

on the flip side of the “undeserving poor” concept, the “undeserving rich.” (Klosko shows how this argument was elaborated by the English “new liberalism.”) “If you’ve been successful, you didn’t get there on your own. ... If you’ve got a business, you didn’t build that” (143). But this trope did not play well. And the Affordable Care Act joined Social Security and Medicare as a deliberate ruse, designed to hide its true costs from “the stupidity of the American voter,” as one of its principal architects, Jonathan Gruber, put it.

Klosko overlooks a few important arguments, such as Robert Hale’s article “Coercion and Distribution in a Supposedly Non-coercive State” (1923), which helped make the “undeserving rich” case, along with FDR’s speeches about rich industrialists’ “regimentation” of labor. He too easily conflates “noncontributory” and “undeserving” programs—nobody believes that all, or even most, “welfare” recipients are undeserving. Klosko should be credited, on the other hand, for not claiming that Americans conflate “undeserving” and “nonwhite,” as scholars like Jill Quadagno do (*The Color of Welfare* [Oxford University Press, 1994]).

While the book is generally well written, it can be repetitive. Its early chapters are somewhat too intricately theoretical; the later ones too much a cut-and-paste of political speeches. But it is well worth reading as an exposé of the genealogy of the entitlement state and its attempt to redefine entitlements as “rights.” Cass Sunstein advised, in *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More than Ever* (Basic Books, 2004), that “the best response to those who believe that the second bill of rights does not protect rights at all is just this: unembarrassed evasion.” Professor Klosko has made an honest and admirable attempt to square the circle. We can have Locke or Rawls but not both.

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Joseph Postell: *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government*. (Columbia: University of Missouri Press, 2017. Pp. xii, 403.)

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Federal agencies wield great power in the United States, from environmental regulations to financial accounting rules to decisions about drug safety and food labeling. Despite our traditional conviction that law-making power resides in elected representatives, Joseph Postell reminds us that “today, most policies are enacted not by Congress and the president but by

administrative agencies" (3). That reality creates the fundamental question animating Postell's *Bureaucracy in America*: To what extent can the modern administrative state be reconciled with American constitutional government?

Especially over the last decade, many legal historians have sought to minimize the constitutional threats posed by the administrative state. Some point to the constraints posed by administrative law (i.e., the legal and judicial precedents governing administrative action); others insist that the administrative state is compatible with American constitutional principles, and indeed that it existed in an attenuated form in the early republic. Postell challenges both of those claims by tracing the intertwined history of political thought, legal opinion, and administrative power from the American founding to the present. The grand sweep of Postell's narrative allows him to cover both American constitutional debates and contemporary developments, and thereby to show—in one of the most striking turns in the book—that even “originalist” jurists such as the late Justice Antonin Scalia have ironically abandoned what Postell sees as core constitutional principles.

Postell's first three chapters lay out his view of the founding and the early republic through the Civil War. As Postell demonstrates, intense discussions over how to instantiate and control administrative power pervaded the Constitutional Convention, in no small part because colonial Americans had been attuned to abuses of discretionary administrative power under British rule. In Postell's reading, the Federalists and a majority of the convention intended for administrative power to fit cleanly within their tripartite division of governmental functions (legislative, executive, and judicial). Far from constituting its own distinct unit, the administrative state would reside strictly within the executive branch: under the control and supervision of the president, charged with carrying out legislation passed by Congress (rather than formulating its own regulations), and subject to rigorous judicial review. Postell argues that the early republic embodied this vision in practice and that it was not incompatible with extensive government action and intervention. In contrast to later models, however, regulation within the early republic relied on legislatures at both the state and federal levels to create detailed and specific rules which executive agencies would then enforce and monitor, with their actions and decisions subject to judicial review.

This system, though, was never universally supported nor followed. State legislatures tended to grant greater discretion to administrative agencies (blurring the legislative/executive distinction), the Whigs challenged executive control over those agencies, and the Supreme Court under Roger Taney began to defer more readily to administrative decisions. In the decades following the Civil War, these tensions grew. Civil service reforms such as the Pendleton Act sought to curb patronage appointments (thereby insulating certain administrative staff from presidential or legislative control) and new regulatory agencies (notably the Interstate Commerce Commission, or ICC) took a greater role in setting regulatory policy. Still, Postell follows Stephen Skowronek's classic *Building a New American State* (Cambridge University

Press, 1979) in arguing that even late nineteenth-century politics was dominated by courts and parties. The Pendleton Act had only minor effects through the end of the century; the most aggressive acts of the ICC were repeatedly undone by the courts; and Postell highlights the significant constitutional concerns that many legislators and jurists leveled at efforts to grant regulatory powers to federal agencies or to free them from political control.

If there is a group of villains in Postell's account, it is those whom he labels capital-P "Progressives" (such as Herbert Croly, Frank Goodnow, and—at times—Woodrow Wilson) who argued for weakening the constitutional separation of powers by constructing expert-led agencies that could be granted discretionary law-making power on the grounds that their decisions were technical and apolitical. Still, despite some rhetoric in a few passages, Postell is too good a historian to collapse progressivism into a unitary bloc. Wilson, for example, turns out to be a more complicated character who sought to limit administrative discretion in his *New Freedom*, and Postell's account is peppered with those he describes as small-p "progressives" (such as Louis Brandeis) who consistently sought to maintain the traditional American separation of powers.

Indeed, Postell's narrative rightly complicates any attempt to create a neat dichotomy whereby support for government regulation and intervention translates into support for the administrative state as a novel "fourth branch" of the government: staffed largely by unelected experts, insulated from political control, and granted *de facto* law-making power in specific domains that is relatively free from judicial review. In the early republic and in figures such as Brandeis or Roscoe Pound, Postell depicts approaches to regulation and intervention that work within the traditional tripartite division of powers. Likewise, Postell shows how support for some components of a "fourth branch" did not entail a commitment to all of it. During the New Deal, for example, Franklin Roosevelt supported a strong, law-making administrative state that was nonetheless under the control of the president and more protected from judicial review; by contrast, even many left-leaning jurists pushed back strongly against Roosevelt's preference for judicial deference.

Postell's final two chapters track the shifting, and surprising, political allegiances to an independent administrative state. As liberal Democrats lost their hegemony in the postwar era, they became concerned that agencies led by Republican appointees (perhaps with industry ties) would no longer support previous agency priorities. Accordingly, they looked increasingly to the courts to sustain (or even advance) their regulatory agenda—the very kind of judicial review that had infuriated Roosevelt several decades earlier. Meanwhile, reacting to this judicial activism, conservative justices such as Scalia or William Rehnquist advocated for deference to agency decision-making on the grounds that Congress had legitimately delegated that authority. Ironically, as Postell points out, that left these justices opposed to what Postell had identified as the original constitutional arrangement that kept administration a strictly executive activity.

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Given the scope of Postell's narrative, he has focused primarily on the legal and constitutional debates over administrative power rather than the policy context that generated the administrative state itself. (Indeed, Postell's account skips over every major US war, although these are precisely the periods where policy historians have seen the greatest growth and innovation in federal administrative action.) That omission makes sense for Postell's goals as a historian (one can never write about everything), but it does complicate his own concluding hope that the early nineteenth-century approach to regulation (detailed legislation with extensive judicial review) offers a viable alternative to our present system. For of course Postell's "Progressives" insisted that the scale and complexity of the intervention needed to govern a radically new economy (technologically innovative, dependent on high concentrations of capital and economic power, and linked to integrated national and international markets) necessitated granting limited law-making ability to administrative agencies. One can only challenge that claim by looking in detail at the context that produced those agencies and the details of their work.

Such limitations, however, cannot undercut the value of what Postell has achieved. To craft a narrative spanning more than two hundred years of American intellectual history is no mean feat; to do so with care and attention to the complexities of the periods and the nuances of the central protagonists is even more impressive. *Bureaucracy in America* will not end the debate about the modern administrative state, but it should become an essential part of that conversation.

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Daniel L. Dreisbach: *Reading the Bible with the Founding Fathers*. (New York: Oxford University Press, 2017. Pp. 344.)

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Pascal began his famous poem *Memorial*, "God of Abraham, God of Isaac, God of Jacob / not of the philosophers and of the learned." Many modern scholars of the American founding would readily follow Pascal's dichotomy, and count the founders among the learned deists who followed the God of the philosophers and *not* the God of the Bible. Daniel Dreisbach's *Reading the Bible with the Founding Fathers* is framed against the arguments of prominent scholars who claim a version of this thesis, and he successfully demonstrates that