future most public administrators will have university training. Mosher senses that the future of democracy is tied to our current

'blessed,' but I do not believe that Christians are expected to deduce from these words general rules of behavior that can be applied to specific situations. They are expected, however, to read the text attentively, ponder its meaning, and develop a sensitivity and awareness to the values proclaimed therein. It is hoped that the believer will translate this awareness into action when the appropriate occasion arises." (Kansas: University Press of Kansas, 1986), note 72, p. 85.

¹¹Rohr, p. 75

¹²Rohr claims that most bureaucrats are "decent." One wonders, though, is decency synonymous with prudence?

educational system. Mosher notes that "trends suggest that university faculties will have growing responsibility for preparing and for developing public servants both in their technical specialties and in the broader social fields where their professions interact."¹³ Mosher's statement, if accepted, presupposes that moral education occurs at institutions of higher learning. This assumption forces one to address two problems. First, moral education generally occurs in one's youth, not at graduate school. Secondly, most colleges and universities today do not embrace liberal education, that type of education thought necessary for the development of a "gentleman." Instead, most institutions avidly teach that there is no "moral" teaching per se. To assume, as Rohr and Mosher do, that moral education occurs at numerous institutions in this country is definitely problematic.¹⁴ For example, in 1978, hoping to resolve the problem resulting from the rule of new independent bureaucrats, the U.S. Office of Government Ethics (OGE) was created. Not surprisingly, the OGE has rapidly expanded and its duties have become comprehensive. Their initial purpose

¹³Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (New York: Oxford University Press, 1982), p. 240.

¹⁴Other writers promote the reading of modern and ancient texts (e.g. Shakespeare and Bible) in order to introduce students to our tradition of ethics. Such readings will lead to a "sensitivity" of moral issues. cf. Lewis C. Mainzer, "Vulgar Ethics for Public Administrators" in *Administration and Society*, 23 (May 1991) No. 1: 3-28.

was to regulate "conflicts of interest" regarding financial matters. The agency reviews the legitimacy of unauthorized benefits received by agency officials. In other words, the OGE seeks to determine the "ethically" correct action regarding the relationship between administrative agents and their innumerable clients. Specifically, how do we ensure against conflict of interests within an agency? To determine this, the particular agency and the OGE shape an evergrowing collection of rules regarding conduct.¹⁵ In order to effect this constantly growing body of ethics, the OGE has created 100 Designated Agency Ethics Officials (DAEO) who are "accountable to both the head of the agency and the OGE."¹⁶ The DAEO have a support staff of over 5000. Remember, in general, the OGE is responsible for the creation of ethical rules for executive agencies, the creation and implementation of educational programs, the determination of violations and penalties for violators. In effect, public administrators are now considered a class different from than normal Americans; they are the "guardians" of the United States subject to Congress and the OGE. In response to this agency pregnant with rules and

¹⁵To see the arbitrary nature of this on-going process of rule making, consider that *The Bureaucrat* journal recently promoted a contest to see whose opinion regarding a bureaucrat receiving free airline tickets "stacks up with the experts."

¹⁶Stuart C. Gilman, "The U.S. Office of Government Ethics," *The Bureaucrat*, Spring 1991, v20 #1, p. 13.

codes, one is forced to ask where are Rohr's and Mosher's university teachers when you really need them?

Beneficent Oligarchy

Even though OGE and hundreds of other ethics programs have been created in the last two decades, a further problem has resulted due to the transformation of democracy and the spread of egalitarianism. Specifically, defenders of bureaucracy claim that regulatory government is more "fair" than traditional government insofar as it represents the interests of a greater number of the citizenry. Yet, to claim this requires an apology for the elitist tendency of bureaucratism. In other words, bureaucracy claims a foundation requiring a "neutral, efficient civil service," which in turn requires selective civil service: one where the few, the best, not the many, are supposedly chosen to lead. A tension here arises because the notion of the few and the best suggests an undemocratic government. Moreover, there is an explicit acknowledgment that a bureaucratic superstructure can easily become a separate class in American politics. And, as Woodrow Wilson points out, this class could easily degenerate into an unresponsive ruling body. They will become unresponsive because they have little attachment to those they supposedly serve. Altruism is indeed a type of virtue; but history teaches that oligarchic classes are seldom virtuous.

Aristotle and the Bureaucratic Hero

Traditionally, the aim of the city is to care for the needs of the body and the soul. To do so properly, a city, according to the ancients, must be of a limited size so that the rulers could know those that they ruled and vice versa. Yet, modern society faces an unusual dilemma. Modern societies are so populous that a limitization on their size or any familiarity between ruler and ruled are equally impossible. Thus, modern social scientists claim that the pace of societies' progress and its size make bureaucracy necessary. Moreover, in keeping with this claim, progress demands the acceptance of certain political truths. To name one which is perhaps the most generally accepted today, immoderate wealth in a world where there is starvation is immoral. Vast differences in wealth result in a class of poor, sick or uneducated citizens. The question arises, though: is an equality of wealth equivalent to morality? In other words, is property the standard for judging moral virtue? In an attempt to answer this question, it would be helpful to first consider a definition of moral virtue which has a longer standing tradition. In my opinion, the best discussion of classical moral virtue occurs in Aristotle's *Nicomachean Ethics*.

In the *Nicomachean Ethics*, Aristotle begins with a discussion of ends or *telos*. All activity, according to Aristotle, is performed with a view to an end.

Consequently, there must be one final end, for otherwise there would be infinite regress. According to Aristotle, happiness is this end to which all men aim. So, then, Aristotle asks, what is happiness? Initially, he defines happiness as an activity of the soul in accordance with virtue. Yet, within this discussion of virtue, Aristotle describes two types of virtue: moral and intellectual. Aristotle reminds the reader that moral virtue is not an innate part of the soul, but comes about through habit and choice. That is, humans are not "naturally" virtuous (although natural virtue does exist). Rather, humans have the ability to acquire such merit.

Aristotle further divides the soul into two parts: the irrational and rational. Moral virtue is concerned with the irrational part of the soul--specifically the passions. Moreover, reason necessarily controls the passions. Yet passion can easily become dominant, causing the destruction of the individual and the city.

According to Aristotle, a "properly" formed city allows men to work (*ergon*) "properly". That is, humans should function in a particular way, acting according to their nature. Ultimately, Aristotle argues that happiness necessitates a properly ordered soul. Finally, Aristotle's understanding of happiness and its fulfillment requires the legislative art to be in the hands of the prudent man. Still, moral virtue, *per se*, does not make men happy. While

moral virtue is required for happiness, it is not synonymous with happiness. To be happy, one needs another virtue. That is, happiness is possible only when the highest virtue, the intellectual virtue, is active. In a centrally administered society, unlike Aristotle's city, a new type of happiness is promoted; namely, bodily happiness. One wonders, then, whether intellectual virtue need be involved in the creation of such happiness. To obtain bodily satisfaction for the citizenry, the bureaucrat seems to need to be above the people and government, forming a new society. The use of the legislative art apparently is not required. Indeed, the modern bureaucrat is transformed into a heroic meta-legislative individual who is capable of ensuring egalitarian results. Yet, this heroic individual is not guided by either Aristotle's moral or intellectual virtue. The question remains: what is required for bureaucratic heroism?

The proponents of the bureaucratic state believe that people cannot rule themselves. The people are not capable of exercising their liberty. Educated "experts" are hired by the government to organize the details of everyday life. This hiring of educated experts causes new problems for public administrators. After all, who is an educated man? Who is an expert?

A curious trend has arisen in public administration in response to the dilemma inherent in the selection of the

educated expert, namely, the belief in the availability of the educated expert and in his potential for transformation into a heroic bureaucrat. The foremost characteristic of these heroic bureaucrats is their tendency to move against the flow of the status quo toward some higher end. That end, today, is equality (fairness) and courage.¹⁷ Fairness occurs when the bureaucrat decides what the public interest is, even though the public might not desire a particular policy. Fairness is defined in terms of the decision made by the bureaucrat. One proponent of heroic bureaucracy notes that "Courage is the ability to decide and act in the face of difficulties for which withdrawal would be an easier response, and to abide by principle even in unpopular causes."¹⁸ For example, those who incorporate minorities into agencies or simply benefit minorities against the will of the majority are considered heroes. A problem arises when one recalls that bureaucrats are supposed to respond to the majority will. To incorporate women, blacks and homosexuals into public service might be considered good. How, though, is this understood since the bureaucrat, as hero, might be acting beyond the wishes of the public? It seems, here, that bureaucrats weigh "values" and decide

¹⁷Cf. Richard A. Couto, "Heroic Bureaucracy," in *Administration and Society*, 23 (May 1991), No. 1: 123-147; Christopher Bellavita, "The Public Administrator as Hero," in *Administration and Society*, 23 (August 1991), No. 2: 155-185.

¹⁸Mosher, p. 234.

which ones will take precedence. The public must then accept the decisions; for, ultimately, these decisions are in the public interest. Again, Mosher notes that these "decisions usually will require some kind of interpretation of *public and public interest*--explicit, implicit, even unconscious."¹⁹ The ability to interpret the public good requires independence of the bureaucrat from the public. Hence, the rise of heroic bureaucracy. Our political salvation relies on the beneficent actions of "secular saints" who set examples of "heroism and saintliness."²⁰

Heroism is characterized by the distinction between itself and mediocrity. Further, heroism is characterized by exceeding the limits of ordinary human endeavor. To argue that an efficient or well organized bureaucrat is a hero is an absurdity. Still, one is taught that modern administrators do indeed strive for distinction, distinction beyond mere mediocrity. Recall that Lincoln warns us against members of the "family of the lion, and tribe of the eagle"? One may ask, though, is the modern bureaucrat likely to be sprung from the tribe of the eagle?

Heroism presupposes excellence, vision and insight; in short, virtue. According to Mosher, to achieve this level, a bureaucrat must become, in an important respect, thoroughly political, while remaining unaffected by public

¹⁹Mosher, p. 239.

²⁰Bishirjian, op. cit., p. 54.

opinion: again, an implicit contradiction. The heroic bureaucrat is actually asked to become a philosopher king. For as king the bureaucrat is beyond law; and as philosopher, he is above all wise.

Bureaucracy and the Denial of Choice

Bureaucracy denies choice, choice which is necessary for moral virtue to exist. Humans invariably make choices which are not always good. And, imperfect wisdom causes humans to harm others unjustly, e.g. discrimination. Nonetheless, discrimination is proper: it enables one to distinguish good from evil. Discrimination, though, is not always just. Disregarding the difficult choices required for proper discrimination, is it possible or probable that people can be made to think alike? Karl Marx believed such homogeneity possible. Not surprisingly, Marx's homogeneity requires the transformation of human nature. Common sense and contemporary history demonstrate Marx's folly. Yet what can be done to prevent widespread discrimination and tyranny? The most practical answer is not found in the codes of the bureaucrat, but in *Federalist* 10. Publius states:

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will

attach themselves.²¹

Accordingly, human nature has not changed and will not change in the future. The purpose of government, says Publius, is to protect liberty and allow for people to rule themselves to the best of their ability. True, injustice always occurs, since human beings will never be perfect. Yet, humans do have the capacity to choose well, and choice is necessary for heroism. Bureaucracy attempts to enforce current values, as Rohr asserts, yet why not allow the people themselves to enforce values at the local level? Why do we need bureaucrats for morality? The answer, I believe, is that most proponents of bureaucracy consider the people to be incapable of self-rule. Bureaucracy forces all men to have the same opinions, hoping to alleviate the need for self government. That is, if we all have the same opinion-- you needn't govern yourself in any special way. Publius argues, though, that this homogeneity is impossible.

Social Equality

The Founders believed that men are capable of self-government. The Founders also believed that all men are created equal: or better, that all men have the same rights to their life, liberty and happiness. Yet, our Founders understood that men's passions unchecked create tyrannical

²¹James Madison, et al., *The Federalist* (New York: The Modern Library,) p. 55.

societies. Therefore, a written constitution was required to ensure that all men would have at least their "political" rights protected. The Founders make a distinction between political equality and social equality. "Social" equality is only possible through extreme tyranny. Men, it was understood, are different: some are stronger, more intelligent, and more ambitious than others. Therefore certain social inequalities are expected. To obtain liberty, and allow for moral and intellectual excellence, a constitutional republic is necessary. The Constitution, as described in *The Federalist*, reflects certain tensions (e.g. self-interest) that can never be eradicated. They can, however, be confronted. The Founders believed that the federal government would never effectively control all aspects of society--still, state and local governments were allowed to exist for the good of all citizens. In order to prevent a tyranny from occurring, it was deemed best to divide the power amongst the various states and, further, to create a separation of powers at the national level. Yet, today, concern for tyranny is overshadowed by the issue of equality--equality understood somewhat differently than the Founders intended, to be sure. In fact, it seems that the "moral" question today is centered only on this new understanding of equality.

Recently, for example, Senator Kennedy proposed that the government should become involved in the regulation of

art. Kennedy's proposed legislative involvement, if passed, would "compel an owner who wanted to resell a painting or sculpture to track down the original artist and pay him a seven percent share of the profit; allow artists to sue owners for negligently or deliberately damaging or altering works in their collections; and force owners to notify a federal agency when they resell artworks."²² Kennedy assumes that the federal government can properly regulate "good art." However, isn't the appreciation of art, for the most part, necessarily in the "eye of the beholder?" The value of a particular work cannot easily be regulated. In fact, the monetary value of a particular work depends completely upon the buyer's opinion. According to the proposed regulation, if the "value" of a piece of art rises, the original artist must receive some of the profit. However, if the value should decrease, the owner loses his investment, but the artist loses nothing. Do not most investment buyers of art from unknown artists usually hope that the art will increase in value? Under the new legislation, the buyers would be burdened under a network of petty rules and taxes. Consequently, investment buyers would be more hesitant to purchase art. (Investors finance more art than the mere admirers). "A tax on successful discoverers of new artistic talent, like a tax on successful

²²Walter Olson, "Flawed Perspective," in *Barron's*, V. LXVII, January 5, 1987, p. 9.

venture capitalists, discourages 'speculation'--at the expense of the young artists to whom the speculators give financial (and moral) backing in their years of obscurity."²³ Equity may be served here, though art certainly would not be. Equity fails to recognize the sometimes important role discrimination plays in everyday life.

Many believe that if two people (e.g. one Anglo, the other Jewish) make different amounts of money then the evil of discrimination is the cause. Thomas Sowell suggests that contemporary men seem to ignore the fact that people make choices which affect their lives.²⁴ Culture, tradition, family and religion have an impact on how people act. The Chinese, for example, who are more "hard working," according to Sowell, have a higher income than blacks and whites. Incentives arise among individuals causing differences in incomes. Young people on welfare may have no desire to succeed in life: their income is assured. In *Losing Ground*, Charles Murray points out some striking statistics on the effect of the welfare state on the morality and work incentive of those receiving benefits.²⁵ Murray claims

²³Olsen, p. 9.

²⁴Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: Quill, 1984), p. 73 ff.

²⁵Charles Murray, *Losing Ground: American Social Policy 1950-1980* (New York: Basic Books, Inc., 1984), p.126. For example, in 1960 the illegitimacy rate for blacks was 17%. In 1980 it was 48%. Murray claims that young men no longer

that young men are no longer the "breadwinners." The government has taken over the responsibilities of the family. The destruction of the distinction between the private and public (the basis of liberal democracy) is at the heart of the decline of the family. In short, regulations and bureaucratization can be demonstrated to be immoral rather than moral influences. Again, equality in this sense is not necessarily a good.

We return, though, to the wider problem of moral virtue and the city. Both Rohr and Aristotle ask the same question: How is moral virtue inculcated? Both would agree that morality is taught. How it is taught is another issue entirely. The best educators in moral virtue (or surely the most important) are an individual's parents. Traditionally, moral training is held to begin at birth and is constantly reinforced until the child is mature. Laws, mores and religion direct the activities of the individual. To repeat, traditionally moral training occurs within the family and at the local level. Those who assert that morality can be regulated by administrators invariably fail to address the question of methodology, and therein lies their dilemma. Moreover, the administrators also fail to address the question of the nature of moral virtue. Here, for want of an opposing definition, this paper will adopt

have the incentive to remain married. This can be traced, Murray claims, to AFDC.

the traditional definition of virtue, which defines virtue as an activity of a particular individual performed by choice and out of habit.

Bureaucracy negates choice, for, as we have shown, choice allows for self-interest. Hence, bureaucracy by its very nature negates moral virtue. Excellence of soul is replaced by homogeneity and concern for the body. A collective society necessarily negates moral virtue when it champions egalitarian principles which aim solely at preservation of the body.

Is the highest end of man the preservation of the body and the fulfillment of mere desire? For an animal this might consist in receiving unlimited food, with its end the preservation of the body. But, to claim that the highest need is the bodily, places humans on a level lower than animals, for animals are ruled solely through instinct, not reason. Humans are not mere animals. Yet, to allow an unelected oligarchy to reign denies that there are rational enduring principles which guide the regime and therefore man. Without enduring principles, a rule of hundreds of agencies will inevitably create thousands of new rules, conflicting and negating each other. Agencies rule without laws. The rule of law, subject to the eternal rational and dominant principles in the Constitution and Declaration of Independence will be ignored in favor of temporary rules which benefit, or harm, various sects in society. Law is

promulgated to moderate the actions of the people and direct them toward good action. Current social values cannot be the standard for judging excellence because social values can, in effect, deny any natural excellence of soul. Excellence is replaced with a desire for uniformity. Beauty and truth are transformed into "political correctness".

Interestingly, this uniformity is not necessarily based on what is good for man, nor does it necessarily take into account the question of man's true function. Bureaucracy promotes mediocrity and, inevitably, citizens who are incapable of ruling themselves. Americans will become, as Tocqueville has suggested, slaves to their own passions.

Ludwig Von Mises aptly points out that

Democracy means self-determination. How can people determine their own affairs if they are too indifferent to gain through their own thinking an independent judgement on fundamental political and economic problems? Democracy is not a good that people can enjoy without trouble. It is, on the contrary, a treasure that must be daily defended and conquered anew by strenuous effort.²⁶

Finally, what will moderate bureaucrats and keep them from acting in a corrupt fashion, if the values of the society become corrupt?²⁷ Will we be subject to the changing winds of "values," or, is it possible to understand and articulate what is just through the rule of law? The

²⁶Ludwig Von Mises, *Bureaucracy* (New Haven: Yale University Press, 1946) p.120.

²⁷One ought not forget that the French bureaucracy easily adapted itself to their captors during World War II.

Founders believed that justice was possible. Yet, they did not argue that a perfect union could be created, but one that is "more perfect."

Citizen as Moral Being

In a bureaucracy, the body takes precedence over all other concerns. Moreover, there is no "one" ruler to blame in the polis--for all its members are corrupt. And, once bureaucracy is entrenched, it is nearly impossible to destroy it. Tocqueville argues that it would be best if the centralized government was controlled by the politicians, so to speak. But, according to Tocqueville, the social issues, e.g. literature, arts, and music, must be handled at the local level. Otherwise, Tocqueville adds, centralized administration leads to apathy, the withdrawal into the family, and a destruction of the spirit. In short, Tocqueville defines this bureaucratic state as a "modern tyranny."

In *Democracy in America*, Tocqueville states that local institutions are necessary for liberty. These institutions put power within the people's reach. Involvement and interest in government is promoted when the people have control of issues. Consequently, under such circumstances, patriotism is promoted too. Otherwise docile subjects, not citizens, inhabit a state. Tocqueville argues that a regime without citizens will be subject to demagoguery and

corruption. In order to preserve the regime, then, it is necessary for the powers to be separated. This new despotism, Tocqueville asserts, degrades rather than torments the people. Moreover:

It covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd. It does not break man's will, but softens, bends, and guides it; it seldom enjoins, but often inhibits, action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd.²⁸

According to Tocqueville, bureaucracy also negates liberty, another element essential for virtue. In *On Liberty*, John Stuart Mill argues that the nature of a bureaucracy threatens the very liberty necessary for the preservation of a regime. Indeed, a bureaucracy, Mill states, is not concerned with the good of the state, but rather with its own preservation and perpetuation. He says:

To be admitted into the ranks of this bureaucracy, and when admitted, to rise therein, would be the sole object of ambition. Under this regime, not only is the outside public ill qualified, for want of practical experience, to criticize or check the mode of operation of the bureaucracy, but even if the accidents of despotic or the natural working of popular institutions occasionally raise to the summit a ruler or rulers of reforming inclinations, no reform can be effected which is

²⁸Tocqueville, *op. cit.*, p. 692.

contrary to the interest of the bureaucracy.²⁹

Werner Dannhauser, on the other hand, suggests that bureaucracy is not as dangerous as one might think. He notes that the bureaucracy can be easily controlled by the president and Congress and, moreover, that it can be put to good use. What Dannhauser fails to note, however, is that the "energy" required by the president to check the bureaucracy can easily be limited by the bureaucracy. Indeed, the larger the bureaucracy, the less involved the citizens become in government. Still, Dannhauser states that "Nothing will be gained and a great deal can be lost by magnifying the bureaucratic problem out of all proportion."³⁰ Dannhauser, though, in his praise of bureaucracy avoids the problem of apathy, a problem emphasized by Tocqueville. In fact, unlike Dannhauser, Tocqueville warns that people will no longer act as citizens if all the details are handled by a centralized administration. And without citizens, there can be no polity.

If good government should not include a centralized administration, where should particular issues and daily

²⁹J.S. Mill, *On Liberty*, in *Essays on Politics and Society*, ed. J.M. Robson (Toronto: University of Toronto Press, 1977), p.307.

³⁰Werner Dannhauser, "Reflections on Statesmanship and Bureaucracy," in *Bureaucrats, Policy Analysts, Statesmen: Who Leads?*, ed. Robert A. Goldwin (Washington: American Enterprise Institute for Public Policy Research, 1980) p.132.

problems be handled? Tocqueville argues that these issues are best faced at the local level where the participants are known personally. Bureaucracy, instead, is impersonal "constant", and "non-deliberative." Prudent action is not possible in a bureaucratic regime. Arbitrary and self-interested bureaucrats can impose rules that are neither good for the individuals nor for society. Moreover, the "general interest," or common good, is easily forgotten in a bureaucratic state.

Centralized administration is in direct contradiction with the Constitution. While the short term effects of centralized administration might lead to a form of justice between a few members of the society, it will not create a just state. If administration is needed to redistribute goods to those in need, one must keep in mind the nature and limits of a national public administration. To ensure justice, the recipients of benefits need to be known. Otherwise the actions of bureaucrats will of necessity be arbitrary; for if there are no true limits to guide them, nothing can moderate their actions. Rohr believes that because bureaucrats take an oath to uphold the Constitution, they will somehow be inclined to act justly. What if, for example, a bureaucrat decides not to uphold the Constitution or misunderstands it? As an un-elected official, to whom is he responsible? History, repeatedly reminds us that society needs laws--laws with "teeth" in them. Otherwise humans are

inclined to act in their own interest, which may not correspond with the common good. Our Constitution creates fundamental law, law which organizes, limits and gives power. Bureaucracy, though, negates the Constitution: for to succeed, bureaucracy must ignore the Constitution.

CHAPTER IV

Constitutionalism and the Rule of Law

Constitutionalism v. Public Administration

In this chapter, I explore the relationship of constitutionalism, as articulated by the Founders, to modern public administration. The central issue to be addressed is whether the Founders envisioned a national government which would include a large centralized administration. It is necessary to understand the Founder's view of constitutionalism and administration in order to better comprehend contemporary government and its deviation from the prototype. Many argue that the American government, prior to the emergence of the Great Society, was both inefficient and unjust. In opposition, others argue that modern public administration is unconstitutional and, if left unchecked, it will undermine the fundamental constitutional principles of equality and liberty.

John Rohr, in his book *To Run a Constitution: The Legitimacy of the Administrative State*, argues that the rise of public administration is compatible with the founding. He claims that

The administrative state is in reality the welfare/warfare state we know so well. Despite its warts and wrinkles, it has provided the underpinnings of the free, decent, and prosperous society most Americans have enjoyed for the past half-century. I want to legitimate the American administrative state because I believe it provides the stability to accommodate orderly change in a liberal democratic regime that is fundamentally just.¹

Rohr defends public administration by asserting that "...Administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights."² That is, a bureaucrat's true duty is to uphold the Constitution. And they, unlike elected politicians, are well-trained, non-partisan and professional, and, hence, better prepared for the task. The most important and different characteristic of constitutional bureaucracy is that the hitherto separate powers of government are combined, allowing the bureaucracy to be more powerful and efficient. Rohr states that a government constituted by these administrators is actually more capable of fulfilling the principles promoted by the Founders than the Constitution itself. Indeed, according to Rohr, "one of the major arguments in favor of the new Constitution was that a strong government is needed to protect individual rights."³ Rohr adds that these amazing

¹John Rohr, *To Run a Constitution* (Kansas: University Press of Kansas, 1986), p. xi.

²Rohr, p. 181.

³Rohr, p. 6.

professionals actually provide an additional check and balance, acting "as mediators of the will of the single executive" preventing the president from acting in a "haughty or arrogant manner."⁴ Although the regime is fundamentally "just," Rohr argues that public administration is necessary to defend individual rights which are left unsecured. For today's society has grown so large that politicians and the Constitution cannot adequately attend to the rights of the people.

Publius and The Founding

In light of Rohr's argument, it is appropriate to consider the Constitution as explicated in *The Federalist*. The initial aim of *The Federalist* was to appease the states' apprehension that the federal government would dominate the states. Did Publius believe, like Rohr, that individual rights were not adequately protected? Or, that a bureaucratic state is necessary? Before this question can be addressed, one must first consider the problems Publius faced. In *Federalist 34*, Publius argues that

...the particular States, under the proposed Constitution, would have *coequal* authority with the Union in the article of revenue, except as to duties on imports. As this leaves open to the States far the greatest part of the resources of the community, there can be no color for the assertion that they would not possess means as abundant as could be desired for the supply of their own wants, independent of all external

⁴Rohr, p. 48.

control.⁵

Publius insists that the states would retain their authority if the Constitution were to be ratified. Does this mean that "individual rights" would be ignored? Should we conclude, then, that the Founders, Publius included, only desired for a federated union where the states would rule, without concern for rights?

Hamilton in *Federalist* 11 argues that without the Constitution, America could not "soar to a dangerous greatness." Undoubtedly, Hamilton wanted a more powerful national government which would promote a commercial empire. However, this does not necessarily mean that Hamilton desired a large centralized administration. Nonetheless, Madison claimed that "the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object."⁶ Happiness, according to Madison, necessitates a form of government which allows for public security. The thirteen independent colonies could not adequately defend themselves. The question "Is Rhode Island always to be at the mercy of chance or the `merciless Indian Savages?'" was an important one. Only the union could

⁵Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. with introduction by Edward Mead Earle (New York: The Modern Library, 1937), No. 34, p. 203.

⁶*Federalist* 45, p. 299.

prevent hostile agents from destroying the "peace, liberty, and safety" of the states. The question becomes: does security necessitate the absorption of all state powers? But more generally: should the Union consolidate under its authority the powers of the state in order to secure public happiness? Publius does not argue that happiness requires a consolidation of powers, for the colonists had a seemingly innate desire for their own freedom. Indeed, Publius argues, for example, that the executive should not be chosen without the participation of the state legislatures. Moreover, the senate "will be elected absolutely and exclusively by the State legislatures." Even the members of the House of Representatives are chosen indirectly by the states, for the states will have an influence over who will be chosen for the House. Publius concludes:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.⁷

The federal government, because of its defined and limited powers, will be constrained by the states. The states will have the "predilection and probable support" of the people.

⁷*Federalist* 45, p. 301.

Publius continues his argument in *Federalist* 46 claiming

...beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise.⁸

However, Publius add, if

the people should in future become more partial to the federal than to the State government, the change can only result from such manifest and irresistible proofs of a better administration...but even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.⁹

The members of the Senate, because of the Senate's very nature, will fight any encroachment of federal government over the state powers. Since the Senate members are attached to their particular states, they will not readily give up any authority. Still, in times of war the federal union must be able to protect itself. While Publius apparently wishes to create a diversified society where no national character is formally promoted, he nonetheless argues that this federation must be capable of defending itself in times of crisis. Hence, an admission, in part, of the need for centralization.

Publius points out in *Federalist* 34 that future "exigencies" may require the federal government to assume further powers. Although Publius specifically mentions the

⁸*Federalist* 46, p. 305.

⁹*Federalist* 46, p. 306.

exigency of defense, he claims that such a defense is necessary for the future security of a "commercial people." It is clear that the federal government, according to Publius, has the power to usurp and may one day become dominant. Yet this question remains unanswered: did the Founders desire a centralized administration?

Necessity forced many different and opposing groups to join an allegiance among states. To them, death was preferable to tyranny. The new science of politics as described in *Federalist 9* claims to allow for an order to exist which could safely protect itself against insurrections and other disabling threats to the regime-- while still allowing for liberty. Yet, why should this be a concern? Publius insists that mankind has been, and always will be, faced with problems that threaten their regime. Man's nature does not include comprehension of the universe and all its particulars. Moreover, man's imperfect nature leads him to selfishness and cruelty. Human beings need law to protect as well as to perfect themselves. In short, we need laws to ensure justice.

What, though, is justice? It is a question which at the very least has plagued man. Is justice simply the preservation of property? For the Founders, preservation of property alone is not justice. Their writings and actions clearly indicate an attempt to create a regime with "sub-states" having as their aim the cultivation and protection

of education and religion. Hence, the question of justice becomes more complicated, including questions of virtue and character.

The Founders were attentive to the type of character created by the new regime. Rohr, too, admits that "Both the Federalists and the Anti-Federalists had much to say about character and civic virtue."¹⁰ The Anti-Federalists championed the virtues of a small republic, noting its ability to promote civic virtue. But what of the Federalists? Rohr notes that "There are many references in *The Federalist Papers* to the need for civic virtue and good character, even though these references are not solidly integrated into the overall argument, which decisively favors interest over virtue."¹¹ Many state constitutions, at the time of the founding, included provisions regarding religion and education. Civic virtue was considered necessary to preserve free government. Both Publius and the Anti-Federalists admit that the states, and local townships, would rule themselves. They rule because the people are thus habituated in matters of self-government. Moreover, life, that is, decent life, is not possible without laws which guarantee the support of religion. And, M.E. Bradford, in *A Worthy Company*, demonstrates that the

¹⁰Rohr, p. 158.

¹¹Rohr, pp. 158-159.

majority of the Founders were pious men.¹² Yet, the Founders understood that religious fanaticism inevitably overwhelms justice. Therefore they designed a regime that could both preserve liberty and advance religion. The Founders, while never denying religious rights, desired to protect others from those who wished to rule tyrannically in the name of religion. Consequently, the Founders allowed for the promulgation of many religious sects. Religion, though, is not the only concern of justice.

Education, too, is a necessary element for a free and decent government.¹³ The constitution of New Hampshire, for example, promotes the study of literature and arts which are "essential to the preservation of a free government." The study of the arts and sciences, in public and private (seminaries) schools has, as its aim, to "inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections and generous sentiments among the people."¹⁴ Vermont's Constitution includes a provision maintaining that no one

¹²Cf. M.E. Bradford, *A Worthy Company* (NH: Plymouth Rock Foundation, Inc.), 1982.

¹³Leo Paul S. de Alvarez, *The Constitution and American Character*, in *Constitutionalism in Perspective*, ed. by Sarah B. Thurow (Lanham: University Press of America, 1988), pp. 258-263.

¹⁴1792 Constitution of New Hampshire, in *The Constitutions of the Several States of the Union and United States* (New York: A.S. Barnes & Co., 1852), p.65.

ought by law be forced to join a particular congregation but, nonetheless, "every sect or denomination of Christians ought to observe the Sabbath, or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."¹⁵ The Vermont Constitution also provides that "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town..."¹⁶ Rohr, however, asserts that in *Federalist* 10 virtue is replaced by mere self-interest. That is, self-interest is the underlying principle in the new republic.¹⁷ The underlying issue, however, is not self-interest, per se, but rather the creation of a regime that will endure. Numerous factions, described in *Federalist* 10, will in fact prevent tyranny from occurring. Despotism can be created by one, few or many. Self-interest or despotism, though, is not the end of the proposed government. Yet, would not unmitigated self-interest destroy government? The notion of self-interest, however, should not be confused with egalitarianism. Egalitarianism does, as we have seen, necessitate the rise of centralized administration. To better understand self-interest, as presumed by Publius, it

¹⁵1793 Constitution of Vermont, p.71.

¹⁶1793 Constitution of Vermont, p.79.

¹⁷Rohr, pp. 158-159.

is essential to consider the nature of the expressed separation of powers.

In *Federalist* 51, Publius claims that "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."¹⁸ To repeat: Publius does not claim that the protection of property is the end of government; the end of government is justice. Moreover, the thirteen separate and independent colonies joined together to protect their liberty. They did not join, at least overtly, to create a single government that would have complete control over all. Rather, they chose, out of necessity, to create a regime which could ensure their liberty as separate states. The question becomes whether such an effort could, or should, succeed.

Rohr maintains that since Publius defends a blending of powers in various branches of government, he would then reasonably come to conclude the necessity of what has become modern public administration. Rohr bases his conclusion on Publius' explication of the principle of separation of powers. While Publius admits the necessity of a blending of powers, he does so for reasons contrary to Rohr's defense of the need for public administration. Publius encourages a separation of powers to ensure the liberty of the people. The separation of powers doctrine is promoted to preserve

¹⁸*Federalist* 51, p. 340.

the proposed extensive union. Time and again Publius claims that the central government will only be concerned with a few, specified powers. These powers are partially combined to advance the common good. For example, defense and commerce, in Publius' view, are the appropriate concerns of the federal government. Still, the question arises: Did the Framers create this limited government simply because they assumed that every other proposal of government would be rejected by the states? Did the Founders champion limited government because they truly believed that the other responsibilities would be better provided for by the individual states? In short, did the Founders promote limited federal government merely because of circumstance or was it circumstance informed by prudence?

Publius states in *Federalist 47* that

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.¹⁹

Upon reflection, one is struck by a single omission in this citation, namely, Publius omits the possibility of a divinely ordained ruler. People may rule unjustly; God does not. Since no man is an angel, the people, according to Publius, cannot rule without restraint. Man has limits; his desires must necessarily remain unfulfilled. There is a

¹⁹*Federalist 47*, p. 313.

proper way for a people to act, and there is an improper way. The crucial questions remain: What are man's limits and what is just?

Before Publius addresses these questions he emphasizes the prudence of blending powers of both the states and federal government. Again, the separation of powers is a protection against tyranny. Indeed, the greatest need for protection arises because of the legislative branch. The legislative branch reflects the immediate desires of the people. Publius notes that "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."²⁰ The desires of the legislative branch are, by nature, unlimited. As a result, tyranny will occur here in the name of justice. Lawmaking for the common good is replaced by the interests of the few, or the turbulent passions of the day. The common good is ultimately ignored. The legislative branch, then, is the most dangerous branch in a democracy because it reflects the interests of the people. The people, unless tempered, act in a rude and destructive manner. The crux of Publius' dilemma is not the evolution of a corrupt kingdom, but the development of a fickle democracy. (It is interesting to note that the American revolution was not predicated on a reaction against kingship per se, but against the actions of an unjust king who refused to treat the colonists as

²⁰*Federalist* 48, p. 322.

Englishmen.) The evils of democracy must be moderated with ideas discovered by the "new science" of politics.

Consequently, Publius notes that

a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.²¹

The founding occurs during a time when the passions of the people are "repressed"; they have only their uniform desire to rid the land of tyranny. What will moderate the people once these passions reappear?

Lincoln, in the "Lyceum" speech, raises a similar question. Will not, he asks, a people's passion become disoriented and multiply according to changing circumstances? Will the government continue to have any great importance to the people? Lincoln's remedy is the introduction of a civil religion. He believes that a people must be inordinately attached to their city; otherwise they will forget their allegiance and without this allegiance, demagoguery will ensue.

How is a government to last, a government necessary for the good of the people, if the very basis of government is constantly being questioned? A constant questioning of fundamental principles causes the fabric of society to remain vulnerable to conflicting passions. Indeed, Publius

²¹*Federalist* 49, p. 329.

states that factions will always cause turmoil within society. Factions, by nature, are infinite, for the desires of a people are infinite. Political parties always take great pains to show the people what they lack. The people, normally acquiescent, will claim new rights. Such rights replace the principles of the regime. While chance cannot be overcome, it is easy to persuade men that it, indeed, can be overcome. (Marxism is the paradigm for this belief.) As a result, instability becomes the norm in a democracy. Yet, how can this instability be resolved? Publius hopes that the principle of separated powers will prevent parties from gaining control. Publius states in *Federalist 49* that

The *passions*, therefore, not the *reason*, of the public would sit in judgement. But it is the *reason*, alone, of the public, that ought to control and regulate the government. The *passions* ought to be controlled and regulated by the government.²²

Reason, not passion, should rule. Those who accept the teachings of Rousseau deny that reason is the ruling element of the soul. Moreover, they argue that reason can tell us nothing, for there is nothing to know. In short, the idea of a cosmos is nothing more than a Greek myth and Christianity is mere opium. What can be felt, though, are the passions. Reason has been replaced by the senses. We are now sensitive, compassionate individuals who experience life and lifestyles.

²²*Federalist 49*, p. 331.

The replacement of the guidance of reason with the senses has not occurred by chance. Modern philosophy relegated reason into the abyss. Consequently, we are no longer restrained in our actions. The passions, or as they are understood today, our rights, take precedence over all. On every street corner there is heard some new declaration of rights. Is this what the Founders created? Or rather is this inevitable?

Some argue that the founding was a fluke--a historical occurrence rendered possible by circumstance, environment, upbringing and chance. Yet, Publius believes the new regime is a product of deliberation. If reason is possible, is not Publius' argument regarding the passions plausible? He does not, to repeat, claim that a nation of philosophers is possible. Neither does he deny philosophy. He puts forth the following dictum: the reason of man can and ought to create good government. Yet good government can and ought to make laws which the citizens (and philosophers) ought, in turn, to obey. However, occasional appeals to a higher justice are necessary and proper. Since abuses occur in any regime these occasional appeals will help correct inevitable problems. Publius never envisions a perfect government. Rather, again, he desires "a more perfect union"; one that is self-correcting. The necessity for institutions is apparent: there are no philosopher-kings who are forever available and willing to rule. As a result, in a democracy

self-interest becomes the dominant theme. It is unavoidable. Rule of the best is precluded by circumstance. Hence, the difficult task of creating a regime where self-interest does not destroy the political fabric. Publius' practical solution to a difficult problem is to introduce numerous regimes within the regime. In *Federalist 10* the remedy against tyrannical self-interest, a multiplicity of factions, is presented. A multiplicity of factions, though, appears to deny the possibility of virtue. Is it possible that Publius proposes to create many small republics (factions) under the guise of a large regime?

The Founders place little concern for the townships and states: they shall rule themselves. The pressing issue, both then and today, was one of security. A land which encompasses many states will be subject to foreign and domestic threats. Foreign nations, out of avarice or ambition, will always threaten the United States. Moreover, the states themselves, being so close in proximity, also pose an immediate threat. Commerce, too, will cause disputes. Such a land will be unstable and ripe for invasion. Publius' first concern is one of defense. His goal is to ensure the preservation of the regime. If a people are of a like mind, whether in a large society or small republic, they are subject to demagoguery. Publius does not disagree with Montesquieu, at least initially. In fact, Publius claims that if Montesquieu is understood

literally, then many of the existing states should be divided into smaller sections. Montesquieu argues that smaller republics are necessary for good rule to occur. Publius points out that

If we therefore take his ideas on this point as the criterion of truth, we shall be driven to the alternative either of taking refuge at once in the arms of monarchy, or of splitting ourselves into an infinity of little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt.²³

The people, and states, if left to their own devices, will create discord and injustice. The people, again, are the cause of strife and anarchy. The overriding issue, for Publius, is whether or not a unified body of law can be created for the good of the people that, ultimately, forces the people to succumb to the rule of law. It is important to note here that Publius indicates that with the increase of the number of states there will be a proportionate increase in discord. That is, even the states, as states, cannot rule themselves. A small republic would be constantly subject to majority faction and external threats. Again, Publius desires to limit the authority of the states. However, he does not want to destroy the states, for they are necessary for his design of government. That is, the states serve as a check against the legislature.

Publius states in *Federalist* 51 that

²³*Federalist* 9, pp. 49-50.

Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority--that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.²⁴

Publius claims that "an hereditary or self-appointed authority" resolves the first problem. For society is always controlled by a specific interest. In a federal republic such as America, another solution must be created. Although democracies boast of equality, the liberty prevalent in democracy creates both intellectual and monetary inequality. Such distinctions will create "classes" that are always contending with each other. Primarily, the poorer classes yearn for the wealth possessed by the richer classes.

Publius' goal is to prevent factions from destroying the government. The multiplicity of factions or interests serves as the remedy. He further states: "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."²⁵

Freedom of religion allows for a multiplicity of

²⁴*Federalist* 51, p. 339.

²⁵*Federalist* 51, p.339.

religious sects. The absence of a formal national religion and an atmosphere of toleration ensures the creation of numerous religious sects. Religion, for Publius, serves as a very useful tool, helping to prevent majority faction. Indeed, the thousands of churches today demonstrate the fulfillment of Publius' wish.

Publius desperately sought to create a large union, a federal republic, which could prevent tyranny. Did he believe it to be the best? No. He did, however, believe it was the best in light of the circumstances of its creation and of human nature.

It is worthwhile to pause and reflect, here, upon Publius' understanding of man, and human nature, as articulated in *Federalist* 9. Publius reminds us of how the history of republics is forever vacillating between tyranny and anarchy. He notes:

If they exhibit occasional calms, these only serve as short-lived contrasts to the furious storms that are to succeed. If now and then intervals of felicity open to view, we behold them with a mixture of regret, arising from the reflection that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party rage.²⁶

The "new science of politics" motivates Publius to defend republicanism. He lists the following new discoveries:

The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during

²⁶*Federalist* 9, p. 47.

good behavior; the representation of the people in the legislature by deputies of their own election...(and) the enlargement of the orbit within such systems are to revolve...²⁷

For Publius the fifth discovery, the enlargement of the orbit, pertains both to the proposed confederacy and to the states. Yet it was not feasible to discuss the states within the context of the *Federalist*. Nonetheless, Publius concludes that such principles as he announces are efficacious in the states.

The new science of politics can teach us much about Publius' understanding of being human. That is, if the city can be understood as a human being writ large, then we may benefit from our efforts. The first discovery is the regular distribution of power into distinct departments. As is pointed out by him, only when a man understands the possibilities of his office will he pursue it. If an office offers no real authority, it would be senseless to pursue it. Publius desires to persuade men of ambition and talent to work within the proposed constitution. Secondly, within the legislative branch itself there will be checks and balances. The congress will be composed of two branches which will, because of their makeup, check each other. Given that the legislative branch is the most dangerous branch in a democracy, Publius devises a branch that will legislate, yet not tyrannize. The Senate will be composed

²⁷*Federalist* 9, pp. 48-49.

of state representatives who will defend the interests of the various state legislatures. The states will serve as a partial check against the people, who are represented by the congressmen. Thirdly, judges are independent of the executive, congress and the people. The courts are composed of lawyers who, traditionally, are attached to law. The laws, if formed correctly, will ensure that the rights of the people are protected. The judges need independence, according to Publius, to enforce the law. Fourthly, the people themselves will be represented by deputies of their own choosing. The people are not forgotten by Publius. Publius never ignores the tendency of people to ignore law, tradition, order, and reason, with the sole purpose of fulfilling their immediate passions.

Returning to the question of the legitimacy of centralized administration: one wonders whether an unbiased bureaucracy might achieve justice more effectively than the government made by the Framers. (Yet, is it possible for one to receive a degree from a university in bipartisan justice?) Publius envisions a government of different spheres constantly checking each other. He claims that human beings imperfectly believe that their thoughts and beliefs are correct opinions corresponding most closely with God's. Attached to self-love, righteousness is dangerousness. Men argue, fight, and die for their opinions. Although truth might be discernable, it can never

be universalized. Even Christianity is subject to dispute. It is doubtful that Publius anticipates an expert in bipartisan justice.

Interestingly, Publius claims that the diversity of faculties is the basis of unequal distribution of property. Indeed, the diversity of faculties form the basis for rights. Yet, what, exactly, does Publius mean by property? Publius states that there are "different degrees and kinds of property." There is, of course, land and monetary wealth, but also honor, reputation, intelligence and power. Although we are all equal before the eyes of God, we are unequal in civil society. Liberty, when unfettered, allows for ambition to exist. Still, with liberty excellence will occur naturally. The speculative soul is created and unleashed in the new world. It is important to note, though, that the proliferation of factions in the new regime is based on the settled and agreed principles of equality and liberty. America might be "low," but not base.

Rohr claims that the Founders envisioned the type of public administration we have today. Rohr contends that the new government, as described by Publius, allows for better administration. This is indeed true. Now the question turns on whether the states would, ultimately, lose power or remain strong. Here, the question does not refer to a centralized administration. The issue can be put this way: if the Founders approved of a centralized administration,

why did they insist on a separation of powers? The *Federalist Papers* can, and should, be understood as an attempt to prevent the corruption of good government. Moreover, energy and stability are also considered essential features of such a government. Even if Publius did not envision the states remaining strong, he did envision them as an integral part of the American government. The whole issue turns on whether or not the states, and the people, can rule themselves. The Founders believed that yes, they can rule themselves, making good government possible with the necessary safeguards.

What, again, is the purpose of centralized administration as envisioned by Rohr? The first purpose, which Rohr readily admits, is to redistribute goods. The redistribution of wealth is predicated on a supposition that egalitarianism is the implied end of the Constitution. As indicated above, the Constitution, as understood by the Founders, never indicates that egalitarianism is its end. The *Federalist*, and the Constitution, clearly protect private property. Furthermore, Rohr's insistence upon the need for educated experts presupposes that the citizens are incapable of ruling themselves. Thus, the nature of centralized administration negates liberty by presupposing the people's inability to rule themselves. A centralized administration is based on the assumption that the purpose of government is to care for the needs of the body, making

the soul inconsequential. Thus, a happily enslaved people is the by-product of such a regime; in fact, what is discovered is that slavery is its primary goal.

Rohr's Defense

Rohr, in his defense of public administration, presents a view of the American founding accepted by many modern scholars. Indeed, acceptance by modern scholars is, for Rohr, the primary criteria for legitimacy. Hence, public administration gains legitimacy as a result of its universal acceptance. A problem arises when one considers Rohr's examples of illegitimacy: "the American Nazi party, the Flat Earth Society, and *Hustler* magazine" are not considered legitimate. What makes these illegitimate and others legitimate? According to Rohr "Legitimacy means more than a grudging acceptance of the inevitable. The word suggests at least confidence and respect and, at times, even warmth and affection"²⁸ What would occur if the people, for whatever reason, became attached to the Nazi regime? What if they gave it their "confidence and respect?" Did not Britain initially believe that the newly created German war machine, with Hitler as its "manager," posed no danger? As for "warmth and affection," is that not what *Hustler* magazine is all about? The issue here is the nature of legitimacy. Obviously, what might be considered legitimate is not

²⁸Rohr, p. x.

necessarily "good." Common opinion, or majority will, is not synonymous with justice. So one asks: What standard is used to determine the good? Rohr cannot answer this. For him the question is irrelevant. Public administration, in Rohr's mind, simply put, satisfies the desires of the people. Desires are legitimate if enough people desire something. Publius, however, does not agree.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.²⁹

The people, according to Publius, can easily destroy themselves. Moreover, demagoguery lurks behind the masks of many defenders of the people's rights. Again, if men were angels--if they were pure intelligence--government would be unnecessary. Men, though, are not angels, and the constitutionally mandated separation of powers protects property, citizens, and states from the arbitrary will of dictatorship, be it a dictatorship of one or a thousand rulers. The American government was created to be a partly national and partly federal government, not completely centralized.

Since the various branches constantly fight over the control of the bureaucracy, Rohr suggests that

²⁹Federalist 51, p. 337.

statesmanlike administrators might consider delivering their agencies for a time to a constitutional master of their own choosing. Which master the administrators would favor and for how long would depend on the administrators' judgement of which branch of government needs to be strengthened...³⁰

Administrators, according to Rohr, should attempt to first interpret the will of the people before acting. Politics is too disjointed and unstable to allow politicians to rule alone. And since politics is no longer concerned with the principles of a particular regime per se, or the ends of a regime, an appeal to the people is necessary. The sempiternal political questions (concerning equality and inequality), having been answered, are no longer asked. The new goal of government is simply to interpret the will of the people.

Rohr goes to great lengths to convince his reader that the Founders were simply concerned with authority, and not with ends. The Founders, though, went to equally great lengths to give authority to proper officials, based on prudence. Rohr responds, in his interpretation of Herbert J. Storing and Gordon Wood, with the statement that even elections are irrelevant when the claims of the people are in question. The claims of the people are paramount. Indeed, Rohr adds, "This is an important consideration in any effort to legitimate the administrative state."³¹

³⁰Rohr, p. 89.

³¹Rohr, p. 79.

Rohr argues that the constitutional principles of the founding are adequate since they support the democracy we now have. Curiously, though, he also claims that the "values" of any given generation change. Rohr contends that:

It is emphatically, however, the administrator's task to understand changing values and abiding principles and the difference between them. Alertness in these matters enables administrators to join judges and elected officials in making real their oath to uphold the Constitution of the United States.³²

Therefore, it is the responsibility of government to interpret those values.³³ Rohr pretends to accept Publius' belief that man's nature is "unchanging." Rohr, however, qualifies this by adding that since values change, even the task of government changes accordingly. What, though, are values? Are they not inextricably tied to "principles?" If the end of government is to fulfill current values, why the necessity of constitutional principles?

According to Rohr, the new purpose of government administrators is to interpret the people's desires and fulfill their wishes. Unelected professionals, not politicians, can rule undisturbed by frequent convulsions brought on by elections. Once again we return to the question: what moderates the administrators? Rohr believes that administrators will get a sense of duty from their

³²Rohr, p. 112.

³³Rohr, cf. footnote # 3, p. 242.

teachers. Moreover, their training in technical matters concerning law and policy will deter them from promoting "causes." Rohr, elsewhere, states:

In addition to technical skills, the students should also acquire a deep and abiding sense of the moral foundations of their careers...We can hope that this educational experience will not only enrich the personal and professional lives of the civil servants but that it will also enable them to tame the excesses of the administrative state.³⁴

Finally, the moral foundation of the administrators will be solidified because they, like elected officials, will be forced to take an oath of office.

Rohr admits to the central importance of the separation of powers provided for in the Constitution.³⁵ What he confuses, as I have suggested, is the end or purpose of government. Government does have as its end the protection of rights, but the protection of rights defined as political liberty and the protection of rights as the fulfillment of desires are two separate issues. It is appropriate that Rohr ends his book by declaring that administrators "will have a principled basis and, above all, a 'sense' for when to bend and when to hold firm. They will know statesmanship when they see it."³⁶ If statesmanship is seen and

³⁴John A. Rohr, *Is Bureaucracy Constitutional?*, in *Constitutionalism in Perspective*, ed. Sarah B. Thurow, (Lanham: University Press of America, 1988), pp. 113-114.

³⁵Cf. Rohr, p. 170.

³⁶Rohr, p. 194.

appreciated by administrators (all or a few?), then they will defend the statesman, i.e. the elected politician. One assumes then that if an elected official is not considered a statesman, then the administrators may take it upon themselves to prevent the elected official from succeeding in his activities.

The Founders, concerned that statesman will not be at the "helm" when needed, devised institutions to secure rights. Rohr suggests that statesman can be properly trained at the universities. Administrators will become the new statesman of the age. They are ombudsmen adjusting desires between competing interests. One wonders if they will really understand the concerns articulated by the Founders? Will "educated" administrators, these extra-constitutional leaders, always act for the public good? Rohr insists that

We have little to fear from today's massive bureaucracy. Though millions of persons compose the bureaucracy, they are a 'select corps' vis-a-vis the citizenry at large. They are our sons and daughters, our brothers and sisters. They think as we think and feel as we feel. They need not be an embodiment of arbitrary power; they can be a safeguard against it.³⁷

Has our democracy matured to a degree that constitutional restraints are no longer necessary? Has human nature changed so much that when the executive, legislative, and judicial powers are combined, tyranny will not occur? Or

³⁷Rohr, p. 50.

better, should one place in the hands of our universities the job of ensuring that we have just leaders?

Evidence indicates, contrary to Rohr, that the issues the Founders addressed are still relevant. For when the administrator's will conflicts with the executive will or the will of Congress, administrators act contrary to the Constitution and common good. In fact, there can be no unity in society if the "fourth branch" of government disagrees with the elected branches. The principles of the regime will be forgotten in the ensuing storm. The Constitution created by the Founders will inevitably become mere parchment, ignored by all in the fray. And, if we accept Rohr, so be it.

CHAPTER V

THE COMMON GOOD

The Possibility of Prudence in the Bureaucratic State

Modern proponents of the bureaucratic state rely on scientific rationalism to guide their efforts. In effect, science is the new paradigm for human affairs. It is argued that through rigorous training at academic institutions bureaucrats learn the necessary theories that will enable them to guide the government. These skills include value-free organizational theory, human resources management, public management, and budgetary processes. With these abilities the administrator seeks to gather, record, tabulate and reduce the common good "to laws, rules, and even to mathematical formulae."¹ Constitutional law, and with it popular rule, is replaced by scientific management. Scientific management is unimpeded by passion or values. Values, which cannot be reliably reduced to scientific rules

¹Frederick Taylor, "Scientific Management," Testimony Before the U.S. House of Representatives, January 25, 1912. Quoted in *Classics of Public Administration*, op. cit., p. 30.

or formulae, are dismissed from the governmental process. The primary assumption underlying the growth of public administration is the belief that a man's self-interest and passion can be replaced by something that is neutral or value-free and that these neutralized men become the rational technicians--technicians who are capable of regulating a government for the common good.

As indicated in Chapter I, the proponents of public administration insist upon value-free rule. Yet, during the 1940s, it became apparent that some values must be instilled within the administrators. In short, an end or goal must be made explicit, allowing the administrators to guide their actions. Otherwise, as Robert Dahl points out, the management of human affairs, without goals, is aimless. Science is capable of determining the "how," but not the why. Science can only specify the "is" and not the "ought." Properly trained public administrators--if they adhere only to the process and not the ends of politics--are as capable of assisting a Roosevelt as a Stalin. Dahl, among others, claims that ends must be created. The goal of administrative government most explicitly stated, as we have seen, is equality. The reason why equality is chosen, rather than some other alternative, seems arbitrary. Traditionally, the "ought" is determined by revelation, custom or natural law. The science of public administration, even with its new concern for ends, denies

revelation, custom or natural law as a basis for determining these ends. Standards must be created, but there are no standards to judge the standards. Public administration summons wisdom while it, in effect, denies its existence.

The consideration of political ends is traditionally referred to as prudence. Aristotle notes that prudence "is a truthful rational characteristic of acting in matters involving what is good for men."² Post World War II public administrators, in contradistinction to Aristotle, sought to instill a type of prudence within their teaching, yet refused to acquiesce in their belief that science per se can guide human affairs. Aristotle notes that prudence cannot strictly be understood as a science; for prudence is concerned with ultimate particulars as well as universals. Aristotle continues by arguing that "what is known scientifically is demonstrable, whereas art and prudence are concerned with things that can be other than they are."³ In other words, one may have knowledge of general rules, but one must be knowledgeable of the particular situation before the rules can be applied. This requires flexibility and wisdom. Institutions of higher learning can easily impart abstract principles to their students, yet an application of these principles to the political realm requires experience and wisdom--both of which cannot be taught.

²Aristotle, *Ethics*, op. cit, 1140b20.

³*Ethics*, 1140b35.

The dilemma can be stated thus: while prudence is outside the realm of science, the proponents of public administration insist that science must decide questions whose answers require prudence.

Is Prudence Necessary?

To begin with, one must come to some understanding of the nature of prudence. In the classical sense, prudence is understood to be wisdom which is composed of knowledge of general principles in light of particular details.

Aristotle states that a prudent man is one who understands the details of the city and, equally important, the end or purpose of the city. He continues stating,

Of (prudence) exerted upon a community, that which I would call the Supreme is the faculty of legislation; the subordinate, which is concerned with the details, generally has the common name Politics, and its functions are Action and Deliberation (for the particular enactment is a matter of action, being the ultimate issue of this branch of <prudence> and therefore people commonly say that these men alone are really engaged in government, because they alone act, filling the same place relative to legislators that workmen do to a master).⁴

Prudence is the art which combines the various types of knowledge necessary for proper action. However, the prudence of the legislator is rare, insofar as it is impossible to teach and difficult to acquire. Natural intelligence and experience form the basis of prudence.

⁴Aristotle, *The Ethics of Aristotle*, trans. D.P. Chase (London: Walter Scott, 1847), p. 187.

Aristotle adds that "Prudence is not Science, for it has to do with the ultimate end, as has been said, because every object of action is of this nature."⁵ Abstract principles, e.g. mathematics, can be taught to the young, but again, prudence requires experience, which young men do not have.

The end of prudence is the good city, according to Aristotle. The good city, then, is dependent on those who are capable of determining what is good for men in light of particular circumstance. What is good for one man at a particular time is not necessarily good for the same individual (or city) at a different time. One could easily argue that the principle of one man-one vote is good. However, at certain times, for example, during rebellion or tribal warfare, it might be imprudent to allow for one man-one vote.

Congress and the American Founding

In light of the above comments, one might ask whether the American Founders felt "prudence" was a necessary political virtue. In other words, did the Founders plan to rely on prudential statesmen to keep the American ship afloat? *Federalist* 10 seems to suggest that the Founders placed little hope in the possibility of "enlightened statesmen" being at the "helm". The institutions of government, it seems, replace enlightened statesmen.

⁵Aristotle, p. 189.

Instead of statesmen, the very structure of civil government will help prevent majority factions from disturbing the public good. Publius notes in *Federalist* 51,

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other--that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.⁶

The institutions, "these inventions of prudence," will govern men. Consequently, the prudential lawmakers are the Founders themselves. Their actions will lead to good government, and once the institutions are in place, prudence is no longer necessary. That is, after the founding, "administration" becomes the only concern of government. Indeed the term administration is used numerous times by Publius. Yet, "administration" is not simply management by a central bureaucracy. To begin with, Publius argues that the "administration" of government will be divided up between various governments in America. He notes: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among

⁶*The Federalist*, p. 263.

distinct and separate departments."⁷ Publius does not desire a centralized power. In fact, he argues against centralization for two reasons. First, the centralization of power would threaten the "rights of the people." Secondly, Publius believed it would be impossible for a central government to have wisdom enough to govern over an area as large as the United States.

Publius does not propound that the proposed government would be filled with managers and administrators. Rather, as *Federalist* 53 suggests, the lawmakers--in order to be good lawmakers--must acquire knowledge of the "public business." Public business necessitates knowledge of foreign affairs, numerous state laws and the various manners and customs of the inhabitants throughout the states. The end or purpose of acquiring this knowledge is to enable lawmakers to make clear, concise general laws which effect the common good. Publius further adds that "a law established by the government and alterable by the government" is inferior to "a Constitution established by the people and unaltered by the government," because the former method allows for bad laws and threatens liberty. In this sense, then, Publius attempts to ensure good lawmaking. Lawmaking is clearly differentiated from "administration" or bureaucracy. Furthermore, this design of government allows for laws based upon prudence. In short, good lawmaking

⁷*Federalist*, pp. 263-4.

requires a constitution that cannot be easily altered by the people.

I would suggest that there are two types of prudential activity at work here. The first is the prudence of the Founders. That is, in the first sense the very nature of the Constitution is prudential. In the second sense, the future acts of Congress might be considered prudential. For example, the Constitution is treated as fundamental law, government is limited, elections are relatively frequent, and the Constitution can be amended (albeit with difficulty). These elements help preserve liberty and promote justice. Yet, the prudential action of the Founders seems to be different from acts of Congresses that succeeded the Constitutional Convention, insofar as all future Congresses are restricted in their ability to act extra-constitutionally. To wit: Congress is prevented from acting as the Founders acted. Are we to interpret this to mean that Congress will not be "prudential"? Publius has made it clear that the Constitution is structured in such a way as to allow for the greatest amount of deliberation possible. An element of time or restraint, for example, is inserted into the lawmaking process in an effort to prevent poor bills from becoming laws. Moreover, Publius insists that lawmakers must be of good character. Indeed, good character, for the Founders, is more important than advanced

degrees.⁸

Executive as Leader

In what sense are we to understand the president? That is, is he savior, statesman, or manager? Many today believe that the proper role of the executive is, on the one hand to sort among the clashing interests and offer benefits accordingly, and on the other hand act as a visionary who sees above the low view of the huddled masses and points the way toward a more "perfect union". Notably, Publius argues that the executive officer has less power than the governor of New York. One might argue that Publius understates presidential power in order to persuade his already suspicious readers to accept the necessity of the office. Realistically speaking, though, Publius is correct in asserting that the president will be limited in his powers. The president cannot make treaties without the aid of Congress; he cannot declare war; and, if war is declared he must rely on Congress for monetary support; he has only "a qualified negative upon the acts of legislature"; he cannot regulate commerce; nor offer privileges; he is subject to the law as set down by Congress; and, most importantly, he "has no particle of spiritual jurisdiction." The primary responsibility of the president, it seems, is to preserve the *office* of the executive and "protect" the

⁸Cf. *Federalist* 52-54.

Constitution.⁹ From the perspective of the Founders, then, the president is not the leading moral force of the country. Who is to shape and guide the "moral" element within the country? Is the Constitution to be considered amoral? The answer, I suggest, is that the moral element of the founding is linked with the "form" of government created. The writers of the Constitution created an executive "department" within a particular "system" in order that a "republican" form of government could be preserved.

The Constitution clearly indicates that the executive is limited in domestic powers. He is, primarily, an executor of the laws created by Congress. Foreign affairs do present a different problem, though. The executive cannot rely on "law" while dealing with foreign countries. Such issues, e.g. war, are outside the scope of law in the general sense. Again, though, even with foreign affairs the president is subject to the "will" of Congress and "judgement" of the judiciary. As *Federalist* 34 points out, the national government (not simply the executive) must have the power to resolve future exigencies.

Interestingly, in order to secure a president¹⁰ who is

⁹Cf. Article II, Sec. 1 of the Constitution obliges the president to take the following oath: "I do solemnly swear that I will faithfully execute the office of President of the United States...." (*italics mine*).

¹⁰The word president (*praesidere*) means one who presides. Admittedly this term was chosen because it did not suggest monarchical overtones. However, does it not still reflect the nature of the office?

capable of defending the Constitution, the Founders designed the electoral college. The Founders drafted a means of presidential election that does not rely on Congress for the security of his office. Publius notes that the president relies only on the people via their electors, but then the president remains insulated from the people until the next election.¹¹ The presidential office was designed to compliment a government based on liberty and justice. The executive design was intended to prevent anarchy as well as tyranny. Publius notes:

It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.¹²

In order to preserve liberty the Founders deliberated at length over the nature of the government--a government which would not promote greatness, but security.¹³ Lincoln addresses this issue when he proclaims that "Towering genius

¹¹Note that Publius, in *Federalist* 64, claims that the electoral college will prevent the popular election of "those brilliant appearances of genius and patriotism, which, like transient meteors, some times mislead as well as dazzle."

¹²*Federalist* 9, p. 47.

¹³I exclude, for the moment, the idea of "commercial" greatness as discussed in *Federalist* 9.

disdains a beaten path."¹⁴ Lincoln and the Founders were concerned with "leadership" insofar as it could easily undermine law and promote tyranny. Consequently, Lincoln asks that citizens "sacrifice unceasingly upon" the alter of law. The alter of law, or political religion, attaches a people (via custom) to the rule of law. It is custom, not reason nor the executive that in the end protects the Constitution.¹⁵ The Constitution, in turn, protects religion (specifically Christianity) which acts as a higher standard for legislators to live by.¹⁶

Publius claims that the constitutional structure of the presidency promotes "energy". It seems that energy, rather than inspired leadership, is the best facilitator of republican government. Energy, according to Publius, is composed of unity, duration, adequate provision for support and competent powers.¹⁷ These institutional powers allow for an executive to carry out laws and promote domestic and foreign policy unimpeded by the popular and momentary passions of the people and Congress. Institutionally speaking, the president's best defense is the Constitution. In other words, the best way the president can preserve his

¹⁴Abraham Lincoln, "Address Before the Young Men's Lyceum of Springfield, Illinois," January 27, 1838.

¹⁵Note the short life and quick death of the idea that the Constitution should be amended to outlaw flag burning.

¹⁶See below, p. 139.

¹⁷*Federalist* 70.

power is to preserve the "office." In turn, this will result in the protection of the public good. Still, what exactly constitutes the public good?

What is Moral Leadership?

To answer this question, one must first come to terms with the relationship of "morality" to the Constitution. Willmoore Kendall argues that the president asserts a moral view, albeit a Judaeo-Christian view, which underlies the American Constitution. For Kendall, it seems, Lockean constitutionalism is incomplete without reference to a higher principle and that principle is supplied by the Christian tradition. The Christian tradition fortifies natural law teachings. The president and Congress both provide standards and principles that form policy. Moreover, these standards and principles moderate government. Kendall states:

The tension between the Executive and Legislative has a deeper meaning--one which, however, begins to emerge only when we challenge the notion that the high principle represented by the President and the bureaucracy is indeed high principle, and that the long run task is to somehow 'educate' the congressmen, and out beyond the congressmen the electorate, to acceptance of it.¹⁸

Ultimately, Kendall asserts, principle as understood by the executive and principle as understood by Congress are

¹⁸Willmoore Kendall, "The Two Majorities," *Liberalism and Constitutionalism*, ed. Willmoore Kendall and George W. Carey (N.Y.: Van Nostrand Reinhold Co., 1966), p. 172.

different "conceptions" of the same "high principle." The executive provides high principle through programs or policies that promote the common good.

We must consider, too, that the common good is connected with property. As Publius notes in *Federalist* 10, the first object of government is to protect the diverse faculties of man. Diversity creates unequal property; hence, the constitutional need to protect it. Publius, while discussing the merits of the House in *Federalist* 55, asks the following question: "What are the objects of federal legislation? Those which are of most importance, and which seem to require local knowledge, are commerce, taxation, and the militia."¹⁹ The promotion and protection of commerce is equated with the common good. In fact, such activity is considered "virtuous" by Publius.

Modern Government

The modern presidency clearly differs from Publius' understanding of the presidency insofar as executive officers (and congressmen) now support specific policies long before they enter office. They are no longer chosen because of their ability to properly consider future issues or for their ability to become "masters of public business." Due to the instability of parties and the importance of media, candidates must now proclaim that certain impossible

¹⁹*Federalist* 55.

goals will be achieved while in office.²⁰

Are we forced, then, to rely on leadership, or statesmanship to solve the problems of modern government? A distinction should be made between leadership, statesmanship and administration (in the Founder's sense). Leadership, as mentioned, is based upon popular oratory. But, as we have seen, such rhetoric is antithetical to constitutionalism. Statesmanship, one could argue, is ultimately extra-constitutional and therefore cannot be relied upon. In daily affairs, then, the executive is understood to be an administrator--one who pursues the ordinary affairs of office.

What of Ronald Reagan? Was he a "statesman?" If a statesman, why did Ronald Reagan fail to assert his authority over Congress and the bureaucracy? Did Reagan simply "give up"? Or, do we unrealistically hold presidents too "personally responsible for our moral and political well-being?"²¹ After all, our Constitution is republican in nature. On occasion executives might act extra-constitutionally--for example, Lincoln during the civil war. (Otherwise the executive acts as a representative of the people and the Constitution). Thus, the president is ultimately held responsible to Congress and the people for

²⁰Non-specific phrases such as "education," "environment," or "rights" now dominate the political forum.

²¹Lawler, p. 711.

his actions.²²

Surprisingly, Ronald Reagan, as president, made some initial headway in the realm of regulatory reform. Executive Order 12291 (1981) allowed the Office of Information and Regulatory Affairs "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, (and) provide for presidential oversight of the regulatory process."²³ Although the OIRA had some success, it eventually incurred the wrath of Congress: for Congress threatened to withhold OIRA funding. Ultimately, the OIRA succumbed to the wishes of the Congress and the bureaucracy. Reagan, it seems, overestimated the power of rhetoric, and underestimated both the people's desires and Congress' persistence. Reagan believed that rhetoric, informed by truth, could solve any problem. Indeed, at first Reagan seemed willing to fight, cajole, plead and bargain with Congress in the name of truth, but even he finally succumbed to the promises of popularity and an image of how history would record his efforts. More obviously, rhetoric is only effective if the audience is attentive and the rhetoric persuasive. Reagan's

²²Both Congress and the Courts sanctioned Lincoln's action after the fact. If Lincoln had lost the war, or if FDR had not been successful during WW II, history would have remembered them quite differently.

²³Quoted in "Reagan the Bureaucracy: The Bequest, the Promise, and the Legacy," by Peter M. Benda and Charles H. Levine, *The Reagan Legacy*, ed. Charles O. Jones (New Jersey: Chatham House Publishers, Inc., 1988), p. 115.

audience lost interest in his rhetoric. Indeed, Reagan's "big government" issue is not as threatening as, say, the issue of slavery. Reagan's rhetoric provided the issue, an issue that some would argue was not paramount in the minds of the American people before Reagan brought the subject up. Indeed, more than half the American population benefit directly at the hands of "big government". At least 50% of the population receive federally funded benefits in one form or another. Frankly, Americans enjoy receiving these benefits: why should they view their benefactor as evil? Interestingly, small, insidious programs such as AFDC were easy targets for Reagan's rhetoric. However, such programs make up only a small portion of the budget. One cannot ultimately criticize Reagan for failing to bring the bureaucracy under control. His platform introduced the issue of the bureaucracy and in his articulation of the problem, he was, once in office, faced with the discovery that the ultimate responsibility for the bureaucracy lies with Congress. Moreover, one is forced to admit (as Reagan did) that even the "Republican Establishment" is opposed to true regulatory relief. Simply put, although it is expensive, the regulatory bureaucracy ensures that many businesses never have to face competition.²⁴

²⁴Paul Craig Roberts notes that "the Republican Establishment stands for a closed system run by its members along the lines of the French cooperation between government and business that has turned that into a cartel..." In "Why Bush is Bush," *National Review*, January 28, 1991, p. 48.

In an important respect, the problems described are faced by all modern democracies. The Republic has, to a great degree, become a democracy. The populace is accustomed to democratic rhetoric; and only a major crisis will allow for a change. Yet, rhetoric may be the damn which will stem the bureaucratic tide. I believe, though, that the necessary changes require a type of statesmanship that is rarely found in the political arena.

It is clear that the rise of the administrative state or bureaucracy has altered government. Since the mid-sixties the federal government turned from lawmaking to the administration of bureaucracy. Congress learned that it could reap numerous benefits by strengthening the bureaucracy and directing benefits to particular interest groups. John Wettergreen suggests that the Hatch Act of 1939-40 inadvertently led to "nationally organized public employee's unions at all levels of politics."²⁵ This and subsequent acts gave the bureaucracy "political rights" that insulate them from Congress and the presidency.²⁶ In this position of power, "administration" becomes "regulation"--allowing the lawmaking process to occur independent of the legislative branch and independent of executive veto.

²⁵John Adams Wettergreen, "Bureaucratizing the American Government," *The Imperial Congress*, ed. by Gordon S. Jones and John A. Marini (New York: Pharos Books, 1988), p. 86.

²⁶For example, Executive Order 11491 and the Civil Service Reform Act of 1978. Cf. Wettergreen, p. 85.

In 1983, the Supreme Court decided, in *Immigration and Naturalization Service v. Chadha*, that the legislative veto is unconstitutional. Congress was faced with a choice: exercise the lawmaking power that it legally possesses, or ignore the decision. Congress chose the latter alternative. Curiously enough, Congress seems to have understood clearly what it was doing. Representative Gillis Long noted:

It appeared to me that with the application of an extreme type of legislative veto...we were turning ours from an institution that was supposed to be a broad policymaking institution with respect to the problems of the country and its relationship to the world, into merely a city council that overlooks the running of the store everyday²⁷

The true issue is not whether politics can be separated from administration, or even whether democracy needs centralized administration, rather the issue turns on whether constitutionalism and good government is worthy of perpetuation and preservation.

Public Administration's Account of the City

One must now consider the modern public administrators' capacity for prudence. Writers such as Woodrow Wilson and Frank J. Goodnow criticize the American Founding as being indifferent to change and social progress. Wilson argues that government "must make itself master of masterful

²⁷Quoted in Wettergreen, "Bureaucratizing the American Government," p. 85.

corporations.²⁸ Government must be transformed into a more equitable and compassionate force in order to counter the prevailing "injustices" in America. Justice will occur only when the state enters those spheres of American life traditionally considered separate from public control. Wilson unequivocally argues that "The idea of the state and consequent ideal of its duty are undergoing noteworthy change; and the idea of the state is the conscience of administration."²⁹ Public administration must reflect, Wilson asserts, the new interests of the state and enforce policies that reflect these interests.

Who, though, is to represent and articulate this philosophy? According to Wilson, the executive officer coupled with the bureaucracy will interpret the spirit of the age. Yet, this Hegelian interpretation of politics denies the possibility of prudence, in so far as prudence is based on universal principles that are unalterable. To suggest that the "spirit of the age" is the "conscience" of the bureaucracy allows for unprincipled and dangerous foreign and domestic policy. Indeed, as we have seen, contrary to this view, Publius claims that "The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most

²⁸Woodrow Wilson, *The Study of Administration*, quoted in *Classics of Public Administration*, op. cit., p. 12.

²⁹Wilson, p. 13.

virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust."³⁰

Bureaucratic rule, as described above, is arbitrary as well as unrestrained, and the end result can only be destructive. Even if one believes that in a bureaucratic state the executive and the bureaucrat merely interpret the people's desires and pursue their fulfillment efficiently, one still must ask if a political regime is truly serving the ends of justice by allowing the desires or whims of the majority to go unrestrained as a matter of law.

Interestingly, Publius did not concern himself with the matter of threats from a minority faction: instead, he feared majority faction, i.e. he feared the will of the people. Indeed, he argues that the will of the people must be rendered less dangerous via the multiplicity of factions and the filtering agent of Congress. One would suppose, then, that the people's will is considered less dangerous by modern bureaucrats. What, though, is the current "will" of the people according to modern public administration?

The 1937 Brownlow report clearly suggests that "There is but one grand purpose, namely, to make democracy work today in our national government; that is, to make our government an up-to-date, efficient and effective instrument

³⁰*Federalist* 57, p. 289.

for carrying out the will of the nation."³¹ The report suggests that the will of the people is centered upon equality. The extent or degree of equality differs from generation to generation, yet it is clear that the primary goal of bureaucracy is to ensure bodily equality. In order to secure bodily equality, public administrators will necessarily be concerned with the redistribution of wealth and other benefits. This same view is expressed by modern proponents of bureaucracy, namely, those who claim that the "rights" of the citizens must be protected. Rohr notes that "This means that administrators should use their discretionary power in order to maintain the constitutional balance of powers in support of individual rights."³² To do this numerous interest groups will be surveyed and those groups with legitimate needs will win benefits. These groups include, for example, racial groups, businesses, environmentalists, cities, etc. In this way the will of the people may be accomplished.

Politics and Bureaucracy

Why doesn't public administration allow for prudence? To begin with, public administration does not take politics seriously. The purpose of politics is to determine how the

³¹Brownlow, p. 1.

³²John A. Rohr, *To Run A Constitution*, op. cit., p. 181.

public good can be achieved in light of particular circumstances. Politics, by its very nature, is competitive, imperfect, and "messy". Public administration claims to be rational and efficient. Herein lies the crux of the issue: the assumption underlying the efforts of public administration is that politics can be "cleaned up" by staffing the government with properly educated technicians whose primary purpose is to rationally sort out competing interests.

With the assumption that politics can be cleaned up in mind, two very real problems arise. The first is that in public administration there is no conventional standard (i.e. no Constitution) to limit the actions of the bureaucrats. While many proponents of bureaucracy avow an attachment to the Constitution, in reality the Constitution must be ignored if bureaucracy is to be "successful." In short, the Constitution prevents Congress from transferring its authority to make laws (or rules) to unelected officials.³³ Secondly, there is no universal standard (i.e. natural law) to dictate how individuals ought to act or be treated. In other words, the principles of equality and liberty are not "true" and eternal principles, but instead, they are principles which are true for only "a" period of time.

Today, the traditional separation of powers which was

³³Consider the recent *INS v. Chadha* decision.

intended to preserve just law have been replaced by a bureaucratic government. Traditionally, liberty was preserved and good laws passed because the three branches of government worked with each other. The president, the only national officer, always viewed Congress with a suspicious eye; for the president's tenure required that any law created not harm the broad political base upon which he was elected. As John Wettergreen points out, before the bureaucratization of American politics "the whole central government had a common interest in deliberating the national interest, and in distinguishing it from narrower interests."³⁴ Unfortunately, the national interest is no longer an apparent concern of the central government.

Wettergreen adds

The Great Society's policies of centralization did not subordinate private and parochial interests to the national interest, as the proponents of bureaucracy believed would happen. Instead, centralization brought all the partial, petty, and parochial interests to the national center, where they do almost nothing but try to compromise national legislation and national execution of the laws.³⁵

In fact, laws are rarely created today. The real "laws" are the thousands of regulations issued each year. And these regulations, which are ultimately not different from laws, are neither deliberated upon nor sanctioned by Congress, the

³⁴John Adams Wettergreen, "Bureaucratizing the American Government," in *The Imperial Congress*, ed. Gordon S. Jones and John A. Marini (New York: Pharos Books, 1988), p. 96.

³⁵Wettergreen, p. 96.

supposed representatives of the people. Yet, there are a number of articulate defenders of the current method of rulemaking. John Rohr claims that the rulemaking performed by our bureaucracies is the only method of true representation: for in this type of rulemaking, everyone can have their say.

Curiously enough, what occurs today is actually a form of regulatory negotiation, better known as "reg-neg". A reg-neg occurs when a specific agency discusses potential rulemaking with private citizens and interest groups. This reg-neg is done to prevent legal attacks on its future rules. For example, the Department of Transportation holds a meeting with those interest groups concerned with a particular issue or problem. The interest groups work out their differences and the rule is created in light of the compromise. The purpose is to prevent opposition from those inclined to "go running to the courts or Congress to overturn the rule."³⁶ Hence, this reg-neg replaces traditional legislation.

Rohr claims that justice is served with reg-neg because all interested groups can have a say in rulemaking and government. What Rohr fails to mention, though, is that there are other "interest groups" not represented because they lack the resources or the know-how to get involved or

³⁶L. McGinley, "Experimental 'Reg-Negs' Try to Head Off Numerous Attacks on Federal Regulations," in *The Wall Street Journal*, 11/5/87, p. 29.

represented in this reg-neg process. More importantly, in most cases, only particular interests are served in the rulemaking process. As Wettergreen has pointed out, the national interest is completely ignored.

Tocqueville on Bureaucracy

It is helpful, here, to consider Tocqueville's warnings regarding the dangers of bureaucracy. For us, the most important issue which Tocqueville raises is brought forth when he describes the principle of equality as it was interpreted by the French people in the 18th century. The people, who were being abused, listened to the "philosophes". The philosophes promoted the equality of all--a principle which was easily accepted by those who were beleaguered. The principle reason for this development in Tocqueville's time was a desire to "level" everything. And so it seems to be in our own: no one can be superior in any way. That is, in order to ensure equality, a leveling of differences must occur. And for the 18th century Frenchman this required the destruction of all things old. The Church, based on tradition, authority and hierarchy, was rejected. Moreover, even many of the churchmen accepted the new leveling. Tocqueville argued that the Christian religion as a result was ultimately replaced by a new religion, namely the religion of equality. Accordingly, modern philosophers claimed that this was no great loss

because reason was a sufficient rule for all men. It was thought that God, tradition and the passions could be eradicated easily with little fuss or few negative effects. Furthermore, it was believed that through this leveling mankind was evolving towards perfection. Tocqueville states, "impiety became modish, a new hobby to occupy their idle lives, and not satisfied with cultivating it between themselves, they propagated their ideas among the lower classes."³⁷ To repeat, when the Christian religion was repudiated, it was replaced by a new political religion. While it is true that Christianity holds that all men are equal in the eyes of God, the revolutionaries accepted the principle of equality in a more literal sense. Tocqueville notes:

They had a fanatical faith in their vocation--that of transforming the social system, root and branch, and regenerating the whole human race. Of this passionate idealism was born what was in fact a new religion, giving rise to some of those vast changes in human conduct that religion has produced in other ages.³⁸

Tocqueville does not condemn all the new patriotic virtues created by this revolution. Instead Tocqueville bemoans the dismissal of Christianity, for as a result audacious and ruthless men gained unlimited and unchecked power, using their power without deference to any higher authority.

³⁷Alexis de Tocqueville, *The Old Regime and the French Revolution*, trans. Stuart Gilbert (New York: Doubleday Anchor Books, 1955), p. 155.

³⁸Tocqueville, p. 156.

In France, the people's desire for freedom was quickly overcome by a desire for reform. Freedom, necessary for a good regime according to Tocqueville, was lost because the many did not truly understand the nature of government. It is important to remember, here, Tocqueville's teaching on the end of government. Tocqueville argues that a good government is one where liberty is prevalent, allowing its members to live a decent life unfettered from tyranny. In Tocqueville's society, there would be less glory, but more stability; pleasures "would be less extreme, but well-being more general; the heights of knowledge might not be scaled, but ignorance would be less common; feelings would be less passionate, and manners gentler; there would be more vices and fewer crimes."³⁹ Society would not be as great, but it would be stable. Most importantly, if equality and liberty were properly balanced in society, men would not suffer slavery. In other words, without equality and liberty, regardless of the nature and extent of their "benefits," man is a slave.

Tocqueville notes that the bureaucracy had firmly entrenched itself in France long before the revolution broke out. Policies were created by a bureaucracy that adversely affected both the peasants and the nobles. Land was arbitrarily taken and taxes were assessed without political recourse. Still, the peasants were, Tocqueville notes,

³⁹Tocqueville, *Democracy*, p. 15.

truly aggrieved, for they suffered more than the nobles. Both the peasants and the aristocracy, though, disassociated themselves from things political. Consequently, prudence, normally cultivated by tradition, experience and education, was replaced by constant change and innovation.

After the revolution, the people were so caught up with equality that the dangers of bureaucracy were forgotten. Instead, bureaucracy was promoted as the champion of equality. The powers remained as centralized as before, more so in fact. Frenchmen yielded to the tyranny of the state in order to preserve their new status as the recipients of hopefully ever increasing benefits. Desiring the comforts of the body, the French quickly enslaved themselves. They lost their desire for freedom. While the love of freedom for Tocqueville is something that cannot easily be analyzed, he did believe it could be felt. Tocqueville says this of freedom: "It is a privilege of noble minds which God has fitted to receive it, and it inspires them with a generous fervor. But to meaner souls, untouched by the sacred flame, it may well seem incomprehensible."⁴⁰ Tocqueville concludes arguing that the French Revolution replaced one despotism with another more savage despotism.

Things Public and Private

⁴⁰Tocqueville, *Old Regime*, p. 169.

Regarding the distinction between centralized government and centralized administration, this much can be said: a bureaucracy can occur at the federal level or at the local level. At the federal level, one finds agencies attempting to rule local associations directly or indirectly. Administrators rule in person (directly) or create general rules which local communities must follow. Most "federal" agents live and work within their specific communities. In this sense, then, it can be said that our government has grown, even though the actual number of bureaucrats in the capital has not increased.

Bureaucratic government, or centralized administration, can occur locally. Members of any community can give up their political powers to local un-elected officials. Yet, ordinarily at the local level this does not happen. This is so for two reasons. First, the American spirit of self-rule is prevalent. Citizens still remain aghast at the prospect of voluntarily giving up their liberty. A second influence is the refusal, by most everyone, to willingly submit to the absolute will of another, especially one controlled by fellow citizens in the guise of an official agency. That is, history offers numerous examples of how citizens give up authority to one--or a few--who are charismatic. Yet, bureaucrats, regardless of expertise, are typically viewed as grasping, mediocre and small. One does not readily hand over one's concerns to a person or persons considered to be

of little character. Hence, the hesitance on the part of citizens to allow for centrally administered local associations.

Why, though, do we have a centralized administration that substantively controls local associations through unelected officials? The answer, I believe, is one of conception: the "authority" is perceived to be beyond and above the local communities and therefore seems more powerful and authoritarian. The rules and regulations are not controlled locally; they are divinations from on high. The pain one receives from being ruled is somehow lessened when the true ruler remains impersonal and unseen.

Politics and Regulation

How does government work today? By way of example, one need only review a sampling of the regulatory agencies. For our purposes, we will look at the Federal Trade Commission and the Environmental Protection Agency. With them, one sees a definite economic bias on the part of regulatory agencies. Agencies such as the National Labor Relations Board, Equal Employment Opportunity Commission, Environmental Protection Agency, to name a few of the hundreds that exist, have as their aim the regulation of the "public interest." These agencies are given free reign to determine who gets what, when they get it and how they get it. The outcome of much of this regulation is the

imposition of extensive requirements that impede the entry of new businesses into the marketplace.⁴¹ It has been shown time and again that through regulation, established businesses become a protected class.⁴² New companies find it difficult, if not impossible, to enter the market since the cost of regulation, the complexity of rules, and bias favoring existing companies all act in dissuasion. Although large established firms would prefer not to deal with the regulatory agencies, they find nonetheless that once a relationship is begun with an agency, they benefit. Large firms quickly learn that competition can be prevented, if regulatory agencies are not limited. The agencies themselves benefit from this arrangement since lawsuits or public dismay is limited when the larger corporations are willing to work with them. Ironically, then, "big business," the bane of democracy, actually benefits from administrative government. Hence, the regulatory agencies actually keep big business as a friend to the bureaucracy,

⁴¹A recent Civil Rights Bill outlaws "unfair" written tests by potential employees. This curious effort at social engineering might not only curtail written exams, but also the "House Education and Labor Committee's report indicates that job interviews may also have to go." Robert G. Holland, "Race-Norming By Any Other Name," in *National Review* 43 (1992) No. 13: 37.

⁴²See, for example, Robert A. Leone and John E. Jackson, "The Political Economy of Federal Regulatory Activity: The Case of Water-Pollution Controls," in *Studies in Public Regulation*, ed. Gary Fromm (Cambridge: The MIT Press, 1981) and Peter Navarro, "The Politics of Air Pollution," *Public Interest* 59 (Spring 1980): 36-43.

even though on the surface, agencies like FTC and EPA appear anti-business.

In 1914, The Federal Trade Commission Act⁴³ and the Clayton Act were both passed with the intent to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." The purpose of the FTC was originally to limit unfair competition, prevent monopolies from controlling the economy, and ensure "the nurturing of competitive market processes as an end in itself."⁴⁴ Even at its inception, the FTC's goals were somewhat conflicting and unclear. Agreement on a definition for unfair or competitive market processes is rarely found. In light of the obvious difficulty in assuring agreement, the FTC's goals will be impossible to achieve. Amazingly, Robert Katzmann argues that the unclear language and lack of goals made the FTC Act a shoe-in for congressional support. "In short, the advocates of the FTC Act and the Clayton Act represented different interests: the consumer, large corporations, and the small businessman."⁴⁵ Small

⁴³In 1964 the FTC, in an effort to limit consumption of tobacco, claimed that the distribution of cigarettes is "unfair" without proper warning of the ill-effects. Cf. the Federal Trade Commission's Trade Regulation Rule on Cigarette Labeling and Advertising (29 FR 8325) Subchapter D--Trade Regulation Rules.

⁴⁴Robert A. Katzmann, "Federal Trade Commission," in *The Politics of Regulation*, ed. James Q. Wilson (New York: Basic Books, 1980), p. 156.

⁴⁵Katzman, p. 155.

businessmen believed that the Act would prevent the creation of monopolies, whereas large corporations believed that competition would be limited.⁴⁶ Everyone carried favor; for everyone hoped and had reason to believe that they would benefit.

So one realizes that in this case the FTC was not created to please just one interest group. Because of this, the goals of the FTC are unclear. Unfortunately for us no one has attempted to articulate a mission for the FTC from a legislative or moral perspective. It would seem that it was, to begin with, thought to be necessary to do so. Moreover, the mission of the FTC seems to depend in great part upon what party is in office, the mood of the American people, and the commissioners themselves. Some FTC officials may define "unfair" with those who have more property as compared to those who have less. Or, unfair might be interpreted as one large monopoly, for example, the oil industry.⁴⁷ As such, the FTC attempts to rearrange a whole industry to make it more competitive. Yet, the definition of competitive remains unclear. Certain

⁴⁶The Robinson-Patman Act of 1936 is evoked more often than not by the FTC. The Act was created to limit price discrimination but is used now to limit competition. A secondary purpose, it seems, is to inflate prices. Cf. Richard A. Posner, *The Robinson-Patman Act* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1976).

⁴⁷Katzmann notes that "The Exxon case alone has consumed 12 to 14 percent of recent agency antitrust budgets," p. 157.

industries are by nature big, others small. Also, certain industries require extensive technical competence which disallows easy market entry. A further problem is the question of consumer costs. A decision must be made: should the consumer pay more or less because of the FTC's activities? In many instances, the FTC purposely causes the market price of goods to rise, fostering a kind of upward "competition".

Not surprisingly, within the FTC there is little agreement as to its ends. The Bureau of Competition of the FTC is concerned with the legal aspects of antitrust: determining if an infraction of the law has occurred and by whom. The Bureau of Economics assists the Bureau of Competition by offering advice as to whether or not a particular business's activities are anticompetitive. Understanding what is anticompetitive is a difficult task, particularly in an open market where economic activities are in constant flux. In many instances, there will be tension between these administrative tasks. As Katzmann notes: "In part, disputes between lawyer and economist arise because of legitimate differences about the way in which data should be interpreted. Often, the complexities of the industries under investigation are so enormous that it is difficult to determine the effect that each of a multitude of factors might have on the market."⁴⁸

⁴⁸Katzmann, p. 172.

The purpose of the FTC's action remains a question. Ought it be pro-business, anti-business, promote small business, keep consumer costs down or up, or promote social stability? These possible answers are all part of the question, What is the Public Interest? Should the public decide? Or, Congress. Or the President or Commissioners? The answer to these questions is this: no one decides and all decide. For example, in many instances the Bureau of Competition is animated by a desire to win cases. Lawyers, which this bureau is composed of, desire to gain prestige, to grow professionally and move up the bureaucratic ladder. Yet, promotion rarely occurs without courtroom experience and/or successful suits. Many times politicians seek to influence the FTC officials for political reasons. Corporations also make attempts at influencing the FTC for obvious reasons and the FTC often succumbs to one or many of its suitors.

So we see that although the FTC has an agenda of its own, the agenda changes in response to various influences. The Public Interest could not possibly be served by this constant change. Moreover, a further problem arises in light of the processes of regulatory rulemaking. While rulemaking is the process through which administrative agencies act and perpetuate themselves, lawmaking is the public issuance of a specific rule that affects business or whomever. As noted above, rulemaking is outside the

traditional legal process of lawmaking. Unelected officials make "rules" in order that open ended laws ("unfair" trade practices) might be completed.

The scope of rulemaking in recent years, though, has been greatly undermined by its own rulemaking processes. For example, the Consumer Product Safety Act of 1973 was amended in 1981 so that the commission could "analyze the costs and benefits of its proposals;" those who will bear the brunt of the costs and those who receive benefits must be clearly outlined at the beginning and end of "the rulemaking procedure."⁴⁹ Furthermore, the CPSC must determine how its rulemaking will effect both the environment and small businesses. Consequently, the agency is limited in what it may do, at least regarding rulemaking. The CPSC and numerous other agencies have resorted to adjudication. They simply settle a complaint through a process that avoids an official complaint. What is curious about this process is that "Adjudication is also, by nature, retrospective--that is, it penalizes a firm for its conduct during a period before the agency acted, conduct that in many cases was legal at the time."⁵⁰ In other words, if an agency such as CPSC decides to prosecute a company, the company will lose

⁴⁹Terrence M. Scanlon and Robert A. Rogowsky, "Back-Door Rulemaking: A View From the CPSC," *Regulation* (July/August 1984). Reprinted in *Antitrust and Trade Regulation*, 2nd ed., ed. Thomas W. Dunfee and Frank F. Gibson, (New York: John Wiley & Sons, 1985), p. 315.

⁵⁰Scanlon, p. 317.

regardless. For the legal fees and bad press (toys which are "child-killers") force the firms to negotiate with the agency (pre-complaint) more than 98 percent of the time.

The reasons for this change from rulemaking to adjudication may be due to a response to bad press from what is deemed an unfair piece of legislation; or perhaps the courts have struck down a particular law and Congress, scrambling, threatens to limit the power of the particular agency that caused the grievance. Hence, adjudication renders any congressional action impotent. Interestingly, Justice Antonin Scalia points this out: Congress and the White House are "squeezing the balloon of bureaucratic arbitrariness at one point, only to have it pop out somewhere else."⁵¹ Indeed, a look at the Environmental Protection Agency and its meanderings effectively illustrates Scalia's point.

The Environmental Protection Agency (EPA), created in 1970, differs from the FTC in at least two important respects. Its creators believed that the EPA would be more effective because of initial insistence on clearer laws and stricter guidelines. The EPA would not be "captured" by a particular industry, making it ineffective. Secondly, the EPA would address environmental issues from a comprehensive perspective--from a perspective of both economics and the overall health of American citizens. The environment, its

⁵¹Scalon, p. 314.

people, and their industries would be studied and controlled by a single "administrator" utilizing only one effective bureaucracy. The EPA would usher in a new, enlightened bureaucracy. For better or worse, the president, Congress, interest groups and the American people whole-heartedly accept the mission of the EPA.

With great fanfare and almost unanimous support by Congress, the EPA became responsible for monitoring air, water, noise and radiation pollution. Its 1972 budget was 2.5 billion dollars. Given the EPA's responsibilities, what methods were to be used to implement them? As indicated above, strict guidelines would be followed. For example, Congress demanded "90 percent reductions in auto emissions in five years."⁵² Moreover, the EPA was required to determine effluent guidelines for numerous industries and ensure their adherence within a set period of time. But as the EPA began its adventure, it faced a multitude of problems. Specifically, the EPA receives its authority from numerous acts dating as far back as 1933; yet many of these acts are contradictory or unclear.⁵³ In other words, the EPA has to create and implement guidelines without really knowing the effect they will have on economics, employment,

⁵²Alfred Marcus, "Environmental Protection Agency," in *The Politics of Regulation*, ed. James Q. Wilson (New York: Basic Books, 1980), p. 274.

⁵³See, for example, Warren Freedman, *Federal Statutes on Environmental Protection* (Connecticut: Greenwood Press, 1987), pp. 21-32.

taxes, and other environmental issues. For example, industries could no longer dump pollutants into the local rivers, so they were dumped in landfills, creating new pollution problems. Further, the EPA is intended to be a comprehensive program, but the EPA itself is composed of many diverse organizational units that would not, or could not, look at the environment in a comprehensive fashion. As Alfred Marcus points out, laws created by Congress often create conflicting goals. Laws are created to set limits on how much a specific industry can pollute while simultaneously setting clear air and water standards that also must be met. Air pollution rules stipulate that an industry must act in a specific way, yet this is contrary to what solid waste rules stipulated. There is little harmony or agreement within these comprehensive pollution programs and less harmony in their administration. Not surprisingly, the source of the EPA's difficulty lies in their comprehensive nature.

Under EPA guidelines, states are faced with the dilemma of creating their own regional programs. Of the EPA, Marcus says this:

EPA was created by a Reorganization Plan that consolidated several existing agencies...(which) brought together close to 6,000 employees from 15 government programs located in 3 departments (HEW, Agriculture and Interior). Many of these employees were scattered throughout the United States in laboratories and regional offices. The two biggest organizational components were the Federal Water Quality Administration (FWQA)...and the National Air Pollution Control Administration

(NAPCA)...The smaller organizational units included: from HEW--the Bureau of Water Hygiene, the Bureau of Solid Waste Management, the Office of Pesticides, and the Bureau of Radiological Health; from Agriculture--Pesticides Regulation; and from Interior--the Pesticides, Wildlife and Fish Office.⁵⁴

Due to the unique needs of individual states and the complexity required for organization, it is natural that a comprehensive plan fails to be effective. Indeed, the issue of economics emphasizes the failure implicit in a comprehensive plan. At first, the EPA was not concerned with the effect of its regulations on the economy. Soon, though, it became apparent to all that some restrictions must be placed on the EPA. The number of businesses that face closure because of conflicting EPA rulings is immeasurable. Yet, who carries the economic burden? The citizen? Only the "rich"? The effects of inflation, unemployment, and taxation all fall by default within the jurisdiction of a regulatory agency, forcing both Republican and Democratic lawmakers, President Nixon, the media, courts and public to level intense criticism at the EPA as early as 1974.

Marcus argues:

Trying to implement the plan for rapid progress uncovered an almost obvious inadequacy in the original theory about the need for clear statutes. Explicit goals and dates of achievement were not sufficient to ensure goal accomplishment. Goals and timetables that were explicit without also being achievable and defensible were declarations

⁵⁴Freedman, p. 275.

of intention without real credibility.⁵⁵

Restating the issue, one sees that the term "environment" includes all human related activities: pollution, health, wildlife, civil rights, airplanes, oil tankers, energy supplies, economics, selling minnows, etc.⁵⁶ Moreover the difficulty inherent in regulating this environment is made incalculable when one asks: what is a good environment? The Congress, White House, courts, EPA, businesses, states and environmentalists are all demanding a right to be players in the game.

Finally, what has occurred over the years in response to the burgeoning bureaucracy is the increasing role the courts have played in arbitrating the differences among the articulators of what makes a good environment. In an important respect, the courts are not to be blamed for their involvement in the making of environmental law. For they are not deciding on a specific law or laws, but must act upon open ended policy created by Congress and implemented by the EPA. The courts out of necessity have become thoroughly political. As Herbert Jacob states:

Citizen contact with executive and judicial

⁵⁵Freedman, p. 285.

⁵⁶In *Alyeska Pipeline Service v. Wilderness Society*, 95 SC 1612 and 421 US 240 (1975) Justices Marshall and Brennan argued that the Wilderness Society ought not pay for attorney's fees "on grounds that minority groups often cannot afford to initiate cases at their own expense." Quoted in Lettie M. Wenner, *The Environmental Decade in Court* (Bloomington: Indiana University Press, 1982), p. 183.

agencies of government is increasing at the same time as legislators become isolated from personal contact with their constituents and electoral participation becomes meaningful primarily in a symbolic sense.⁵⁷

Private groups turn to the courts to decide political issues and clarify policy. In fact, in the early 1970s, the courts obliged both the EPA and environmental groups by declaring that defendants now had to prove that they were not guilty!⁵⁸

The courts today have become a type of oligarchy: a group that sits outside the political machinery, creating policy. As Laura Lake notes:

Though they do not trust elected officials or bureaucrats, environmentalists perceive the courts to be neutral or even sympathetic, and therefore do not object to *judicial intervention* in environmental matters. They, like economic conservatives during the New Deal, perceive a shared value-set with the judiciary, and therefore seek to replace judges for elected decision makers.⁵⁹

Can the Many Rule?

After all this, the question remains: who is to rule? If one centrally organized bureaucracy is to rule, to whom do they owe allegiance? Does the bureaucracy owe fealty to Congress, the presidency, the courts or the to people

⁵⁷Quoted in Laura M. Lake, *Environmental Regulation* (New York: Praeger Publishers, 1982), p. 88

⁵⁸Lake, p. 90.

⁵⁹Lake, p. 100.

themselves? If to the people themselves, what will prevent bureaucrats from forming allegiances with various interest groups, thereby forgetting the common good? Is Congress capable of overseeing all the activities of a massive bureaucracy? Or is the president better suited? Until the early 1970s, many administrators relied upon the executive to guide the bureaucracy. Yet, this belief in an unerring executive was shaken when Richard Nixon held office.

There are, then, three views of public administration. The first is that it is "democracy," properly understood, where everyone willingly (or unwillingly) works together for the common good. The interests of one man are necessarily the interests of another. Proponents of this view claim that freedom is important, but the overriding theme is communal friendship. By this I imply a society where self-interest and the public interest are one and the same. One is considered free if he actively strives to fulfill the public values. The "values" of compassion replace greed and pettiness. The second view of public administration includes the belief that administration functions to serve the people. At the same time, the people inform the agencies about what ought to be done, and the agencies willingly comply. The expression "representative democracy" is commonly heard. The third view is that the people think they know what is best for them, but they can not be allowed to actively participate because their self-interest might

interfere.

The commonly heard apologia for modern bureaucracy is that trained experts are better qualified to decide what is best for the many. However, one must ask: does the bureaucracy necessarily rule in the interest of the people? Decisions reached by administrators are, ultimately, arbitrary; the administrator or agency decides an issue according to current sentiment, public pressure, "feelings," and threat of law suits. Topical issues, such as the environment, have a special way of affecting social policy. Agencies may create and implement rules affecting coal mines in the western United States, however, those rules do not apply to the eastern coal mines.⁶⁰ Politics, it seems, cannot be eradicated from the public arena.

According to John Wettergreen, these broad changes have occurred because of a rejection of economic liberalism. This post New Deal period, which Wettergreen calls postindustrialism, is not concerned with the production of goods per se. Instead its goal is to transform the nature of man. Wettergreen notes:

As the ideology of the regulatory revolution, postindustrialism reflected the end of New Deal liberalism without positing a new political program. Postindustrialism is a form of historicism; it looks to the supposed passing age, the industrial age, but cannot imagine any central

⁶⁰Bruce Ackerman and William T. Hassler, *Clean Air/Dirty Air* (New Haven: Yale University Press, 1981).

characteristics of the new age.⁶¹

The regulatory revolution came into existence with nothing to guide it. It was hoped that perhaps the executive could mold and control the new government, but the events of 1973 clearly indicate the reluctance of Congress to give up its power.⁶²

As Wettergreen points out, the Reagan administration, elected to limit government, soon turned to regulatory relief. The Office of Information and Regulatory Affairs sought to "relieve the burden of regulation upon particular corporations or locales."⁶³ Now the president and particular members of Congress grant "favors" to those well organized enough to get the attention of the players. Those who receive relief know that the law is meaningless, and those who are not afforded relief learn that the law, that is, the government, is merely a sham which can not represent political equality. Finally, the age old question: what is to become of society when respect for the law disintegrates?

The end result in this transformation of American politics is this: the non-political, unelected agencies created to administer America have become our new political institutions. Political activity, albeit petty and low,

⁶¹Wettergreen, Part II, 181, p. 6.

⁶²Wettergreen points out that congressmen, the ones who help created the regulatory society, now brag how they can offer regulatory relief. Cf. Wettergreen, part I, p. 6.

⁶³Wettergreen, II, p. 11.

occurs outside of the public arena. While economic redistribution and social engineering have failed, the bureaucratic agencies remain.

The American government was designed to protect individual rights. If individual rights are understood merely as an expression of the will of the people, then there is nothing to protect liberty or ensure that justice prevails. As Tocqueville has suggested, modern government will be a despotism--although not a harsh despotism. Yet, to promote this type of government is not a wise choice. For internally the "rights" of citizens will be subject to whoever has the greatest sway over the bureaucracy. Eventually, this government must submit to the will of a tyrant: and, the citizens will forget how to rule themselves. Sadly in this city, men become petty and small, seeking refuge in the shadows.

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