

# Interpretation

A JOURNAL OF POLITICAL PHILOSOPHY

Summer 2020

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Department of Political Science  
Baylor University  
1 Bear Place, 97276  
Waco, TX 76798
- email* [interpretation@baylor.edu](mailto:interpretation@baylor.edu)

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Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government*. Columbia: University of Missouri Press, 2017, 403 pp., \$45 (hardcover).

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MARK A. SCULLY

LEE UNIVERSITY

*mscully@leeuniversity.edu*

Joseph Postell's *Bureaucracy in America* details the development of American bureaucracy, from colonial to contemporary times. Though deeply critical of developments in the twentieth century, Postell acknowledges that America's constitutional regime has fundamentally shaped the trajectory of administrative power, even while administration often threatens essential constitutional principles. Consequently, while one may be inclined to group Postell's thesis with forceful broadsides against the administrative state, such as those by Phillip Hamburger and Theodore Lowi, that would be a mistake.<sup>1</sup> Hamburger and Lowi, in their own ways, tell tales of the villain, administrative power, vanquishing the constitutional or liberal order. For Postell, administration develops in punctuated ways. Modern administration has weakened, but not displaced, constitutional institutions. Separation of powers is not gone, even if bureaucracies often aggregate them in one agency. Experts are everywhere, but so are politicians. Despite its best efforts, public administration has never broken free of the Constitution. Instead, the two deeply wounded each other. Now they stagger on, neither one able to deliver the decisive blow to the other.

Postell's appreciation for developmental complexity and historical detail make him more akin to Stephen Skowronek, Steven Teles, Christopher

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<sup>1</sup> Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014); Theodore J. Lowi, *The End of Liberalism* (New York: Norton, 2009).

Howard, or Suzanne Mettler.<sup>2</sup> By the telling of those political scientists, the American state has developed in malformed, counterproductive ways in response to various political stimuli that discouraged outright state building. Postell's work helps us see similarly complicated layers of development in the American bureaucracy. In the heady days of the Progressives, victory seemed attainable. Nevertheless, the second half of the twentieth century brought those champions crashing down. Congress, the president, and the courts all reasserted themselves. When the dust settled, the bureaucracy had power, but little discretion and little accountability. The two political parties had equally incoherent ideas of administrative power and were equally skeptical of it. The powerful administrative apparatus was couched in an even more powerful, if ambivalent, constitutional structure. In short, what remained was an administrative state in crisis.

Postell's contribution to the scholarship on American political thought will bear this out. Before getting into the details, however, I want to acknowledge that my superficial forays into political and historical analysis will pale in comparison to the rich and satisfying detail of Postell's book. I will skip many parts entirely, such as his novel and enlightening exposition of administration in America's colonial, antebellum, and postbellum periods. I will note only that Postell marshals impressive evidence to demonstrate that public administration before the Progressive era "revealed the possibility of a different kind of regulatory regime, one that allows for regulation at the federal level without the abandonment of cherished constitutional principles" (164). The details I want to focus on, however, come from Postell's analysis of the mid-twentieth century. To begin with, consider Franklin Roosevelt's mighty efforts to consolidate his authority over the bureaucracy. Some early skirmishes certainly stand out. The Supreme Court took a stand early to prevent the rise of administrative power: *Schechter Poultry* and *Humphrey's Executor* in particular. But the real fight was between Congress and Roosevelt over the 1937 Reorganization Act, which would have consolidated the president's authority over the bureaucracy. What was this fight about? Was Roosevelt simply grasping for more power?

The answer is less reductive than one might imagine. As he surveyed the administrative scene, Roosevelt saw a "bewildering maze of autonomous and

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<sup>2</sup> Stephen Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982); Karren Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge: Cambridge University Press, 2004); Steven Teles, "Kludgeocracy in America," *National Affairs* 17 (Fall 2013): 97–114; Christopher Howard, *The Welfare State No One Knows* (Princeton: Princeton University Press, 2007); Suzanne Mettler, *The Submerged State* (Chicago: University of Chicago Press, 2011).

semiautonomous regulatory agencies, a state of administrative decentralization, and fragmentation”—an administrative apparatus that had developed into what the Brownlow committee called a “headless fourth branch” of government. Roosevelt desired executive-centered reorganization because that was the path to creating some kind of order in America’s burgeoning state. Putting the president atop the administrative pyramid could impose “accountability as well as the public interest on an apparatus that risked being unaccountable and infiltrated by organized interests” (216). Of course, it is impossible to know to what extent Roosevelt’s motivations were constitutional, as opposed to political. But that is beside the point, which is that his political interest overlapped with a cogent argument about executive responsibility.

What about Congress’s part in this fight for executive-centered administration? Why did it reject the sweeping 1937 proposal, and significantly weaken Roosevelt’s proposal before assenting to a modified plan in 1939? It resisted Roosevelt for one simple reason: it was unwilling to relinquish its control of administration. Its members held that congressional oversight would make the fight over reorganization into a fight over how to make administration more accountable, representative, and, in a word, more political. This story of administrative power is a story of how James Madison rules America.<sup>3</sup> The fight demonstrated how “ambition counteracted ambition; the interests of the [men] were connected to the constitutional rights of the place[s]” (*Federalist*, No. 51). America’s constitutional structure, in other words, transformed power-hungry politicians into jealous guardians of political control over expanding administrative power.

Six years after the Reorganization Act, Congress yet again asserted its power over administration. In 1945, it passed the Administrative Procedures Act (APA). This act ushered in a new phase of combat over control of the bureaucracy, and a new combatant entered the arena: the courts. The APA significantly enhanced the court’s power of judicial review over agency action. Courts were slow at first. But that changed during the 1970s and 1980s, beginning when President Nixon made a concerted effort to purge the bureaucracy of enemies and staff it with loyalists. Liberal activists, working with sympathetic judges, began to assert newly found authority under the APA. Judges enhanced interest-group access to judicial review by expanding the definition of standing, then scrupulously reviewed the procedures, facts, and statutory interpretations of many agency decisions. All of a sudden, courts were

<sup>3</sup> I borrow the phrase from William Connelly, *James Madison Rules America* (Lanham, MD: Rowman & Littlefield, 2010).

listening to special-interest groups to second-guess administrative decisions that Congress left in administrative hands. Naturally, conservatives counterpunched. When their allies on the court had sufficient power, they began to articulate doctrines of judicial deference to agency decisions in cases like *Chevron v. NRDC*, *Auer v. Robbins*, and *Vermont Yankee v. NRDC*.

This judicial battle illustrates once more how our constitutional regime transmutes political interests into constitutional values. For their part, liberals took steps to limit administrative power by raising significant procedural requirements before bureaucracies could act. They also limited that power by increasing the number of watchful eyes on bureaucracy by diminishing standing requirements. Conservatives spoke for a different version of accountability by centralizing bureaucratic policy control in the White House: political accountability through a unitary executive. This dynamic exemplifies how political interests acting as police are more effective over constitutional form than “a mere demarcation on parchment of the constitutional limits of the several departments” (*Federalist*, No. 48). Indeed, the fact that conservatives favored judicial deference and liberals favored judicial oversight flipped the positions both camps had occupied for decades. Someone will always defend constitutional principles, but who decides to defend what principle just depends on the latest political battle. In sum, the constitutional system of government has proved more than adequate at finding partisans on its behalf; reports of its demise are widely exaggerated.

The second conclusion from this dynamic is that this constitutional fight, just like that between Congress and Roosevelt over reorganization, illustrates something easily overlooked: bureaucracy never emerges from these transformational moments with more autonomy. These two stories illustrate that the political fights surrounding the bureaucracy often leave it bruised, fragmented, and weakened. The fight over judicial review in the 1970s and 1980s left the bureaucracy highly uncertain about the nature of its authority. The Reorganization fight “solved” the problem of independent bureaucracy by yoking the bureaucracy to two feuding overseers. Postell helps us see this curious outcome. He notes, “the Constitution and its core principles have a significant effect on how the administrative state functions in America as opposed to other nations” (319). I think Postell could make more of this conclusion. By facilitating the fragmentation of administrative power, the Constitution deeply wounded the administrative state, though not mortally. Administrative power did grow dramatically in the twentieth century, but it also made a bureau’s use of that power far more incoherent.

This is important, because scholars in public administration, and likely ordinary Americans, do not think of the bureaucracy as an overwhelming and unchecked power. From the DMV to the six-year saga that Robert Kagan tells of Oakland trying to deepen its harbor to accommodate large container ships,<sup>4</sup> power hardly seems like a sufficient category to describe the bureaucracy. Instead, we might oscillate between both power and weakness, ominous and laughable, unchecked or hopelessly weighed down in “red tape.” The conclusion of most, in sum, is that bureaucracy is woefully inadequate and inept. For our political institutions—Congress, the executive, courts, special interests, and parties—have asserted their authority and interests over bureaucrats, denying them the tools of effective administration. Of course, no one institution is strong enough simply to control the bureaucracy, but they can each bend it toward its own inclinations, even if they do so as Lilliputians, not as guardians.

Postell’s ability to identify the American bureaucracy’s crisis in confidence in the context of America’s constitutional development makes it easier to speak to scholars and intellectuals in administration about the vital importance of a more careful consideration of America’s constitutional regime. He can speak to a blind spot for the field. Much of the malformed development of American bureaucracy comes from reformers who give inadequate attention to the fundamental role the Constitution plays in guiding nearly every aspect of our national regime. Postell reminds us all that the Constitution persists in profound but unacknowledged ways. Accepting that fact helps to address, if possible, the bureaucracy’s legitimacy crisis. A more effective bureaucracy is necessary, but any reform that defines effectiveness in ways that exclude awareness of American constitutional forms will seriously blunder; our constitutional institutions are too strong. The twentieth century is replete with stories illustrating this fact, resulting in a twenty-first-century administrative state experiencing declining legitimacy and favor. As Postell notes in his conclusion, the administrative state is stung by declining consensus, as both sides of the political divide have become disillusioned, giving way to the sense that the century-old project of “construct[ing], refin[ing] and incorporat[ing] a bureaucratic system within our constitutional framework... has largely failed” (320). A more constitutionally aware reform might be able to overthrow this depressing conclusion.

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<sup>4</sup> Robert A. Kagan, *Adversarial Legalism* (Cambridge, MA: Harvard University Press, 2003).

