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REVIEW ESSAY

Legitimacy and the Problem of the Administrative State

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NED RYUN, *American Levithan: The Birth of the Administrative State and Progressive Authoritarianism* (New York: Encounter Books, 2024)

WILLIAM NOVAK, *New Democracy: The Creation of the Modern American State* (Cambridge, MA: Harvard University Press, 2022)

JOHN MARINI, *Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century* (New York: Encounter Books, 2019)

ALAN BRINKLEY, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Vintage Press, 1995)
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Abstract

While a postwar consensus largely upheld the legitimacy of the administrative state, the past two decades have witnessed a surge of critiques not seen since the 1930s. This review essay traces the evolution of these attacks from libertarian legal scholars decrying the administrative government's alleged constitutional violations to lesser-known populist conservative figures like John Marini and Ned Ryun who frame the same developments as a subversive plot against the executive branch. Contrasted with them are defenders of the regulatory state like William Novak, who argue both for the historical precedent of state intervention as well as for its democratic legitimacy. The essay closes with a review of liberal concerns about the administrative state—exemplified by Alan Brinkley's critique of the New Deal—and considers how defenders and critics might be speaking past one another. The debate reveals deeper fractures in American political thought and potentially new avenues for research into the politics of the administrative state in the latter half of the twentieth century.

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Introduction

The administrative state is being reevaluated. Since Steve Bannon's (2017) Conservative Political Action Conference speech calling for its "deconstruction," discussion of the topic has moved from academic journals to the mainstream. Politicians now frequently use the term, and the dismantling of government bureaucracies has become a key pillar of Project 2025, which outlines policies to restructure the federal government and has been implemented to varying degrees in the second Trump administration (Dans and Groves 2023). Precedents going back fifty and sometimes ninety years are being overturned or challenged. In the middle of this chaos, the one point of unity across the political spectrum is that the administrative state is in crisis (see, for example, Metzger 2017; Calo and Citron 2021; White 2024).

Considered historically, these frontal assaults represent a notable departure from the postwar status quo where the modern administrative state was taken for granted. In the latter half of the twentieth century, James Freedman (1978, 5) observed that under "Democratic and Republican Presidents alike, Congress [had] regularly chosen to rely upon administrative regulation ... to implement public policies in new and complex areas of federal concern." Regardless of ideological differences, administrative solutions were usually preferred over "civil remedies, criminal penalties, subsidies to the private sector, or the free market." Even a seismic political shift like the election of Ronald Reagan in 1980 did not undo the administrative state.[1] Initiatives like Executive Order 12291 required review by the Office of Management and Budget (OMB) of all proposed regulations to ensure that they complied with cost-benefit analysis. OMB review continued the trends begun under the Nixon, Ford, and Carter administrations and represented Reagan's desire to further centralize control of regulation (Sunstein 1987, 454). The goal here was not to eliminate the tools of government at the president's disposal but, rather, to make them more efficient.

There were disagreements to be sure. Left-wing critics like Ralph Nader and his followers raised the alarm about interest-group capture (Fellmeth 1970).[2] Liberals and conservatives fought over the amount of power that Congress could delegate, the status of the so-called "independent agencies" like the Federal Reserve or the Securities and Exchange Commission, and the proper role of expertise in government (Freedman 1978). Perhaps most importantly, there were debates over the autonomy of agencies and how strong a hand the executive should have in their management. Nonetheless, besides the occasional protest, no one seriously questioned the rightful existence of the administrative state.[3] A barometer of this minimal consensus can be found in none other than Antonin Scalia, the future US Supreme Court Justice and intellectual leader of American conservative jurisprudence, who wrote impassioned

[1] On social issues, for example, Cass Sunstein (1987, 426) noted at the time that Reagan "has not fundamentally altered the regulatory state."

[2] For a more detailed analysis of the history of left-wing critiques of the administrative state, see Schiller 2019.

[3] For one of the most damning portrayals of administrative government as it developed in the 1960s and 1970s, see both editions of Theodore Lowi's book *The End of Liberalism* (Lowi 1969, 1979).

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defenses of *Chevron* deference in the 1980s (overturned by the US Supreme Court under Chief Justice John Roberts in *Loper Bright Enterprises v. Raimondo*).[4] The *Chevron* doctrine counselled courts to defer to agency interpretations of regulations rather than to interpret them *de novo*. Politically, Scalia worried about judicial encroachment on the executive branch. *Humphrey's Executor v. United States*, which barred the president from removing agency heads, already limited the executive.[5] Courts intervening with their own interpretations of technical rules would further hamper things. Deference was thus a way of returning power to the executive and of making executive agencies more open to the "political process" (Scalia 1989, 519). New presidents voted into office by the electorate would come in with new programs and goals, and rules would be reinterpreted to match these priorities. In sum, Scalia was, as Adrian Vermeule (2023, 12) notes, "the Court's champion of *Chevron*, of the administrative state, and of presidential power."

The picture that comes into view is thus a cautious, but nonetheless workable, consensus on the legitimacy of administrative government. Yet, while this consensus no doubt captures something very real about postwar American political and legal thought, it leaves us with the puzzle of how everything fell apart. By attending only to the mainstream debates, it is difficult to understand how substantive challenges to the administrative state not seen since the 1930s have returned with a vengeance under the second Trump administration. Parallels can be drawn here with the field of American history in the postwar period. In the midst of peace and prosperity, intellectuals began to see America as unified by one liberal tradition. Lionel Trilling (1950, ix) famously asserted that in "the United States at this time Liberalism is not only the dominant but even the sole intellectual tradition. For it is the plain fact that nowadays there are no conservative or reactionary ideas in general circulation." Remembered now for its naïveté, Trilling's statement captured the myopia of a liberal establishment seemingly oblivious to the anti-war sentiments of the New Left, the conservative grievances that would fuel the Goldwater campaign, or the discontents that would erupt in the Civil Rights Movement. Within a short period of time, so-called "consensus historiography" would be abandoned in the face of the conflict and radicalism of the 1960s.

A similar dynamic is at play in current political debates about the administrative state. The postwar truce between liberals and conservatives seemed enduring, such that it was easy to overlook dissenting voices. At the margins, however, fundamental questions about the legitimacy and stability of the administrative state have been raised. In the liberal camp, thinkers like Alan Brinkley (1995) began to question whether the turn to bureaucratic management characteristic of postwar politics should be reckoned a success. Writing amidst the "defeat and disarray" of the Reagan revolution, Brinkley was one of the first liberals to undertake a critical examination of the New Deal in order to see if the later failures of liberalism could be explained by the consequential decisions of the 1930s (14). His conclusion was in the affirmative.

On the right, a new political language preoccupied with conspiracy and subversion emerged. The Progressives of the early 1900s were no longer seen as misguided reformers—as in the old conservative critique—but, rather, as agents of a

[4] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
[5] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

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counterrevolution looking to institute an authoritarian regime and put down those deemed to be "apostates, backwards, deplorables, the irredeemables, [or] dirty little peasants" (Ryun 2024, 120). The administrative state, another author writes, was not concerned with the welfare of the people in a modern industrial society; rather, its goal was "to turn a nation of cowboys into a nation of cattle" (K. Roberts 2024, 165). While Brinkley's liberal critique is purely negative—the road not taken—the populist conservative account offers both a critique and concrete recommendations. With the return of Donald Trump to the presidency, developments like the shuttering of governmental departments and the Department of Government Efficiency's funding cuts are the fruits of this critique, but it is important to see the wider context. The modern administrative state plays an essential role in postwar American political life. Grievances with it indicate frustrations with the way in which we govern ourselves. Revisiting these debates can offer us clarity not only into our own moment but also into the deeper fault lines of twentieth- and twenty-first-century American politics.

Cracks in the consensus

In the first two decades of the twenty-first century, cracks in the consensus began to form as new criticisms of the administrative state emerged that were both more fundamental and more militant than anything called for by mainstream conservatives like Scalia. At the dawn of what Cass Sunstein and Adrian Vermeule (2015) have called "libertarian administrative law," first judges and then prominent academics like Randy Barnett (2004), Richard Epstein (2014), and Philip Hamburger (2014) put forward broadsides that challenged the legitimacy of the administrative state and called for massive reductions in regulatory capacity. Representing the judiciary, Judge Douglas Ginsburg was one of the first major postwar figures to reject the New Deal's settlement root and branch.[6] In a 1995 call to arms that initiated the "Constitution-in-exile" movement, he urged jurists to work toward the revival of strong libertarian doctrines that checked executive power. For "60 years," he wrote,

> the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes. (Ginsburg 1995, 84)

Over the past two decades, themes of constitutional betrayal have found their way into more and more judicial opinions and legal writing. In a particularly striking example, Judge Janice Brown launched an assault on the post-New Deal regulatory state's tendency, in her view, to trample on property rights and economic liberty.

[6] As an exercise in historical speculation, one can wonder how administrative law doctrine would be different today had Judge Douglas Ginsburg not withdrawn his nomination to the US Supreme Court in part because of his past use of marijuana. The seat in question was filled by Anthony Kennedy.

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"America's cowboy capitalism," she concluded, "was long ago disarmed ... [and] the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s."[7]

In the academic camp, meanwhile, Barnett (2004) charged the country with a case of amnesia. What had been forgotten was the "lost Constitution" of the Founders, which was more protective of private property and the separation of powers. Courts primarily were to blame and had over the past century interpreted away key provisions of the Constitution as it was originally enacted. Most relevant to the debate over the administrative state, the post-New Deal court, Barnett (2004, 1) claimed, had "gutted the Commerce Clause and the scheme of enumerated powers affirmed in the Tenth Amendment, while greatly expanding the unwritten 'police power' of the states." Expansive regulation obscured what Barnett took to be one of the key philosophical underpinnings of the original Constitution—the "presumption of liberty," which asserts that any restrictions on liberty will be deemed unconstitutional unless the government can convince the courts of their necessity. Its opposite—the "presumption of constitutionality," which is currently dominant—shifts the burden to citizens to prove why a given regulation is unconstitutional (5). *Restoring the Lost Constitution* is a story of decline, but it remains hopeful that we can remember our foundational principles and restore the protected position of citizens and their rights in the republic.

In *The Classical Liberal Constitution*, Richard Epstein (2014, 276) drew on his research into economics and political theory to argue that the classical liberal insistence on the separation of powers was far superior to the "quasi-legislative" and "quasi-judicial" actions that characterize modern administrative commissions. In abandoning the old arrangement and rewriting the Constitution, the Progressives had made a Faustian bargain: everyone had "to cede a large portion of their common law property rights (especially as they relate to the ability to enter and exit markets) in exchange for the rights, first, to participate in the democratic procedures that set the rules of the game and, second, to appear before the administrative agencies that carry out the legislative mandate" (7; see also Epstein 2006).

Finally, Hamburger (2014) took a *longue durée* view and claimed that administrative law was the reincarnation of the older English royal prerogative against which the American revolutionaries rebelled. As this prerogative's modern heir, administrative power was fundamentally lawless, he argued, because it was extralegal (it is exercised outside of regular courts and, at best, mimics their procedures); supra-legal (it demands deference from courts); and consolidated (it concentrates in one branch of government judicial, legislative, and executive power) (Hamburger 2014, 1–7). The answer to the title of his book, *Is Administrative Law Unlawful?*, was therefore a resounding "yes."[8]

In each case, the stark conclusion was reached not only that the modern administrative state was irreconcilable with our constitutional order but also that an older, uncorrupted Constitution had been abandoned. "Libertarian administrative law" was thus built on an implicit historical theory, and, unsurprisingly, the liberal

[7] *Hettinga v. United States*, 677 F.3d 471, 480 (DC Cir. 2012).

[8] For a critical response to *Is Administrative Law Unlawful?* see Adrian Vermeule's (2015) succinctly titled *Texas Law Review* article "No."

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countermovement that emerged to justify the administrative state in response to these criticisms found some of its most important champions among historians. Daniel Ernst (2014) and William Novak (2022) offered some of the most striking responses, building on extensive historical research into the nineteenth and early twentieth centuries to explain how the modern administrative state actually emerged. Against the charge of lawlessness, Ernst showed in *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* that the most important statute for the administrative state—the Administrative Procedure Act (APA), passed in 1946—was the result of careful compromise.[9] Rather than granting wanton discretion to bureaucrats, the APA institutionalized long-standing procedural safeguards into the rule-making and decision processes. These measures ensured stability and avoided militant varieties of both progressivism and libertarianism.[10]

Novak's (1996) response, meanwhile, begins with the work of his earlier classic, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, which went to great lengths to debunk the idea of the "weak state" in the nineteenth century. The modern administrative state, he argued, had long-standing precedents in the form of fire regulations, liquor prohibitions, disease control, and morals policing. Once one attended to the local level, the state had long had a hand in supposedly private exchanges. In *New Democracy: The Creation of the Modern American State*, Novak (2022) extends this argument into the twentieth century, offering one of the most comprehensive analyses yet of the institutional contexts and intellectual traditions that underwrote the Progressive case for administrative government. In developing this account, he explicitly targets the central tenets of libertarian critiques of the regulatory state:

> This book continues my long-term effort to debunk persistent and dangerous fallacies about an original American historical tradition defined primarily by transcendent precommitments to private individual rights, formalistic constitutional limitations, and laissez-faire political economy. In contrast, this project excavates an alternative American historical reality where public rights, popular lawmaking, and robust regulatory technologies take center stage in a narrative grounded in an examination of the actual practical workings and pragmatic public policy demands of a rapidly expanding and modernizing polity, society, and economy. (Novak 2022, 3)

To make his case, Novak explores the great transformation of American law in the areas of citizenship, police powers, public utilities, social welfare, and anti-monopoly, showing the popular development of each as well as how the fields of public administration and modern administrative law crystallized the insights of these developments. Against the charge of illegitimacy, Novak argues for a broader understanding of democracy, with implications for both historiography and political science. Many interpretations of the American state, he maintains, display "an overreliance on the pantheon of British political theorizing," which overemphasizes

[9] Administrative Procedure Act, June 11, 1946, 60 Stat. 237.

[10] For a detailed review of *Tocqueville's Nightmare*, see Kessler 2016.

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ideas of individual rights. This tradition, however, has both a "democratic as well as American" deficit and is improper for understanding the great Progressive reforms of the late nineteenth and early twentieth centuries (Novak 2022, 7).

For Novak, democracy goes beyond voting and, at the deepest level, means living in a society and culture that actualizes the widely held desires of the populace without being tied down in formal procedures. As each chapter progresses, we witness the slow but steady emergence of national schemes of regulation as a necessary response to the rapidly accumulating problems of the industrial era. Bringing about these reforms required breaking out of the "traditional ideas about quasi-private officeholders and formal constitutional limitations." The result of the Progressive reform efforts, however, was no less than "the public law legitimacy of broad-scale legislative and administrative action in the public interest"—the very same hard-won legitimacy that the libertarian critics are now calling into question (Novak 2022, 236).

Ernst's and Novak's defenses of the administrative state represent important objections to the "lost Constitution" literature, marshalling a great variety of evidence to ease the anxiety about administrative government by offering an alternative to the libertarian narratives of decline. Nevertheless, the seeming incapacity of these historical studies to silence the libertarian critics and now the even more militant populist conservatives suggests deeper problems that go beyond the historical facts. First, as Jeremy Kessler (2016, 759–61) has pointed out, is the problem of relevancy. It is not always clear whether historical modes of argumentation are the best tool for establishing the legitimacy of an institution. One can show, as Novak does, that the statist reforms resented by libertarians were broadly supported and the product of widespread clamoring for change, but for those who hold on to a strict separation of powers, a popular history of the administrative state is not in itself a justification.

In the background of much of libertarian criticism is a commitment to originalism, which posits a fixed meaning for the different provisions of the Constitution and demands conformity to it by courts. As critics have long noted, however, originalism suffers from a selection bias. It speaks of an "original public meaning," even though meaning is almost always contested. Moreover, as Jonathan Gienapp (2024) has recently argued, originalists often illicitly assume that the Constitution plays the same role in the imagination of different generations, as if the notion of the document produced in the heat of the culture wars unleashed by decisions of the Warren and Burger courts were the same as that of the late eighteenth century.

At the most basic level, though, the originalism of thinkers like Barnett and the historical focus of Ernst and Novak, despite their difference of opinion on the administrative state, assume that the past has a legitimizing force, as though how our society ought to be organized could be deduced from a more accurate description of how it was organized. Both forms, in brief, make crypto-normative arguments while arguing about history. To fully assess legitimacy, however, would likely require moving into the realm of philosophy. Although this is a step that historians do not usually make, recent works in political and legal theory looking to challenge originalism have moved in this direction and have sought to provide, albeit for different reasons, firmer moral and philosophical foundations for administrative

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government (see, for example, Mashaw 2018; Emerson 2019; Sunstein and Vermeule 2020; Vermeule 2022).[11]

Another problem with the historians' critique is the possibility of talking past one another. *Tocqueville's Nightmare* (Ernst 2014) and *New Democracy* (Novak 2022) tell a story that culminates in the APA and the New Deal, respectively. The idea is that the historian can grant legitimacy to institutions by showing their democratic genesis in the later nineteenth and early twentieth centuries. This misses, however, the fact that much of the current criticism of the administrative state focuses on the period after the New Deal and the APA. Even if one can show the popular roots of the New Deal state, it will not quell those who see it not as the triumphant culmination of progressive reform but, rather, as the beginning of a major political breakdown. This possibility, largely left unaddressed in the literature that defends the administrative state, is present in the work of liberal historians like Alan Brinkley as well as in the increasingly influential world of conservative media and publishing.

The populist conservatives

The development of the populist theory begins by radicalizing the libertarian themes advanced by academic critics. A central figure in this development—and one of the most influential voices for later populist thinkers—is John Marini. Marini served as special assistant to future Supreme Court Justice Clarence Thomas at the Equal Employment Opportunity Commission and, according to Thomas, was a key philosophical mentor (Marini 2019, 1–3). He later joined the Claremont Institute, where he became a leading conservative theorist of the administrative state.

Marini's collected writings, *Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century*, assemble papers and speeches spanning from the 1980s onwards. Printed by Encounter, one of the largest conservative publishing houses, the volume reiterates core libertarian concerns—especially, the insistence on a strict separation of powers, described as the "political essence" of the Constitution (Marini 2019, 142). Yet Marini's work distinguishes itself by offering a darker, more dramatic narrative about the rise of the administrative state and the perilous condition in which it leaves the American republic. As he writes, concerning the vision of the Founders,

> In the old view nature itself had established rational limits on human freedom. The political conditions of human life required recognition of the fact, as Madison noted, that factionalism is inherent in human nature. Although

[11] Sunstein's and Vermeule's (2020) *Law and Leviathan: Redeeming the Administrative State*, for example, argues for the legitimacy of administrative law by grounding it in the "inner morality of law" first theorized by Lon Fuller (1964). In *Common Good Constitutionalism*, Vermeule (2022, 151–52) goes a step further and argues that administrative law also has a foundation in the classical conception of law, developed from the Romans onwards, which saw the necessity of constant determinations (*determinatio*) to give concrete form to general principles. The return to a substantive conception of law that could justify the administrative state comes into conflict, however, with a libertarian understanding of the limits of government. For a rejoinder to *Law and Leviathan* and *Common Good Constitutionalism*, respectively, see Epstein 2020, 2024. For a pragmatic defense of the administrative state, see Rosenblum 2024.

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> political philosophy could make the principles of natural right intelligible, prudence would always be necessary to determine the practical requirements of politics or political science. It was not possible to ignore the sphere of prudence by establishing a wholly theoretical and applied rational science. Constitutionalism, therefore, was thought to be the best practicable solution to the political problem of reconciling freedom, equality, and natural necessity. Consequently, although the human problem, like the political-theological problem, is capable of reasonable accommodation, the political and religious antagonism remains insoluble. (Marini 2019, 229)

It was against this older philosophy that the Progressive counterrevolution emerged. Importantly, Progressivism here has a specific and more expansive meaning—it was not simply a set of reforms like income taxation, Prohibition, or railroad regulation. Trained as a political theorist under Harry Jaffa and Leo Strauss in the late 1960s, rather than as a lawyer, Marini understood the Progressive movement as a decisive break with the natural right tradition, which had emphasized the limitations of human nature and called for the prudence of the statesman to tailor governance to those enduring constraints.

Taking a cue from Leo Strauss's (1953) critique of historicism, Marini saw in Progressivism the denial of any transhistorical moral or political truths; instead, human beings are seen as adaptable creatures without any fixed essence that can remake themselves and their political institutions. So understood, the Progressive movement and its historicist presuppositions were from the beginning on a collision course with the ideals of the Founders:

> The new Progressive political scientists accepted the European doctrines of *social* justice and a new science of society, which required government to provide political solutions to social and economic problems. The acceptance of the idea of the state as the framework to achieve social justice would result in the rejection of the theoretical and institutional framework of constitutionalism, or limited government. The American social compact had limited the power of government by separating church and state, government and civil society, politics and economics. It had established a defense of the autonomy of the private individual, based on an understanding of nature and the natural rights of individuals. With the acceptance of a philosophy of History and its practical embodiment, and the organic or rational state, the Progressives necessarily rejected the doctrine of natural right and the social compact, or constitutionalism. In addition, the authority of the new doctrines of History and the organic state were further legitimized by the scientific discoveries of the evolution of the living organism, man. (Marini 2019, 235; emphasis in original)

What is notable in this passage, and in Marini's chapter on Progressivism and social science as a whole, is the scope of his indictment. The critique is not a legalistic one; instead, Progressivism is taken to task not only for betraying the vision of the Founders but also for displaying a philosophical hubris. It is worth noting as well that Marini's description of the Progressive conception of the state actually agrees in

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many respects with the one given by Novak (2022) in *New Democracy*. Novak wanted to force his audience to think more expansively about the state and its relation to democracy. The two, he argued, could be reconciled. On both his and Marini's account, the Progressives abandoned limited constitutionalism in favor of a policy state, which moved beyond guarding private property rights toward the active provisioning of social and economic goods.

In the words of Léon Duguit (1919, 243), a central figure in *New Democracy* and a key theorist of modern government decades before Michel Foucault (1991), "public law is ... no longer the body of rules regulating the relation of the sovereign state with its subjects; it is rather the body of rules inherently necessary to the organization and management of certain services" (see also Novak 2022, 226).[12] With crowded cities and the new conditions of industrial society, the old stories about divine right or primordial social contracts no longer cut it. States earned legitimacy only by meeting the needs of the populace.

Yet, whereas Novak sees this as a great accomplishment of the early twentieth century, Marini sees it as a grave misstep. The abandonment of natural right came at a steep price; Progressivism, Marini believes, is a double-edged sword. On the one hand, it could cut through the fictions of laissez-faire in order to argue for necessary regulations to improve the quality of life. But by favoring an adaptationist view, Progressivism threw out the idea of any historically fixed standard for the notion of an organic and historically evolving state. This resulted, Marini contends, in History with a capital H being the ultimate arbiter of rights. But if history decides, then those whom history does not seem to favor—importantly, in the Progressive era, Blacks and other minorities—are simply left without recourse to anything higher to justify themselves. The apparent cruelty of the historicist view of the state alarms Marini (2019, 243–51), who over multiple pages catalogues how the Darwinism of the Progressives underwrote their refusal to grant equal rights to those deemed "inferior."

Novak (2022, 146–79), for his part, recognizes this ugly stain on the Progressive legacy but nonetheless believes that a common good does exist and that a state more attentive to the demands of the people is on balance a positive development. Marini (2019, 256) is unconvinced and sees Progressive political principles merely as the road to "the universal tyranny of the rational state." In the context of the wider debates on the administrative state, then, what Marini is doing in his writings is raising the stakes. If, in the present, the administrative state is viewed not just as an inefficient bureaucracy but, rather, as an existential threat to the American constitutional order and a violation of human nature, then the dispassionate scholarly critiques will no longer suffice. To confront something that is not merely wrong but also a radical evil, an equally radical defense will be necessary. If administrative government fundamentally subverts our liberties in favor of collectivism, then for those who

[12] Specifically, Léon Duguit's description of modern government as being primarily concerned with the "organization and management of certain services" predates by sixty years Michel Foucault's (1991, 100) more famous discussion of the same development, whereby the question of state legitimacy is reoriented away from abstract debates about sovereignty toward the more practical issues of "the welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health, etc."

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agree with Marini only a complete "deconstruction" instead of piecemeal reform will pass muster.

Another significant break between Marini and more mainstream conservatives before him concerned the subversive ambitions of the bureaucracy. While critics long worried that the rise of bureaucracy would threaten executive power, there had never been any notion of an explicit plot to undermine the president. In 1984, by contrast, Marini advanced this exact argument and focused on the Watergate affair as the watershed moment in American history where the bureaucracy finally conquered the executive. On Marini's telling, Nixon was looking in his second term to significantly reduce the power of the bureaucracy that had built up during the New Deal and Lyndon B. Johnson's Great Society. In a diary recording that Marini (2019, 137) cites, Nixon noted that his intended reforms were "going to be quite a shock to the establishment, but it is the only way, and probably the last time, that we can get government under control before it gets so big that it submerges the individual completely and destroys the dynamism which makes the American system what it is." On the basis of this anxious prediction, Marini offers a revisionist history of Nixon's resignation centering on the behind-the-scenes machinations of a shadow government.

In Marini's chapter on Watergate, actions are imputed to structures and abstract forces rather than to specific individuals. Readers are counseled not to focus "on the details of the event" but rather on "the political circumstances surrounding it" (Marini 2019, 131). Accordingly, there is no mention of Haldeman, the "White House Plumbers," the Oval Office recordings, or the congressional investigations. Instead, we learn that "the bureaucracy," the "administrative state," and the "defenders of the New Deal order" had interests at odds with the president and that Nixon fell right into their trap. While leaving unspecified the mechanism, Marini concludes that the end result was subversion. Here, we encounter the key reason why Ernst's (2014) and Novak's (2022) defense of the administrative state would have little sway on the populist conservatives. Any attempt to stoke fears about the administrative state that focuses on the 1930s or 1940s is insufficient because it fails to address the crisis of the 1970s. It is at this moment, so the populist narrative contends, that the breaking point was reached, and future administrations learned that they could not challenge the bureaucracy. Even Reagan, Marini concedes, could only change the discourse around government. In agreement with liberal defenders, he concludes that Reagan had to make peace with the administrative state (Marini 2023).

Was Watergate a coup orchestrated by the administrative state to take down a president looking to limit its power? Such speculation obviously cannot be settled here. But, as a datapoint, this theory is significant because it illustrates an important lesson that would be taken up by a younger generation of conservative activists with similar castes of mind. The image of Nixon locked in conflict with the bureaucracy has taken hold in more recent publications and now provides a model for understanding current political developments. Consider the recent example of Ned Ryun's (2024) *American Levithan: The Birth of the Administrative State and Progressive Authoritarianism* and its accompanying documentary, which, as of August 2025, was the most viewed YouTube video on the administrative state. Published by Encounter and with an endorsement from Donald Trump (2025) claiming that it "reveals the History of the Deep State, which has seized unConstitutional control over our Nation, and unleashed

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Death and Destruction on the World," *American Leviathan* presents the ideas of Marini for a mass audience.

What the work loses in erudition, it gains in bluntness. All of the alarmist ideas of Marini (cited seventeen times over the slim book) are present but dialed up to an even higher level. Watergate is now no longer controversial but simply a "leftist fantasy" (Ryun 2024, 113); the goal of the Progressive movement is to construct a modern "Tower of Babel" meant to imitate God (53–54); elections are an "opiate of the masses" meant to "keep the American people numb to the reality of who actually governs them" (41); and the 16th (Income Tax), 17th (Direct Election of Senators), 18th (Prohibition), and 19th (Women's suffrage) Amendments are all taken to be vehicles for "Progressive statism" (43–52). Significantly, the language of conspiracy is taken up and updated for current events. At the center of *American Leviathan* is a deep anxiety about the first impeachment inquiry of the first Trump administration. In a replay of Watergate, on Ryun's account, Trump "found himself at incessant war with certain powerful elements . . . who fought him every day—in fact, doing their best to see him removed from office since they viewed him as an existential threat to the entire edifice of the administrative state, all because he rejected the premise of it" (6). Like Marini (2019), many of the details are left vague, and the "administrative state" is brought in as the abstract antagonist that Trump, like Nixon before him, was battling.

Implicit in Marini's work and directly stated in *American Leviathan*, however, is perhaps the most important shift from the libertarian to the populist conservative critique, hinted at in the Trump quotation above: the tendency to equate the administrative state with the "deep state." These two concepts were at first distinct. The "administrative state" originally signified in the public imagination the agencies dealing with social and economic problems—particularly, those arising after the Great Depression—while the "deep state" denoted the subversive activities of the intelligence and national security agencies (Scott 2015, 2).[13] Yet, despite the original conceptual distinction, in various podcast appearances and popular books standard bearers for the new populist conservatism have begun using the two terms interchangeably, with yet untold consequences.[14] To take one example, Kevin Roberts (2024), president of the Heritage Foundation and author of *Dawn's Early Light: Taking Back Washington to Save America*, equates the two in his interview with *The Telegraph* and likens the deep state to the "nanny state," which wants kids to wear "two masks" and take "puberty blockers" (K. Roberts 2024, 159).[15] *American Leviathan* is once again

[13] The notion of a "deep state" traces its origins to Turkey in the late 1990s, where the term was used to signify the public and private networks in and around the armed forces that operated as a type of shadow government (Parenti 2025). A key idea here is the supposed transcendent, and, thus, potentially subversive, authority that the bureaucrats at the center of these networks presume for themselves. The idea of an "administrative state," meanwhile, has early precedents in the nineteenth-century German *Verwaltungsstaat* and French *état administratif*, but it was Dwight Waldo's (1948) treatise *The Administrative State* that did the most to popularize the term (A. Roberts 2020). Waldo (1948, 10) was trying to account for the vast "growth of administrative organs" that he observed in the 1930s and 1940s as a response to the Great Depression.

[14] John Marini (2023), for his part, still insists on a meaningful distinction between the deep state and the administrative state.

[15] Other examples include David Bernhardt (2020), former secretary of the interior and author of *You Report to Me: Accountability for the Failing Administrative State*, who asserts in an op-ed for the *Wall Street Journal* that the "notion of a 'deep state' isn't a conspiratorial talking point but a manifest political

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the bluntest, seeing the subversive potential of the "deep state" as the secret goal animating the Progressive expansion of administrative government:

> Legitimate or not in the eyes of the American people, the reality is that we are most assuredly governed by an administrative state. Out of that mentality and approach arises the so-called "deep state." It is in fact inevitable and is the actual goal. If you view, or define, the deep state as a system of powerful, unelected bureaucrats who think they decide, that they govern, on all things more so than any elected official, including the president of the United States, that is in fact the stated goal of Progressive Statists from the genesis of their movement. Furthermore, if you believe in the rightness of those same bureaucrats, you are then in many ways obligated to defend them and their bureaucratic state against all perceived threats. (Ryun 2024, 79)

The associations invited by these examples are dark, ranging from totalitarianism, to conspiracy, to the indoctrination of children. Further, they link in the reader's or viewer's mind the possible misdeeds of the national security state with the actions of the domestic policy state, even though this connection is tenuous. The populist conservatives do not justify this position with a rigorous argument about the superiority of alternative social and legal arrangements (like the free market as one might get in Milton Friedman or Richard Epstein); rather, they proceed by speculative historical argument that labels as "fantasies" relevant questions that challenge the narrative (Friedman 1962; Epstein 2003). The result is a hyper-libertarianism: an ideal deregulated market system is implicitly argued for by casting its assumed opposite—a market system checked by regulatory agencies—as a radical evil. In an explicitly revisionist history, the steadfast desire of the Progressives to ameliorate overcrowded cities, unsanitary conditions, wealth inequality, concentrated political power, and rising crime chronicled painstakingly by Novak (2022) in *New Democracy* is recast as a concerted project meant to strip away political rights. The desire to regulate social and economic problems is no longer simply a misguided effort bound to lead down, in Hayek's phrase, the "road to serfdom"; rather, serfdom instead of any form of social betterment becomes the goal from the beginning. Subversion, not relief, was the "actual goal."

Liberal exhaustion

The liberal critique of the administrative state is more elusive but just as important as its conservative counterpart. Unlike the populist conservative critics, the liberals have a more ambivalent relationship to the administrative state. They do not call for the return to some "lost Constitution," and they certainly do not view the Progressive movement as a philosophical prelude to totalitarianism. Franklin Delano Roosevelt (FDR) remains one of the patron saints of modern liberalism, and no mainstream

reality," and then explains the concept in terms of rogue administrative judges, the *Chevron* doctrine, and the alleged cover-up by the intelligence community of the Hunter Biden laptop scandal (Bernhardt 2023); Russell Vought (2023)—in 2025, head of the Office of Management and Budget and principal author of the content on the administrative state in Project 2025—slips between the two on the Heritage Foundation podcast.

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figure would uphold the militant libertarianism that has captured new segments of the American right. Nonetheless, even if liberals are not directly critiquing the administrative state, it does not mean that they do not have a hand in the present crisis. If there is a crisis, then it is the product both of a strong conservative offense and a weak liberal defense, and, on this point, the liberal response has been tepid compared to the insurgent conservative critique. This indicates a deep ambivalence and forces us to consider how a once dominant political tendency lost its fighting spirit.

Of the many books to help think about this issue, Brinkley's *The End of Reform: New Deal Liberalism in Recession and War*, reaching its thirtieth anniversary in 2025, is one of the best. The context in which the book was written was one of disillusionment and uncertainty. In Brinkley's (1995, 14) own words:

> I began this book in the heyday of the "Reagan Revolution," a moment of defeat and disarray from which American liberals have yet fully to recover. I complete it in the midst of a weak and floundering liberal revival. As I tried to understand why modern American liberalism had proved to be a so much weaker and more vulnerable force than almost anyone would have imagined a generation ago, my thoughts turned to the process by which liberalism assumed its modern form in the last years of the New Deal. And as I looked further, I found that process—a process of adjustment and redefinition in the face of failures and frustrations—similar in many ways to the process by which many liberals in our own time have attempted to change themselves during their long years in the wilderness.

Although *The End of Reform* is about a decisive transformation in the political thought of key figures in FDR's administration, its portrayal of the New Deal creates problems for those who see it as the culmination of Progressive reform and, hence, a model for the legitimacy of the administrative state. Novak recognizes this and singles out Brinkley for helping to perpetuate what he calls the "myth of the New Deal state." Too frequently "in conventional renderings," Novak (2022, 263) writes, "the New Deal is conflated with the modern American state itself, and the history of the New Deal becomes even more magnified as the defining and contested moment in the advent of the modern state." The content of this myth is thus a form of hero worship whereby earlier precedents are ignored in the face of the supposed uniqueness of FDR and his policies.

Given the libertarian broadsides surveyed above, Novak's worries here are understandable. While liberal historians no doubt want to celebrate FDR's achievements, if the New Deal is seen as a bolt from the blue, then the conservative criticism that it is an unconstitutional power grab would be more plausible. Against the charge of illegitimacy by theorists like Hamburger, Novak's plan is to justify the administrative state by showing its democratic roots—to show it, in other words, not as a bureaucratic coup but, rather, as an organic development within American society for realizing popular policies. Accordingly, as Novak (2022) makes clear in the concluding chapter, a central goal of *New Democracy* is to refute the myth of the New Deal state and to show its popular foundations in the nineteenth and twentieth centuries.

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On the issue of idealizing the New Deal and a supposedly decentralized system of local courts and political parties before it, Novak is certainly right, and Brinkley's minimalist understanding of the pre-New Deal regulatory state reflects the scholarly consensus of his time. Nevertheless, Brinkley has a different point to make. *The End of Reform* is about the decline of political ambition and the hollowing out of the administrative state. It is a story of liberal exhaustion that would later pave the way for an energetic conservatism to take its place. Where Novak sees the New Deal as the highest expression of Progressive reform, Brinkley sees it as the beginning of the liquidation of this tradition. The key to Brinkley's argument lies in the problem of bureaucratic autonomy and the challenge that it poses to a democratic view of the administrative state. Historians of the time often debated whether social and political change was best explained by "state-centered" or "society-centered" approaches, with the former focusing on the role of the state and the latter emphasizing cultural and economic interests. For Brinkley (1995, 12), it was incontestable that the proper understanding of change required an examination of social forces, and, in the twentieth century, this meant attention to agrarian dissent, labor activists, populist revolts, and women's organizations. "And yet," he writes, "there remain public questions that exist within a more contained and exclusive political sphere, a sphere the clamor of popular protest and the power of social movements do not penetrate as often or as effectively. Among them are the questions that dominate this book—questions of political economy, the questions that preoccupied liberals in the later years of the New Deal and that, for many of them, represented the essence of liberalism" (13).

The autonomy of presidential administrations to influence political economy raises the issue of the rapid changes in New Deal policies and the potential fallout from these decisions. Brinkley's account of these changes offered a far more sober view of the factions, bargains, and wrong turns that dominated domestic politics. The early New Deal shared with Progressivism the assumption, discernible in almost all the chapters of Novak's *New Democracy*, that "the nation's greatest problems were rooted in the structure of modern industrial capitalism and that it was the mission of government to deal somehow with the flaws in that structure" (Brinkley 1995, 5). The original response—a "chaos of experimentation" as Richard Hofstadter (1955, 307) would call it—was as sweeping as it was novel. Public works projects, price controls, the coordination of production, and the separation of commercial and investment banking all demonstrated a willingness to rethink the orthodoxies of nineteenth-century industrial capitalism.

As a result of these reforms and despite setbacks from the US Supreme Court, Roosevelt won a landslide reelection. *The End of Reform* is not concerned with these early triumphs, however, and instead focuses on the response to the recession of 1937, for this unexpected setback forced a reevaluation of the administration's approach to capitalism (Brinkley 1995). Below, I briefly summarize some of the elements of this response with an eye toward the Keynesian consensus that would ultimately replace the more ambitious visions of administrative government from earlier in the twentieth century. From Brinkley's perspective, it was this American brand of Keynesianism, along with its political assumptions, that played a key role in setting the New Deal and American liberalism more generally on a path to defeat and exhaustion.

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Of the shifting factions and alliances within FDR's administration that sought to influence the direction of economic policy in the face of the recession, one of the most important was composed of protégés of Felix Frankfurter like James Landis and Tommy Corcoran as well as other prominent holders of legal positions like Thurman Arnold (Antitrust Division) and Jerome Frank (Securities and Exchange Commission).[16] These "New Dealers," as they were soon identified in the press, were convinced that the problem of recession was caused by monopoly and that the only cure was a more vigorous policing of competition.[17] An important feature of their thinking, however, was a firm belief that capitalism was a problem that could never be completely solved; rather, it was an inevitable crisis that required a permanent bureaucracy to control the worst effects (Brinkley 1995, 62–63). In opinion articles, memoranda, and books (most famously, James Landis's (1938) work *The Administrative Process*)—the New Dealers argued for a more expansive view of regulation. By using the strong arm of the law, they sought major interventions into capitalist institutions in order to promote what they understood to be the public interest.

Implied in these beliefs was the necessity of an insulated bureaucracy that could enact policies in line with the latest insights from social science, even if that conflicted with misguided public sentiment. This fact cuts right to the heart of Novak's anxiety about the "New Deal state" because, if one takes its democratic pedigree seriously, then it becomes hard to account for the abrupt shift in policies after the recession of 1937, which seems to be nothing other than the changing preference of elite managerial opinion. Brinkley's political history is well equipped for this task because its central focus—a relatively autonomous state and its controllers—is more capable of a sudden about-face. The problem of autonomous bureaucrats is nowhere more evident than the discussion of antimonopoly. Novak (2022, 183) rightly points out that "American antimonopoly was first and foremost a question of the democratic distribution of power and authority in a supposedly self-governing republic." Brinkley (1995, 59) agrees with this and details the long tradition of antimonopoly sentiment going all the way back to the Greenback movement, the Grange, the Knights of Labor, and the populist movement of the 1890s. Farmers, workers, small producers, local merchants, women's organizations, and consumers all clamored for change. Unifying these disparate voices was the belief that "a solution

[16] Other prominent factions included one, headed by Treasury Secretary Henry Morgenthau Jr., which advocated for a balanced budget and pressed for a friendlier regulatory atmosphere for private investment. This orthodox position was wary of government attempts to spur investment by deficit spending and laid the blame for the recession on the anti-business environment created by the Securities and Exchange Commission's restrictions on speculative investment, the Wagner Act, and punitive tax provisions (Brinkley 1995, 31–34). There were also the "corporatists," represented by men like Adolph Berle, Rexford Tugwell, and Hugh Johnson, who saw the active state coordination of labor and capital to be the only solution. For these men, the root of the problem was the ravages of competition, and a robust response, which was modeled on planned economies like fascist Italy, seemed appropriate (Johnson infamously had a portrait of Mussolini in his office and would hand out copies of *The Corporate State*). The corporatist faction was dominant during the "first New Deal," from the beginning of Roosevelt's presidency until 1936, when the US Supreme Court struck down significant portions of the National Recovery Administration (NRA). The NRA had granted broad authority to regulate competition by bringing together representatives of government, labor, and capital to create codes of fair competition.

[17] I borrow in this section from Mason Williams's (2019) illuminating essay "The End of Reform: A Reconsideration."

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must involve some devolution of power from inaccessible corporate institutions to 'the people,' [and] that the economy must be made more responsive to a larger notion of the public interest than the corporate world itself was likely ever to produce" (Brinkley 1995, 113).

Department of Justice Antitrust Division head Thurman Arnold, however, "embraced little of the rhetoric and virtually none of the substance of this tradition" (Brinkley 1995, 113). Anticipating in curious ways the "consumer welfare" standard that would be championed by Robert Bork (1978) and Richard Posner (1976) decades later, Arnold was not interested in concentration or "bigness." His guiding light—as it was for many of the New Dealers who simply accepted the reality of large firms in industrial capitalism—was consumer prices. This meant, however, that awareness of the balance of power would begin to erode in liberal legal thought. By focusing solely on prices, it became possible to equate seemingly incommensurate things with one another. Under Arnold, for example, the price-altering effects of great monopolies would be treated the same as the collusion of small producers and the collective efforts of labor unions (Brinkley 1995, 116).

If Arnold's neglect of the grassroots antimonopoly movement gives evidence of the relative autonomy of regulators, the turn to the ideas of John Maynard Keynes offers further confirmation. By 1943, elite opinion had changed once again.[18] Arnold was out of office, and the aggressive antimonopoly rhetoric was toned down. What remained, however, was his focus on consumption, but now it was reinterpreted through Keynes's (1936) political economy. Keynes's ideas must be understood in the peculiar American context in which they were received. Brinkley sees the late 1930s as a moment when would-be reformers lost confidence and backed down from a substantiative challenge to the capitalist class. Keynesianism is key here because it presented a type of economic management that could ensure prosperity while minimizing political conflict.

At the theoretical level, Keynes's (1936) *General Theory* offered a rejection of Say's law, which as an assumption of classical political economy argued that increased consumption was an automatic result of increased production. This theory carried an implicit political principle, because in a moment of severe underconsumption, like a depression, it seemed to counsel the encouragement of production as the unique solution to re-equilibrate markets—something that could only be done by inducing the owners of the means of production to invest in labor and capital (Brinkley 1995, 76, 122). The interference with production had been tried in earlier stages of the New Deal but always with determined political resistance. By reversing Say's law, Keynes offered an alternative. Rather than challenging capitalist institutions, one could

[18] The faction that won out in response to the 1937 recession was composed of a motley crew of Harvard economists like Alvin Hansen and Lauchlin Currie as well as the other New Dealers left in the administration who were now looking for an economic program around which to unify. The debates over antimonopoly stalled when the Second World War started, as the need for centralized production to supply the military trumped concerns over fairness and market power. But consumption, so conspicuous in Arnold's reform platform, would prove to be the key to postwar politics once freed from the shackles of the declining antimonopoly movement. The problem was that stimulating consumption under the antitrust paradigm required regulating large firms and labor unions—two major centers of power in the New Deal state. Keynesian ideas, as interpreted by Hansen and Currie, provided an opportunity to avoid these costly disputes (Brinkley 1995, 106–40).

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instead use the fiscal power of the government to stimulate mass consumption, which in turn would stimulate production and create a virtuous cycle that put men back to work and gave them money to spend (Brinkley 1995, 268). By adopting this approach, FDR's administration was able to avoid costly political battles. The massive production needed for the war encouraged this model, and the postwar prosperity seemed to be a confirmation of it.

Taking all of this together in conclusion with Novak and the populist conservative critics of the administrative state, we can observe two important points that Brinkley adds to the conversation. First, his "state-centered" history reminds us of the possible dangers of an autonomous bureaucracy, which, although drawing strength from popular movements, can easily abandon the grassroots discontents that supported it. The New Deal state stripped the Progressive tradition of its popular reformist spirit and replaced it with a bureaucratic management of macroeconomic variables. Concretely, this meant that liberals were no longer interested in direct confrontations with capitalist institutions and would instead use fiscal means to try and address social ills. This approach could neither inspire allegiance nor withstand the economic downturn of the 1970s. After years of stagflation, environmental degradation, and deindustrialization, liberals were beset by "paralysis" and "confusion" and flanked by a "powerful conservative opposition casting doubt on the ability of government to play any useful role in resolving America's dilemmas" (Brinkley 1995, 270–71).

Brinkley was writing in 1995 amidst the triumph of Reagan and the conservative realignment of the Democratic Party, and there is a sense in his work that a liberal politics that has lost connection to the old populist concerns—economic power and the distribution of wealth—is not viable. One could extend his arguments to the present where there is concentrated anger against the administrative state—where calls to "deconstruct" it, even if confused, garner increasing support—while there is comparatively minimal support from American liberals, who likely also lack faith in the powers of government. Technocratic measures like tax breaks, countercyclical spending, and the more narrowly social rather than economic regulation, one can infer from Brinkley's arguments, might simply not be enough.

Brinkley's other contribution is to shine a light on the post-New Deal political landscape, a period that has remained elusive throughout our entire discussion. Here, Brinkley's view and that of the libertarians and populist conservatives are mirrors of one another, both grasping on to the same chunk of history, raising the alarm about it but doing so for different reasons and with different ends. Both see the New Deal and the period that succeeded it as a time of crisis. For Marini and the thinkers who followed him, the New Deal built on and solidified the ideas of administrative government originally formulated in the Progressive era. The postwar period saw the consolidation of a leviathan that ultimately subverted the Founders' vision of the division of powers. In this view, accordingly, there is a direct line from the technocratic writings of Woodrow Wilson to the supposed coup of Watergate. For Brinkley, by contrast, the line is broken, and the substantive content of Progressivism was replaced by what would come to be called "liberalism."

In sum, Novak (2022, 270) saw the New Deal state as the culmination of over a century of Progressive reform—a tradition in sore need of resuscitation in the face of the "democratic deficit" brought on by a half-century of neoliberal policies. The populist conservatives saw the administrative state as the violation of both the

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Constitution and human nature and, thus, a source of chaos and subversion that would be fully felt only in the Nixon administration. The result of Brinkley's analysis, finally, is tragic. In agreement with Novak, he saw the necessity of robust administrative government that could confront and intervene into the pressing issues of political economy. But precisely that which was so necessary undermined itself because of its own autonomy and was superseded by a politics that could not meet the future challenges of the century.

Going forward, we are left with many questions about the latter half of the twentieth century. Closer consideration of the populist conservatives' critique of the administrative state has revealed a great deal of anger clustered around the 1970s, decades after the New Deal and the APA. This is a period that has had fierce critics—ranging from early opponents like Theodore Lowi to the more recent thinkers surveyed in this review essay—but no historian with the stature of Novak or Ernst to defend it, thus leaving us with a mismatch between the criticisms and defenses of the administrative state. Important works like Karen Tani's (2016) *States of Dependence* have greatly expanded our understanding of this period, but, not coincidentally, the tone of the book is ambivalent, pointing to the earnest attempt of reformers to expand welfare rights while also recognizing the limitations of these programs as they became entangled with complicated issues of federal, state, and local governance. Between the height of ambition in the early New Deal and the onset of the Reagan revolution, then, there is a no man's land that deserves closer study because of its relevance to the politics of the administrative state, either offering support for the populist conservative or libertarian viewpoints or providing new ground for the defense of an embattled institution.

References

Bannon, Stephen, discussant. 2017. "CPAC 2017: A Conversation with Reince Priebus, Stephen Bannon, and Matt Schlapp." *YouTube*, February 23. https://www.youtube.com/watch?v=8e2g8VAhxeE&t=114s.

Barnett, Randy. 2004. *Restoring the Lost Constitution: The Presumption of Liberty*. Princeton, NJ: Princeton University Press.

Bernhardt, David. 2020. *You Report to Me: Accountability for the Failing Administrative State*. New York: Encounter Books.

———. 2023. "The Deep State Is All Too Real." *Wall Street Journal*, May 9. https://www.wsj.com/politics/the-deep-state-is-all-too-real-congress-chevron-delegation-civics-hunter-biden-985ed65e?reflink=desktopwebshare_permalink.

Bork, Robert. 1978. *The Antitrust Paradox*. New York: Free Press.

Brinkley, Alan. 1995. *The End of Reform: New Deal Liberalism in Recession and War*. New York: Vintage Books.

Calo, Ryan, and Danielle Citron. 2021. "The Automated Administrative State: A Crisis of Legitimacy." *Emory Law Journal* 70, no. 4: 799–844.

Dans, Paul, and Steven Groves, eds. 2023. *2025 Mandate for Leadership: The Conservative Promise*. Washington, DC: Heritage Foundation.

Duguit, Léon. 1919. *Law and the Modern State*. Translated by Frida Laski and Harold Laski. London: George Allen & Unwin.

Emerson, Blake. 2019. *The Public's Law: Origins and Architecture of Progressive Democracy*. Oxford: Oxford University Press.

Epstein, Richard. 2003. *Skepticism and Freedom: A Modern Case for Classical Liberalism*. Chicago: University of Chicago Press.

———. 2006. *How Progressives Rewrote the Constitution*. Washington, DC: Cato Institute.

———. 2014. *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*. Cambridge, MA: Harvard University Press.

———. 2020. *The Dubious Morality of Modern Administrative Law*. New York: Rowman & Littlefield.

https://doi.org/10.1017/lsi.2025.10129 Published online by Cambridge University Press

——. 2024. "The Natural Law Origins of Public and Private Law." *New York University Journal of Law and Liberty* 17, no. 2: 205–95.
Ernst, Daniel. 2014. *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940*. Oxford: Oxford University Press.
Fellmeth, Robert. 1970. *The Interstate Commerce Omission: The Public Interest and the ICC*. New York: Grossman.
Foucault, Michel. 1991. "Governmentality." In *The Foucault Effect: Essays in Governmentality*, edited by Graham Burchell, Colin Gordon, and Peter Miller, 87–104. Chicago: University of Chicago Press.
Freedman, James. 1978. *Crisis and Legitimacy: The Administrative Process and American Government*. Cambridge, UK: Cambridge University Press.
Friedman, Milton. 1962. *Capitalism and Freedom*. Chicago: University of Chicago Press.
Fuller, Lon, 1964. *The Morality of Law*. New Haven, CT: Yale University Press.
Gienapp, Jonathan. 2024. *Against Constitutional Originalism: A Historical Critique*. New Haven, CT: Yale University Press.
Ginsburg, Douglas. 1995. "Delegation Running Riot." *Regulation* 18, no. 1: 83–87.
Hamburger, Philip. 2014. *Is Administrative Law Unlawful?* Chicago: University of Chicago Press.
Hofstadter, Richard. 1955. *The Age of Reform: From Bryan to FDR*. New York: Alfred A. Knopf.
Kessler, Jeremy. 2016. "The Struggle for Administrative Legitimacy." *Harvard Law Review* 129, no. 3: 718–73.
Keynes, John Maynard. 1936. *The General Theory of Employment, Interest and Money*. London: Macmillan.
Landis, James. 1938. *The Administrative Process*. New Haven, CT: Yale University Press.
Lowi, Theodore. 1969. *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority*. New York: W. W. Norton & Company.
——. 1979. *The End of Liberalism: The Second Republic of the United States*. 2nd ed. New York: W. W. Norton & Company.
Marini, John. 2019. *Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century*. New York: Encounter Books.
——, interviewee. 2023. "The Origin of the Administrative State, with John Marini, Part 1." Interview by Steve Hayward. *Powerline: Ricochet*, February 28. https://podcasts.apple.com/us/podcast/power-line/id951235235?i=1000602228953.
Mashaw, Jerry. 2018. *Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government*. Cambridge, UK: Cambridge University Press.
Metzger, Gillian E. 2017. "1930s Redux: The Administrative State under Siege." *Harvard Law Review* 131, no. 1: 1–95.
Novak, William. 1996. *The People's Welfare: Law and Regulation in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press.
——. 2022. *New Democracy: The Creation of the Modern American State*. Cambridge, MA: Harvard University Press.
Parenti, Christian. 2025. "The Left-Wing Origins of 'Deep State' Theory." *Compact Magazine*, February 28. https://www.compactmag.com/article/the-left-wing-origins-of-deep-state-theory/.
Posner, Richard. 1976. *Antitrust Law: An Economic Perspective*. Chicago: University of Chicago Press.
Roberts, Alasdair. 2020. "Should We Defend the Administrative State?" *Public Administration Review* 80, no. 3: 391–401.
Roberts, Kevin. 2024. *Dawn's Early Light: Taking Back Washington to Save America*. New York: Broadside Books.
Rosenblum, Noah. 2024. "Toward a Realist Defense of the Civil Service." *The Regulatory Review in Depth* 13, no. 2: 7–18.
Ryun, Ned. 2024. *American Leviathan: The Birth of the Administrative State and Progressive Authoritarianism*. New York: Encounter Books.
Scalia, Antonin. 1989. "Judicial Deference to Administrative Interpretations of Law." *Duke Law Journal* 1989, no. 3: 511–21.
Schiller, Ruel. 2019. "Regulation and the Collapse of the New Deal Order, or How I Learned to Stop Worrying and Love the Market." In *Beyond the New Deal Order: U.S. Politics from the Great Depression to the Great Recession*, edited by Gary Gerstle, Nelson Lichtenstein, and Alice O'Connor, 168–85. Philadelphia: University of Pennsylvania Press.

https://doi.org/10.1017/lsi.2025.10129 Published online by Cambridge University Press

Scott, Peter Dale. 2015. *The American Deep State: Wall Street, Big Oil, and the Attack on U.S. Democracy*. New York: Rowman and Littlefield.
Strauss, Leo. 1953. *Natural Right and History*. Chicago: University of Chicago Press.
Sunstein, Cass. 1987. "Constitutionalism after the New Deal." *Harvard Law Review* 101, no. 2: 421–510.
Sunstein, Cass, and Adrian Vermeule. 2015. "Libertarian Administrative Law." *University of Chicago Law Review* 82, no. 1: 393–473.
——. 2020. *Law and Leviathan: Redeeming the Administrative State*. Cambridge, MA: Belknap Press.
Tani, Karen. 2016. *States of Dependency: Welfare, Rights, and American Governance, 1935–1972*. Cambridge, UK: Cambridge University Press.
Trilling, Lionel. 1950. *The Liberal Imagination: Essays on Literature and Society*. New York: Viking Press.
Trump, Donald. 2025. "Who Is Running the Country Right Now? In His New Book, "*American Leviathan: The Birth of the Administrative State and Progressive Authoritarianism*," Ned Ryun Reveals the History of the Deep State, Which Has Seized Unconstitutional Control over Our Nation, and Unleashed Death and Destruction on the World. This Is Not What Our Founders' Intended. On November 5th, We Returned Power to THE PEOPLE!" *Truth Social*, February 17. https://truthsocial.com/@realDonaldTrump/posts/114020008419550279.
Vermeule, Adrian. 2015. "No. Review of *Is Administrative Law Unlawful?* by Philip Hamburger." *Texas Law Review* 93, no. 6: 1547–66.
——. 2022. *Common Good Constitutionalism: Recovering the Classical Legal Tradition*. Cambridge, UK: Polity Press.
——. 2023. "The Original Scalia." *Harvard Journal of Law and Public Policy* (Per Curiam): 1–15.
Vought, Russell, interviewee. 2023. "The New 'Big Government.'" Interview by Kevin Roberts. *YouTube*, May 17. https://www.youtube.com/watch?v=d-qn_ArKlU4.
Waldo, Dwight. 1948. *The Administrative State: A Study of the Political Theory of American Public Administration*. New York: Ronald Press.
Williams, Mason. 2019. "The End of Reform: A Reconsideration." In *Alan Brinkley: A Life in History*, edited by David Greenberg, Moshik Temkin, and Mason Williams, 26–38. New York: Columbia University Press.
White, Adam. 2024. "The Supreme Court vs. the Administrative State." *Commentary*, September. https://www.commentary.org/articles/adam-white/supreme-court-administrative-state/.

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