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The Administrative State in America

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The Transformation of the state is also the transformation of its Law.
Léon Duguit

A. Introduction

The purpose of this contribution is to examine the idea of the Continental State in a common-law context. To that effect, the focus of this essay is the American state. Typically, in comparing the American regime to the Continental idea of the state, much has been made of a so-called tradition of ‘American exceptionalism’. Alexis de Tocqueville perhaps started this trend when he observed in the United States distinctive qualities of individualism, associationalism, localism, and decentralization, but not many inklings of a modern state. ‘The federal government of the United States’, he mistakenly surmised in the early nineteenth century, ‘is tending to get daily weaker; stage by stage it withdraws from public affairs, continually narrowing its sphere of action. Being naturally weak, it gives up even the appearance of strength.’¹ Hegel went further and questioned whether the United States was a ‘real State’ at all. As he noted, ‘[t]he general object of the existence of this State is not yet fixed and determined, and the necessity for a firm combination does not yet exist; for a real State and a real Government arise only after a distinction of classes has arisen.’² Without the class dynamics of the old world, without a feudal aristocracy, without a
military nobility or an elite corps of state civil servants, and without the reception of Roman law, what could one possibly be talking about by referring to an American state? Despite more recent efforts to ‘bring the state back’ into American social science, (p. 99) myths of American state ‘weakness’ and ‘exceptionalism’ continue to predominate in the existing literature.³

This contribution, however, takes issue with this common portrait of American state exceptionalism. Building on some very recent historical and theoretical work on the American state,⁴ it explores the conscious effort to create a modern state in the United States on a more or less Continental model. As Daniel Rodgers and James Kloppenberg have suggested, American ideas and institutions were not created in splendid isolation in the wilderness.⁵ Rather, from the beginning, American intellectuals, jurists, and state reformers engaged in an extended transatlantic dialogue concerning matters of politics, law, and statecraft. This was especially true of the period that experienced the most extensive transformations in American governance and statecraft—the late nineteenth and early twentieth centuries. Accordingly, this contribution takes a close look at the American tradition of law and state building in this formative era—from 1866 to 1932. It was a period in which the Continental idea of the state loomed especially large.

This period, of course, opened with a remaking of the American regime through the addition of three momentous constitutional amendments: the 13th, 14th, and 15th Amendments to the United States Constitution. This reconstruction of the American constitution around new conceptions of the nation and the citizen placed the polity on a fresh foundation with ramifications for nearly every aspect of social and economic life. But formal constitutional amendment was just the beginning of the revolution in governance that created a modern state in the United States. Simultaneous with the efforts of legislators and jurists to craft a modern constitutionalism, another group of intellectuals and reformers began to rethink and rebuild the very infrastructure of American government. The major actors, ideas, and institutions involved in this second act of reconstruction are not as well-known as the great personalities and cases and controversies that surrounded the immediate adoption and interpretation of the 14th Amendment: But their legacy was in many ways even more significant. Their work was less the product of immediate responses to the problem of slavery, the crisis of civil war, and the imperatives of reunion than a conscious and more long-term effort to construct a modern American state.

After Reconstruction but before the ascendancy of Franklin Delano Roosevelt’s New Deal, an unmistakably new kind of American state came into being. This structural transformation was slow and accretionary. It was not the product of a sudden new moment of constitutional recognition or popular democratic reformation; nor (p. 100) did it entail a complete and public break with earlier American traditions of governance. Rather it is best understood as a ‘hidden revolution’ in American government—a fundamental shift in the scale, scope, techniques, and legitimating rationales of governance, but one that masked the extent of its discontinuity with an earlier, founding legal-political regime. One thing is certain, American governance by 1932 bore little resemblance to nineteenth-century practice. And legal and public policymaking had acquired the distinctive characteristics that would define American governance for most of the twentieth century.

Although some very important federal bureaucratic initiatives accompanied the establishment of an independent nation and economy in the antebellum period,⁶ American governance before the Civil War remained highly dispersed and remarkably decentralized. A great deal of the general governing authority—the police power—concerning a wide range of the most important issues of the day (health, safety, morals, poverty, welfare, economy, family, slavery) remained in the hands of individual states and a plethora of relatively autonomous local jurisdictional subdivisions: counties, towns, cities, villages, districts, municipalities, and officers. In a word, early American governance was profoundly associative—grounded in a multiplicity of local self-governing institutions, corporations,
boards, legislatures, and councils. The role of federalism and open-ended local powers and loyalties in the early American political economy has led economic historians to call this system ‘rivalistic state mercantilism.’ The legal system also reflected the primacy of this diffuse, locally controlled, case-by-case approach to law and policy-making. Despite some small but distinct inroads made in the direction of codification, general legislation, and administrative rule-making, the controlling rule of law at the time of the Civil War remained the jurisdictional, customary, and controversy-based rule of the common law. The antebellum American state, in other words, continued to function in a mode still recognizably within the classic city-state tradition of local republican self-government.

That regime was upended by the hidden revolution in government that forged a distinctly modern state in the United States after the Civil War. That hidden revolution consisted of several interrelated components, including new conceptions of public good and public purpose; a redefinition of a new active liberalism for an industrial age; an increasingly positivist idea of law, legislation, sovereignty, and the very notion of a state as a legal entity itself; a radical expansion of the ideas of police power, administration, public management, and administrative regulation; and an increased governmentalization of political and democratic processes.

Together, these changes amounted to a transformation of American public law—a fundamental reworking of the legitimating basis for governmental action in the United States. This transformation yielded a polity far more rationalized, centralized, and bureaucratized than any anticipated by the founders or experienced in the antebellum period. It marked the emergence of a distinctly modern form of statecraft in the United States that roughly reflected (as history only can) the chief characteristics of Max Weber’s ideal definition of a modern state: (1) a rationalized and generalized legal and administrative order amenable to legislative change; (2) a bureaucratic apparatus of officers conducting official business with reference to an impersonal order of administrative regulations; (3) the power to bind—to rule and regulate—all persons (national citizens) and all actions within its official jurisdiction via its laws; and (4) the legitimate authority to use force, violence, and coercion within the prescribed territory as prescribed by the duly constituted government.

This transformation of public law undergirded a whole series of more particular public policy initiatives through which the modern state apparatus extended its reach into daily American social and economic life. This new interventionism has historically been the most observable feature of the new American state.

Why the hidden revolution? What were the causes of this transformation in American public law? The constitutional crisis and reform of the post-Civil War years was clearly a catalyst for this revolution in American government. But the more general reasons for this political transformation were as complex as the dramatic changes reshaping modern American life generally in these crucial decades: a reorganized corporate economy; an ascendant American labour and reform movement; an increasingly interlocked and interdependent society; rapid advances in science and technology; a growing, diversified, and increasingly mobile national population; and an expanding geo-political role for the United States in world affairs. Such factors transformed the demands made upon government and set in motion political and legal developments that changed the nature of the American state.

This contribution, however, concentrates on the governmental revolution itself—the rise of a modern administrative, regulatory, and welfare state in the United States. For the changes in governmental structure and function in this period are not wholly explained as simple responses to external social and economic stimuli. They were also the result of a concerted effort of legal invention and political re-creation. At bottom, the creation of a modern state involved conscious changes to American public law—a creative reworking of the structures, institutions, doctrines, and underlying rationales of American government. Such changes were distinctive rather than formulaic, contingent rather than determined, and historical rather than predictable or inevitable. They were the product of individual agents...
and reform communities—a movement of engaged intellectuals, experienced lawmakers, and political activists. Their identities—their agency—needs to be recovered from the anonymity afforded to them by the socio-economic determinism of reigning modernization theories. Building upon the national constitutional legacy of Reconstruction, scholars and reformers like Lester Frank Ward, John Dewey, Ernst Freund, Frank Goodnow, and Westel Woodbury Willoughby were the authors of new concepts of public good, state sovereignty, positive law, police power, and administration that recast the role and range of public power in modern America. Their ideas were ideas with consequences—ideas in action, ideas literally with power. For these legal, legislative, and administrative innovations directly unleashed what Weber defined as perhaps the essential attribute of modern states, namely the ‘monopoly of the legitimate use of physical force.’ Modern state-building, in other words, was very much an intellectual and legal as well as an institutional and political project. Indeed, the transformation of American public law was its foundation.

B. The Nature of a Modern State

Theorists of American political order first began fundamentally rethinking the nature of the American state during the Civil War as part of the reconception of citizenship, nation, and constitution. The reconstitution of the nation was a distinct catalyst for a more general reconsideration (and reassertion) of governmental authority in the United States, from abstract notions of sovereignty to more particular powers of legislation and administration. Indeed, it is difficult to separate out the development of state powers and ideas from the growth of nationalism in this period. It was, after all, a modern nation-state that was coming into being. As Francis Lieber put it in his prescient fragment on ‘Nationalism’ dedicated to President Grant upon his election in 1868, ‘[t]he national polity is the normal type of modern government.’

With roots in the nationalist oratory of Webster and Lincoln, the immediate post-Civil War period was flooded with treatises advocating constitutional defences of the Union and strong nationalist theories of the polity. Sidney George Fisher, John Alexander Jameson, Orestes Brownson, John C. Hurd, Elisha Mulford, and others downplayed the original significance of compact, contract, and states’ rights in the creation of governmental authority and defended the overriding prerogatives of nation, Union, and national government. The impact of this nationalist discourse on ideas of the American state was twofold. First, it clearly articulated an aspiration toward a more powerful, unified, central government in the United States—a testament to and a guarantor of the Union’s victory in war. Second, it reflected a more realistic and positivistic assessment of the powers of government to forge a new nation and realize national ambitions. It acknowledged the role of force, coercion, and violence in modern governance and the relationship of necessity to national sovereignty and self-preservation. As Fisher wrote in the heat of battle, ‘[i]f the Union and the government cannot be saved out of this terrible shock of war constitutionally, a Union and a government must be saved unconstitutionally.’ Hurd went even further arguing that all pre-war attempts to derive the nature of sovereignty from abstract constitutional standards were futile: ‘Sovereignty cannot be an attribute of law, because, by the nature of things, law must proceed from sovereignty.’ As Charles Merriam summarized, ‘[i]n the new national school, the tendency was to disregard the doctrine of the social contract, and to emphasize strongly the instinctive forces whose action and interaction produces a state.’ But such lessons were not solely the product of political and cultural theory. They were also embodied—made manifest—in the unprecedented national state-building practices of the wartime presidency of Abraham Lincoln and the radical reconstruction efforts of the post-war Congress. From the suspension of habeas corpus to the military occupation of the South to the far-reaching governmental experiments of the Freedmen’s Bureau, late nineteenth-century reformers...
had plenty of practices as well as theories on which to base a reconstruction of the American state.\textsuperscript{15}

Out of these more general considerations of Union and nation and these ambitious new practices of government emerged a more focussed and systematic reconceptualization of the American state. This new set of political and legal ideas was no longer as preoccupied with past problems of sectionalism and Civil War. Rather, a new generation of theorists and activists seized the reins from the nationalist school and steered directly toward the future, exploring the relationship of a new state to the imperatives of a new program of national social and economic development. These theorists were also more overtly international and cosmopolitan in their influences and vision, drawing on such important intellectual movements as the rise of analytical jurisprudence in England under the leadership of John Austin (inspired by Bentham) and advances (p. 104) in state theory in Germany under the direction of Johann Kaspar Bluntschli (inspired by Hegel).\textsuperscript{16} The result was an impressive new set of legitimations and justifications for the expansion, centralization, and rationalization of state power in the United States. These theories basically provided a template for governmental transformation—an intellectual basis for the myriad of more particular reforms and changes that would dominate American politics and law from 1866 to 1932. Vernon Parrington provocatively dubbed this cooperative nexus of state theory and state action ‘the conscription of political theory.’\textsuperscript{17}

The late nineteenth century witnessed the fast development of a more systematic and scientific study of politics. Out of new professional associations like the American Social Science Association and the American Academy of Political and Social Science and new graduate programmes at places like Johns Hopkins and Columbia, a new generation of students of American politics transformed the way government was conceived and practiced.\textsuperscript{18} The new generation built on the solid foundation bequeathed by the pioneering work of Francis Lieber in his \textit{Manual of Political Ethics} (1838) and Theodore Woolsey’s distinctly more modern-sounding \textit{Political Science or The State Theoretically and Practically Considered} (1878). Lieber and his disciple Woolsey contributed an important American scepticism toward state of nature and social contract theories of social and governmental formation. Like Montesquieu, they favoured more sociological, institutional, and historical explanations.\textsuperscript{19} In contrast to what they termed the abstract ‘juristic fictions’ of Hobbes, Locke, and Rousseau, they emphasized instead the social and political nature of man, the historic tendency to form communities and institutions, the practical virtues of local self-government, the reciprocal relationship of individual rights and public duties, and the idea of the state as but a larger form of moral society.\textsuperscript{20} But despite the usefulness of their scepticism (p. 105) and their historical defence of positive government, in the end, Lieber’s and Woolsey’s political ethics were still rooted in early nineteenth-century conditions. As Parrington concluded only somewhat unfairly, ‘Woolsey had little to say about sovereignty. The speculations of Austin had not reached his quiet study, and the need for a coercive state in harmony with a centralizing industrialism was not likely to be realized by a man whose eyes were turned back fondly to a simple village life.’\textsuperscript{21}

The new generation of modern political science scholarship formally came of age with the appearance of three key texts that more clearly delineated the nature, power, and functions of a modern American state: John W. Burgess’s \textit{Political Science and Comparative Constitutional Law} (1890); Woodrow Wilson’s \textit{The State: Elements of Historical and Practical Politics} (1890); and Westel Woodbury Willoughby’s \textit{An Examination of the Nature of the State} (1896).\textsuperscript{22} The culmination of decades of study and reconsideration, these texts together moved American conceptions of state, sovereignty, and public law well beyond the classic nineteenth-century understandings of Tocqueville, Lieber, and Woolsey.\textsuperscript{23} Rather than orient their inquiries around concepts of local authority, self-government, and civil liberty, Burgess, Wilson, and Willoughby explicitly emphasized the centrality of the modern nation-state and its encompassing sovereign and legal powers. This distinctly modern
theory of the American state involved innovation along three theoretical lines: a reconsideration of the nature of the state itself as a legal entity; a reformulation of the power of the state in terms of sovereignty; and a more positivist, functionalist restatement of the nature of American law. In turn, these state theories would greatly affect American conceptions of liberalism and the public good; legislation and the police power; and administration and public service.

All of these developments involved long, dense, complex, and fairly technical political and jurisprudential analyses. But perhaps the most abstruse and abstract was the attempt to generate a clear and coherent idea of what, in fact, the modern state was itself as an entity. Late nineteenth- and early twentieth-century political and social thought was overrun with a fascinating and important (though frequently underestimated) discussion concerning the nature and character of groups—what they were, whether and how they ‘acted’, and what was the source of their influence in the world. The collective identity, legal personality, and peculiar power of groups became one of the key questions of the day; and the subject preoccupied the very best legal and political minds: Otto von Gierke, Frederic William Maitland, Harold Laski, and John Dewey.24 As the state was viewed as the highest form of group association and collective action, it became the focus of special scholarly attention. Indeed, arguably not since the late seventeenth and early eighteenth centuries had the question of the origin and nature of the state sustained such intense and rigorous scrutiny. It is not hard to understand why. Increasing modern awareness that large collectivities—corporations, cooperatives, unions, and especially states—were exerting unprecedented force in social, political, and economic affairs begged for better explanations. The individualistic theories of the past—social contract, natural rights, and classical economics—seemed to no longer adequately explain the present.

Out of these new discussions and new needs emerged a proliferation of contending theories of the nature of the state as an entity in itself: as a spirit, as an organism, as a being, and as a person, moral or juristic. The intellectual roots of these theories were a curious blend. Burgess began with Hegel and the German ‘Idea of the State’ (Staatsidee) as an abstract ethical entity—a rational unity that acts and knows and wills as ‘the spirit which is present in the world and which consciously realizes itself therein.’ But it was perhaps Bluntschli, once characterized as attempting to do for the modern European state what ‘Aristotle accomplished for the Hellenic’, who exerted even more influence on American political science through his psychological and human conception of the state as more of an organism or person.25 But efforts to pin down the idea of the state as an entity were not just products of German political science. American theorists were just as likely to draw the evolutionary social organicism of Comte and Spencer and the analytical jurisprudential categories of Austin and Holland. Willoughby consciously embraced just such an eclecticism, defending the need to approach the nature of the state as an entity from ‘a number of viewpoints.’ (p. 107) In addition to classical conceptions of the ‘civitas’ and Hegelian conceptions of a substantive ‘being’ or spirit, Willoughby devoted special attention to the ‘central concept of juristic political thinking’—i.e., the ‘envisagement of the State as a legal person.’26

In the end, the intellectual effort to specifically define the existential character or juristic personality of this thing called ‘the State’ came in for some fairly harsh criticism, as in Morris Cohen’s devastating attack on the ‘Communal Ghosts’ of legal and political philosophy.27 But it would be a mistake to underestimate the more general force of this reconceptualization of the state as an entity in itself with a juristic personality and agency, ready to accept and wield an ambitious new set of governing powers and rationales. For the collective result of this disparate effort was a re-imagining of the American state similar to the re-imagining of the American nation. This new vision opened the door for an understanding of the state as something more than a simple agglomeration of individuals or groups, more than a jurisdiction or territory, more than a governing council or a
representative legislature. These theories yielded an idea of the state as intensely related to and the product of society, country, and government, and yet, at the same time, distinct from and irreducible to those elements. This was a whole greater than the sum of its parts. By envisioning the state as an entity itself, these theorists helped to establish and to legitimate an idea of the state not as a passive political reflection of primary social and economic forces but as a powerful prime mover and shaker in its own right with its own ends, objectives, and functions.

While fascination with formal juristic theories of state personality proved short-lived, two other pieces of the attempt to define the nature of the modern state prospered along just these lines. The first was a renewed commitment to a more historical, empirical, and functional account of the origins of the state. Almost all of the new state theories of the late nineteenth and early twentieth centuries began like Woodrow Wilson’s text *The State* with explicit critiques of divine, social contract, and natural law theories of the state. As Wilson introduced the more realistic project, ‘[t]he probable origin of government is a question of fact, to be settled, not by conjecture, but by history.’ Building on Lieber and Woolsey and the anthropological idea of the sociability of man, Wilson and others developed a more relational and instrumental account (p. 108) of the rise of government and statecraft. Rather than root the state in an ancient act of divine will or some eternally binding primordial compact between ruler and ruled, they emphasized the concrete and contingent human origins of the state in the historical ‘search after convenience.’ State and governmental institutions were historically constructed, owing ‘their existence and development to deliberate human effort.’ Rather than see the state as a somewhat static entity ever bound by divine law or a permanent social contract, this simple historicist move liberated theorists and reformers to think about the state as a dynamic agent for larger human ends, purposes, and objectives—an instrument of social change and development. Willoughby accordingly ended his diverse discussion of theories of state origins by quoting Lester Frank Ward: ‘Government is becoming more and more the organ of social consciousness, and more and more the servant of Social Will.’

The second lasting contribution of these theories of the nature of the state was a more sociological conception of the state as a new form of modern organization based upon a complex set of social and political relationships. Though many theorists started with a preoccupation with the ‘idea’ of the state as ‘perfect and complete’, they usually quickly moved toward more concrete analyses of actual states as particular portions ‘of mankind viewed as an organized unit.’ By viewing the state less as a spirit or person and more as a set of relationships and organizations, these theories prepared the way for a more lasting notion of the state as a modern historical and sociological construction—as a new organization of power. Citing Giddings, Holland, Jhering, and Lasson, Willoughby contributed a ‘preliminary’ listing of the essential attributes of a state that was almost Weberian in its sociological aspiration: (1) a community of people socially united; (2) a political machinery, termed a government, and administered by a corps of officials termed a magistracy; and (3) a body of rules or maxims, written or unwritten, determining the scope of this public authority and the manner of its exercise.

Burgess was a bit more juristic, but also identified four key characteristics of modern state organization: comprehensiveness, exclusivity, permanence, and sovereignty. He defined comprehensiveness in terms that resonated with new conceptions of citizenship, embracing ‘all persons, natural and legal, and all associations of persons … within the territory of the state.’ He understood exclusivity and permanence in terms that rationalized the Civil War: ‘Political science and public law do not recognize the existence of an imperium in imperio. … There cannot be two organizations of the state for the same population and within the same territory.’ But perhaps most importantly, Burgess highlighted the new role of sovereignty in modern states. As he put it, ‘[t]his (p. 109) is the most essential principle.’ For in terms of its historical and sociological significance, it was not really the nature or
personality of the modern state that mattered most, but the new forms of power—sovereignty—at its disposal. As Burgess described, '[t]he modern national popular state is the most perfectly and undisputedly sovereign organization of the state which the world has yet attained.'

Together these new ideas of the state as a dynamic historical actor and a new organizational configuration of power augured some important changes in the nature of the American polity from 1866 to 1932. Some of the general implications are visible in these theorists’ express conclusions about the new ends and aims of the modern state. Bluntschli drew on old Roman law ideas of res publica and salus publica in articulating ‘the public welfare’ as ‘the indispensable object of policy’ and ‘the chief duty of the State.’ But he distinctly modernized the concepts in his definition of ‘the true end of the State’ as ‘the development of national capacities, the perfecting of the national life.’ Wilson concluded his treatise with a discussion of the active objects of the state as a ‘beneficent and indispensable organ of society’ pursuing ‘every means, therefore, by which society may be perfected through the instrumentality of government, every means by which individual rights can be fitly adjusted and harmonized with public duties.’ Willoughby was even more direct about the aims of the state to ‘promote the General Welfare, either economically, intellectually, or morally.’ ‘They do point’, he concluded, ‘to an inevitable extension of the State’s activities far beyond those at present exercised.’ Those new ends and aims of a new modern state would eventually precipitate a more general reworking of American liberalism. But first they necessitated a reconsideration of the rule of law. For the new practices of American statecraft in the late nineteenth and early twentieth century also turned on new ideas about the instrumentality of law and law’s relationship to sovereignty. A full appreciation of the creation of the American state thus requires a historical recovery of the American (p. 110) reception of analytical jurisprudence and its more positivist conceptions of both law-making and sovereignty.

C. Positive Law: The American Reception of Analytical Jurisprudence

As Léon Duguit noted, the transformation of the state moved hand-in-hand with the transformation of law. The making of the modern American state was accompanied by new theories of law that provided new instrumentalities and legitimations of government. Like the nation and the state, the rule of law was also reconceived in this period as scholars posed fundamental questions about law’s origins, authority, scope, and efficacy. With urgency and an intense new critical spirit, American scholars, jurists, and publicists interrogated the rule of law as never before. As Roscoe Pound noted, ‘[t]he changed order of things has been felt in legal science.’ Modern conditions forced modern changes in American law. By 1932, the common law tradition, that had shaped and ruled so much of public and private life through the early nineteenth century, had been displaced as a principle tool of American governance. And a regime of constitutional law, positive legislation, and administrative regulation assumed prominence. That regime rested on a different conception of the nature of law.

The transformation of American public law took many forms. And American legal historians have deployed a wide array of descriptive labels to capture the transformation in legal ideas at its core: e.g., anti-formalism, legal pragmatism, sociological jurisprudence, legal realism. Unfortunately, the proliferation of categories of schools of thought together with the legal academy’s special obsession with American legal realism, has led to a comparative neglect of some of the commonalities linking political, social, economic, and legal thought as well as the more general international convergence of modern legal theories in this period. In particular, this tendency has led legal historians to underestimate the important
contribution of legal positivism to all of these debates and to the transformation of the American state and public policymaking.

(p. 111) Legal positivism in its broadest sense refers to an understanding of law as humanly posited—that is, law as established not by theological gods but by historical human beings and communities. Positive law is man-made law rooted in empirical social facts—an artefact of historical conventions and contingent social needs. Legal positivism, in short, is a quintessentially modern, disenchanted, anti-metaphysical way of looking at the origins and nature of law, rejecting earlier natural law theories of law’s moral links to nature and the divine. The roots of legal positivism, obviously, are diverse and extensive, stretching all the way back to the general emergence of a more humanistic, sceptical, and scientific outlook on the world. But two sources in particular were more proximate to and important for the American reception of legal positivism. The first was the hugely influential positive sociology of Auguste Comte and his followers, articulating the need for the systematic and scientific study of human society liberated from theology and metaphysics. The second was the more concrete legal impact of John Austin’s philosophy of positive law as presented in his Lectures on Jurisprudence. Austin’s posthumously published materials revived interest in the reformist legal ideas of Jeremy Bentham and provided a classic English statement of a positivist approach to law that was rapidly spreading throughout Europe in the late nineteenth century. Approached as a starting point—as an opening argument in a great legal debate—rather than as a final analytical jurisprudence of formal legal categories (such as act, right, and duty), legal positivism had a transformative impact on American law. It was the entering wedge of legal rationalization in the United States and it precipitated a whole range of more critical and functionalist accounts of the relationship of law to politics and statecraft.

Austin’s analytical jurisprudence itself found many adherents and advocates in the United States, including John Chipman Gray, Henry T. Terry, Albert Kocourek, and Wesley Newcomb Hohfeld. Austin dominated Gray’s influential Columbia University lectures on The Nature and Sources of the Law. For Gray, it was Austin that led jurisprudence out of the bramble bush of theological and moral abstractions and toward a more scientific approach. As Gray put it, before Austin, law had been defined as ‘the art of what is good and equitable’; ‘that which reason in such sort defines to be good that it must be done’; ‘the abstract expression of the general will existing in and for itself’; ‘the organic whole of the external conditions of the intellectual life.’ Austin, following Bentham’s original critique of Blackstone, insisted upon a harsh analytical separation of law from morality—of the ‘Is’ from the ‘Ought’, so as to cleanse jurisprudence of the myth, folderol, and claptrap of medieval natural law and common law thinking. As Morris Cohen weighed this contribution, ‘Just as Machiavelli separated the science of politics from that of ethics and Grotius made the theory of law independent of theology, so Austin made jurisprudence a distinct science by sharply distinguishing between the legal and the moral.’ Austin was interested not in moral law or divine law, but instead in ‘positive law’—law as it was, in fact, made and deployed by officials—law as an expression of force and power and as tool or instrument of authority. As he originally opened The Province of Jurisprudence Determined so matter-of-factly, ‘[t]he matter of jurisprudence is positive law: law strictly and simply so called: or law set by political superiors to political inferiors.’ The modern critical potential of this more objective and instrumental formulation of law as the command of a superior was not missed by the authors of American sociological jurisprudence and legal realism. In The Path of the Law, Holmes acknowledged the ‘practical advantage’ of mastering Austin and ‘his predecessors, Hobbes and Bentham, and his worthy successors, Holland and Pollock.’ Roscoe Pound began his pioneering work on a new sociological jurisprudence with an initial presentation of analytical jurisprudence, noting its multiple contributions like (1) the idea of law ‘as something made consciously by lawgivers’; (2) the role of ‘force and constraint behind legal rules’; (3) the new emphasis on
statute law; and (4) the social consequentialist perspective of utilitarian philosophy. Felix Cohen later rooted the broad intellectual trend toward ‘functionalism’ in philosophy and law in analytical jurisprudence: ‘If you want to understand something, observe it in action. Applied within the field of law itself, this approach leads to a definition of legal concepts, rules, and institutions in terms of judicial decisions or other acts of state-force. Whatever cannot be so translated is functionally meaningless.’ Ultimately, Holmes, Pound, and Cohen offered fairly intense criticisms of analytical jurisprudence as a final formal theory striving for ‘a useless quintessence of all systems’ and an abstract and deductive conceptualism. Like John Commons and John Dewey, they moved quickly toward less formalistic (p. 113) and more sociological explanations of law-making and state force. But in the end, the American theorists acknowledged the original contribution of positivism to a critical and progressive theory of law. As Julius Stone put it, it was the Austrians who first ‘washed the law in cynical acid’ and established a basis for a more modern, realistic, and pragmatic jurisprudence.

The influence of legal positivism was felt especially in public law where it transformed American thinking about the relationship of law to the state. The heart of this influence was the emphasis that analytical jurisprudence placed upon sovereignty—law as the command of a duly constituted sovereign. As Gray pointed out, according to Austin, “The State” is usually synonymous with “the sovereign.” It denotes the individual person, or the body of individual persons, which bears the supreme powers in an independent political society. By making explicit the links between the positive law, sovereignty, and the state, Austin provided American jurists a model on which to build powerful new theories of the state and its positive law-making powers. Whereas the nationalist thinkers of the immediate post-Civil War era remained murky on ideas like sovereignty—John Hurd dedicated his Theory of Our National Existence to ‘the Sovereign: Whoever He, She, or They May Be’—political scientists like Burgess organized their theories of the state around a positivist conception of sovereignty. The essence of the state is everywhere, and at all times, one and the same, viz; sovereignty,’ Burgess wrote. And though this notion of a sovereign national state consolidated power as never before, Burgess made clear that it was not inconsistent with democracy or liberty. Applied to the American regime, popular sovereignty continued to operate in Burgess’s conception of the state as ‘the people in ultimate sovereign organization.’ And in the notion of a truly sovereign state that ‘exempts no class or person from its law, and no matter from its jurisdiction’, Burgess claimed to locate a ‘truer and secure’ foundation for the ‘liberty of the individual.’

The themes of positive law, sovereignty, and the state came together particularly well in the synthetic public law treatises of Westel Woodbury Willoughby. Willoughby, one of the most prolific political writers of his time, joined new theories of the state and sovereignty to a historical reinterpretation of American constitutional law generally. At the heart of Willoughby’s system was the endorsement of analytical jurisprudence and a positivist conception of law as the command of a sovereign. In contrast to antebellum jurists who regularly rejected a Blackstonian or utilitarian argument for the force of law, Willoughby drew the nature of state sovereignty and all subsequent delineations of governing power strictly from a ‘conception of law as wholly a product of the State’s will.’ ‘However confederate in character the Union may have been at the time of its creation’, Willoughby declared, ‘the transformation to a Federal State was effected.’ The essence of that state was not compact or communal custom or natural rights, rather it was modern sovereignty—that power that was ‘the source of all law.’ While many American theorists took greater issue than Willoughby with the crudest expressions of Austin’s notion of law as the command of a sovereign, they readily accepted more general formulations of law as ‘a
In this way, early nineteenth-century concerns with custom, local self-government, compact, and evolutionary common law gave way to a new emphasis on the positive constitutional powers of a modern nation-state. The reception of analytical jurisprudence speeded a legal movement away from the perceived absurdities, irrationalities, and inefficiencies of common law rulemaking (so vigorously criticized by Bentham) and toward more systematic and rationalized accounts of law as a tool of modern governance—an instrument of a sovereign people and state that could be used to accomplish necessary social ends. Austin himself defined the proper utilitarian end of a sovereign political government as ‘the greatest possible advancement of human happiness.’

Legal positivism thus reinforced a growing tendency to view law (and the state) not as the brooding omnipresence of past moral restraint, but, as Rudolf von Jhering put it, as ‘A Means to an End.’ Imperative legislation, statute law, and administrative regulation assumed greater significance on the basis of stronger claims to legal legitimacy and policymaking efficacy. Nineteenth-century common-law and community-based conceptions of the people’s welfare were increasingly displaced by the more modern notion of the people’s government—the idea of a sovereign nation state positively pursuing a vision of the public good rooted in a more comprehensive rational and national calculus. This more positive conception of law, sovereignty, and statecraft underwrote the constitutional expansion of American governing power in the twentieth century. By taking account of the coercive element in all law as the command of a sovereign, legal positivism also offered a realistic perspective on the rise of the modern state as an organization of power with an expanding monopoly on the legitimate use of force.

These generally positivist and realist tendencies were clearly visible in an extraordinary text published in the early twentieth century by the Association of American Law Schools entitled The Rational Basis of Legal Institutions. The book was essentially a compilation of the most important past essays, international as well as domestic, expressing the movement for a more modern, rationalized jurisprudence. With essays by Henry Sidgwick, Ernest W. Burgess & Robert E. Park, Helen Bosanquet, Richard T. Ely, Albion W. Small, Lester Frank Ward, Thorstein Veblen, Léon Duguit, R.H. Tawney, J.A. Hobson, L.T. Hobhouse, John Dewey & James H. Tufts, and Havelock Ellis among others, it captured the ecumenical and cosmopolitan intellectual spirit of the era’s jurisprudence far better than current digests of the writings of ‘American legal realism’. As John Wigmore and Albert Kocourek put it in their editorial preface, ‘New times have been coming,—nay, are now here. The outermost circle of that wave of scientific rationalism which began in the Darwin-Huxley period has at last reached the Sargasso sea of the Law.’ Oliver Wendell Holmes’s introduction made clear the convergence of thought around a new concern with empiricism broadly construed—as a demand for ‘reasons’, ‘figures’, and ‘facts’ in the law. Such rationalization of law was part and parcel of an instrumental movement for ‘social control’ rooted in the belief ‘that society advantageously may take its destiny into its own hands—may give a conscious direction to much that heretofore has rested on the assumption that the familiar is the best, or that has been left to the mechanically determined outcome of the cooperation and clash of private effort.’ As Holmes implied here and as many of the other contributors to this text made explicit, the end product of a more positive, rational jurisprudence was an emphasis on policy—on the instrumental aims (p. 116) to be achieved by a modern sovereign nation state passing positive laws for the general welfare. A more positive and political conception of law, in other words, played directly into the hands of another group of thinkers and
reformers consciously trying to generate new definitions of liberalism, social justice, and the general welfare.

D. Administrative Law and Public Service

Cumulatively, the consequence of these multiple changes in the ideas of state, law, public good, and legislative regulatory authority was a more realistic and post-metaphysical conception of the state not as an abstract sovereignty or an embodiment of the people but as a modern governmental organization. The regal notion of *raison d’état* was replaced by a more democratic and functional *raison d’être* rooted in the provision of public services in the interest of the public welfare. The state, power, and rule were no longer formally viewed as ends in themselves, but more pragmatically as modern institutional means to the accomplishment of important public tasks. Any remaining traces of notions of divine right and supreme command were subsumed beneath a new focus on the public duties, legal obligations, and social functions of the modern state in solving pressing social and economic problems. As Léon Duguit observed, "[g]overnment and its officials are no longer the masters of men imposing the sovereign will on their subjects. They are no longer the organs of a corporate person issuing its commands. They are simply the managers of the nation’s business." This reorientation of a reorganized government around the provision of public services brought new attention to a final institutional component in the creation of the modern American state—the idea of administration. Public law added to its purview an ever expanding body of rules and institutions for the efficient management, organization, and control of the nation’s business.

As with the police power, the development of administration and administrative law was not wholly an invention of the late nineteenth century—an unexpected outgrowth of the Interstate Commerce Act of 1887. Of the fifty-one major federal agencies and departments with administrative rulemaking powers at the time of the adoption of the Administrative Procedures Act in 1946, eleven traced their origins to statutes enacted before the Civil War. Indeed, national administrative authority was coincident with the very first Congresses and the delegation of extensive administrative powers to the Treasury Department, the Departments of War and Navy, the Pension Office, the Patent Office, the Customs Office, the General Land Office, and the United States Postal Service. Early American states and localities similarly delegated a wide discretionary authority to an assortment of officers, boards, and commissions responsible for the administration of the poor law, trade inspection, health regulation, and morals and law enforcement. But while administration was certainly not invented after the Civil War, it was fundamentally transformed. Like the police power, it traded in early common law origins (and limitations) in the law of public officers and became the modern science of governmental management—public administration.

There were many important aspects of the movement for a modern state administration that could be discussed in detail: the development of a professional civil service inaugurated with the Pendleton Act of 1883; the research, bureau, and budget movements; the periodic efforts for governmental reorganization at federal, state, and municipal levels; and the application of techniques of scientific management to American governance. All subsequent regulatory and policy reforms were decisively shaped by the overall drive toward modern administrative models and approaches to statecraft. Administration was a key part of the transformation of public law that created a new American state.

The overarching impact of administration on modern governance is perhaps best suggested by Max Weber’s conception of modern governmental rationalization as ‘legal authority with a bureaucratic administrative staff.’ Weber enumerated the attributes of administrative governance that increasingly characterized governance in modern states: the continuous rule-bound conduct of official business; the rigorous specification of jurisdictional competence; the hierarchical organization of offices; the governance of offices via technical
rules or norms; the separation of ownership and control in administrative decision-making; the objective rather than subjective nature of rights in an office; the importance of written documentation of administrative acts, decisions, and rules; and the presence of an elaborate administrative staff—officialdom, bureaucracy. The development of this distinctly modern form of bureaucratic organization in modern Western states brought an increasingly formal, rational, impersonal, and functional style of rule that sustained and extended the state’s monopoly on the legitimate use of force in a territory. Although the topic of administration is sometimes overlooked in American history, Theodore Lowi captured its absolute centrality to the development of modern power and policy: ‘The modern method of social control involves the application of rationality to social relations. … Rationality applied to social control is administration. Administration may indeed be the *sine qua non* of modernity.’

(p. 118) This more general vision of overall governmental rationalization and modernization guided the development of public administration in the United States. It was part of what Woodrow Wilson called the ‘New Meaning of Government’. As he put it in his pioneering article ‘The Study of Administration’ in 1887, ‘[t]he field of administration is the field of business. It is removed from the hurry and strife of politics.’ Public administration involved the application of efficiency, economy, and rational techniques of management and organization to the ‘detailed and systematic execution of public law.’ Leonard D. White elaborated, ‘[p]ublic administration is the management of men and materials in the accomplishment of the purposes of the state. … The objective of public administration is the most efficient utilization of the resources at the disposal of officials. … In every direction good administration seeks the elimination of waste, the conservation of material and energy, and the most rapid and complete achievement of public purposes.’ Consequently, the development of administration and administrative regulation involved something of a culmination of many of the state-building trends examined thus far: a conception of the state as a modern form of business-like organization, a more positivist and instrumental conception of rule and law-making, and an increased tendency toward the centralization and consolidation of governmental power. But public administration was also connected to new liberalism and the progressive idea of the state as an efficient mechanism of public purpose. Wilson saw governmental organization and rationalization as a necessary accompaniment of the increasing functions demanded of modern states. Administration was a vehicle of the ‘common interest’—a way of making the government a more ‘sensitive registering instrument’ of public need and opinion. Herbert Croly was just as insistent about the centrality of administrative reform to progressivism: ‘The progressive democracy is bound to be as much interested in efficient administration as it is in reconstructive legislation. … Its future as the expression of a permanent public interest is tied absolutely to an increase of executive authority and responsibility.’

Given the centrality of administration to progressive reform and modern American politics, political scientists and theorists have spent a considerable amount of time charting the rise of administrative organization and bureaucracy in the late nineteenth and early twentieth century United States. But somewhat less attention has been devoted to the important legal consequences of that historical development. The rise of professional administration and administrative regulation posed two fundamental challenges to existing American public law. First, it challenged the traditional role of the office-holder in a common law system formerly oriented around local and participatory self-government. Second, it raised important questions for traditional constitutional ideals like checks and balances and the separation of powers. Like the common law generally, nineteenth-century conceptions of the legal nature of office-holding assumed a general continuity between ruler and ruled, office-holder and citizen in the day-to-day practices of local self-government. The nature of the justice of the peace, the role of the jury, and the proliferation of citizen-officers in the enforcement of regulations all bespeak the fluidity of common-law
conceptions of the interconnectedness of society, politics and local administration. In contrast, modern administrative law and theory posited a foundational separation between the administrative office-holder as professional business manager and the social and political life of the citizenry—a separation of political ownership from the administrative control of the American polity. As Woodrow Wilson somewhat aristocratically justified the idea of administrative discretion and the limits of direct popular participation in modern bureaucracy: ‘Self-government does not consist in having a hand in everything, any more than housekeeping consists necessarily in cooking dinner with one’s own hands. The cook must be trusted with a large discretion as to the management of the fires and the ovens.’ Max Weber captured the departure from more traditional and personal conceptions of office when he characterized the objective formalism at the heart of bureaucratic administration: ‘It does not establish a relationship to a person, ... but rather is devoted to impersonal and functional purposes.’ In place of the subjective, interpersonal, irrational, time-consuming, and case-by-case methods of self-governance, ‘[p]recision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs’ were ‘raised to the optimum point in the strictly bureaucratic administration.’ But as much as modern administration posed challenges for common law conceptions of office and self-government, it produced even greater problems for traditional ideas about American constitutionalism. The original constitutional regime of divided and mixed government, carefully counterbalancing executive, legislative, and judicial powers as well as local, state, and national authority did not easily accommodate some of the new omnibus powers entailed in administrative regulation usually at the level of a centralizing executive. Most of the independent regulatory commissions formed in this period yielded a curious and potent blend of quasi-judicial adjudicative power, quasi-legislative rule-making authority, executive law enforcement capacity, an inquisitorial or investigative function, and a responsibility for overall policy planning. Such powerful, independent, and multi-function governmental entities did not fit comfortably into the existing constitutional schema. A further transformation in American public law was necessary.

As the writings of Ernst Freund documented the transformation of legislative police power, the texts of Frank J. Goodnow charted the constitutional implications of the rise of the administrative state. Goodnow was one of Freund’s teachers at Columbia, the first president of the American Political Science Association, the President of Johns Hopkins University, and one of the first and most comprehensive analysts of public administration in the United States—frequently referred to as ‘the father of American administration’. From his casebooks on the Law of Officers to his treatises on Principles of Administrative Law to progressive advocacy texts like Social Reform and the Constitution to his multiple administrative studies of Municipal Government, Goodnow laid the intellectual and legal groundwork for the jurisprudential transition from traditional ideas about self-governing office-holders and constitutional limitations to the public law legitimacy of professional administration in a modern bureaucratic state. Like most progressive reformers, Goodnow started with an acute awareness of ‘the tremendous changes in political and social conditions’ inaugurated by industrial modernization and the enormous social and economic problems attending that ‘great transformation.’ And he argued explicitly that solutions to those problems required a legal and political transformation of equal extent. In Social Reform (p. 121) and the Constitution and Principles of Constitutional Government, Goodnow equalled Charles Beard and J. Allen Smith with a devastating progressive critique of the constraints of ancient constitutionalism. He proposed that original American constitutionalism was based upon an eighteenth-century political theory of social compact and natural right that presupposed ‘that society was static rather than dynamic or progressive in character.’ The unfortunate result of this original understanding was ‘to fix upon the country for all time institutions which ... were established in the eighteenth century to deal with conditions then existing, but which may in this twentieth century be
unsuitable because of the economic, social and political changes which have taken place in
the last hundred years.’

Goodnow endorsed instead a new positive, progressive, and
dynamic approach to the constitution that would keep public law flexible, responsive to
public opinion, and adaptable to the changing needs of modern life. He echoed Theodore
Roosevelt’s critique of the ‘false and mischievous’ notion of the constitution as a ‘straight-
jacket to be used for the control of an unruly patient—the people.’ He opposed the static
idea wherein ‘the United States Constitution is to the country what a coat too small in size
is to a man. If he buttons it up in front he splits it open behind.’ Rather he endorsed
Roosevelt’s vision of constitutional dynamism in the public interest: ‘Our constitutions are
instruments designed to secure justice by securing the deliberate but effective expression
of the popular will, that the checks and balances are valuable as far, and only so far, as they
accomplish that deliberation.’

In his works on administrative law, Goodnow made clear the implications of this critical
constitutionalism for the progressive expansion of administrative power. He protested
against overly rigid interpretations of federalism and checks and balances which he claimed
‘resulted in a constitutional tradition which is apt not to accord to the federal government
powers which it unquestionably ought to have the constitutional right to exercise.’ And he
called on courts and judges to abandon ‘the strict application of the principle of the
separation of powers whenever the demand for administrative efficiency would seem to
make such action desirable.’ Here Goodnow agreed with Roosevelt’s sometime adversary
Woodrow Wilson on the necessity of ‘large powers’ and ‘unhampered discretion’ in public
administration, believing that there was ‘no danger in power, if only it not be
irresponsible.’

Goodnow advocated a centralized and professionalized bureaucratic corps
insulated from popular politics, arguing that there was ‘a large part of administration which
is unconnected with politics, which should be relieved very largely, if not altogether, from
the control of political bodies. It is unconnected with politics because it embraces fields of
semi-scientific, quasi-judicial and quasi-business or commercial activity.’ In Politics and
Administration, he went so far as to suggest that a new system of government had displaced
traditional American constitutional notions of federalism and the separation of powers. (p.
122) In place of a traditional understanding of the divisions of judicial, legislative, and
executive power, Goodnow reduced all practices of modern government to two overriding
functions—politics (‘the will of the state’) and administration (‘the execution of that will’).
As administration was outside of politics per se it need not be subject to traditional
constitutional limitations. Indeed, Goodnow argued that administrative powers should be
expanded so as to meet the demands of social reform for increased government ownership,
government regulation, and government aid. Through the expansion of administration, ‘the
great centralization of our government’ was to be secured.

**E. Conclusion: American Administration and the Rule of Law**

With the arrival of the New Deal, the administrative state found new prophets and
advocates like Felix Frankfurter and James Landis. In a larger sense, they consummated the
hidden revolution in legislative, regulatory, and administrative governance pioneered by the
likes of Willoughby, Freund, and Goodnow. As Frankfurter noted in 1936, it was ‘Frank J.
Goodnow and Ernst Freund, as early as the ‘90s, [who] saw general tendencies towards an
administrative law’ and a new regulatory state where others saw only unrelated, individual
occurrences. In The Public and Its Government, Frankfurter synthesized and popularized
the several themes worked out by two previous generations of political and legal thinkers
and reformers: the demands of modern society upon government, the need for a more
positive and instrumental conception of law and legislation, the new liberal idea of public
service in the public interest, and the need for an expert administration in a constitutional
democracy. These were the crucial building blocks of the hidden revolution in governance
—the transformation of public law—that created a new state in modern America. Well
before James Landis, as former chair of the Securities and Exchange Commission and Dean
of Harvard Law School, wrote his great defence of the administrative regulatory system *The Administrative Process* in 1938, the main lines of modern American state development had already been well established. And as Landis pointed out, that ‘growth of the administrative process shows little sign of being halted. … Its extraordinary growth in recent years, the increasing frequency with which government has come to resort to it, the extent to which it is creating new relationships between the individual, the body economic, and the state, already have given it great stature.’ Despite some dissent (which he labelled a ‘chorus of abuse and tirade’), Landis concluded, ‘[efficiency in the processes of governmental regulation is best served by the creation of more rather than less agencies. And it is efficiency that is the desperate need.’

But make no mistake about it, there was dissent—Landis’s enthusiastic endorsement of the administrative state was an apology. The rise of modern regulatory and administrative government in the United States between 1866 and 1932 was accompanied by resistance and rebuttal. New nationalism was met by a resurgent sectionalism and a residual federalism, new methods of statecraft galvanized concern about democratic self-government, new positive legislation reinvigorated traditions of statutory interpretation and judicial review, an expanded police power brought an expanded concern with due process, and the administrative state was greeted by vigorous defences of the rule of law. Even Roscoe Pound, himself a progressive reformer, a truculent critic of laissez-faire, and an exponent of a more sociological jurisprudence, ultimately felt the need to revive A.V. Dicey’s concerns about a system of Gallican *droit administratif* overwhelming Anglican traditions of the supremacy of law and due process. But it would be something of an error to view all of the concerns expressed in this period for due process, the rule of law, and individual rights to be somehow inherently oppositional to the new American state taking shape. In fact, this legalism was quite formative and constitutive, keeping the modern American state within a distinctively liberal and legal framework even as it expanded its scale, scope, and social and economic reach in unprecedented ways. Ernst Freund captured this dualism at the heart of the new American state when he identified two tendencies—in the direction of both increased rights and powers—at the centre of modern social legislation: ‘The steady growth in the value placed upon individual human personality and the shifting of the idea of the public good from the security of the state and established order to the welfare of the mass of the people.’ In Freund’s understanding, this was an ‘era of regulation which combined respect for private right with a growing sense of the social obligations of property and business, and which fully recognized the paramount claims of public interest.’

Robert E. Cushman was simultaneously one of the great proponents of national police power, independent regulatory commissions, and administrative management, as well as an unyielding defender of legal civil liberties and civil rights.

By 1932 the legal rights of the new citizen were increasingly hammered out in relationship to a new state—what Charles Beard had already dubbed the *American* (*p. 124*) *Leviathan*. That new state boasted a new institutional identity as a modern governmental organization reflecting an unmistakable centralization of decision-making authority, an expanded positive law-making power, a professionalized bureaucratic competence, and an unprecedented administrative regulatory range. As Beard surveyed the ‘huge complex of wealth, political institutions, military engines, economic undertakings, and technological activities’ that made up American government by 1930, he could do no better than to characterize this vast new power through Thomas Hobbes’s mythical notion of the State as a ‘powerful and bewildering Titan.’ But in the end, this revolution in American governance was about more than just the transformation in traditional public law conceptions of state power, authority, and interest. It turned just as much on the new functions of this governmental apparatus—the new jobs that the new state was constantly being asked to perform. Beard listed just some of the more significant public obligations concerning taxation, finance, and supplies; money and banking; transportation (inland and coastal waters, railways, express,
pipelines, highways, aviation); communications (postal service, wire communications, radio); the promotion of business enterprise (tariff, unfair competition, antitrust, trademarks, copyrights, and patents); labour and immigration policy; agricultural promotion and regulation; the conservation of natural resources; public health, safety, and morals; measurements and planning (standards, surveying, mapping, statistics); and the nature and conduct of foreign relations. And this was but the tip of an ever-expanding iceberg. Here, in the actual output of the positive state, one gains an even better appreciation of the dramatic changes in American life entailed by this hidden revolution in governance—the social and economic consequences of the creation of an *American Leviathan* in the shadow of the Continental idea.

**Footnotes:**


18 James Bryce took note of such developments as ‘powerfully affecting’ American politics in the late nineteenth century: ‘the development not only of literary, scientific and historical studies, but in particular of a new school of publicists who discuss constitutional and economic questions in a philosophical spirit; closer intellectual relations with Europe, and particularly with England and Germany; resort of American students to German Universities; increased interest of the best class of citizens in politics; improved literary quality of the newspapers and of periodicals (political and semi-political) generally; growth of a critical and sceptical spirit in matters of religion and philosophy; diminishing political influence of the clergy’. James Bryce, ‘The United States Constitution as Seen in the Past:

19 Francis Lieber, Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law (CC Little & J Brown, Boston, 1838). Woolsey edited the popular second edition of Lieber’s text released in 1874. He commented on Montesquieu, ‘The “Spirit of the Laws” was the great work on this subject which the eighteenth century produced, and has given more impulse to political thought than any other that has appeared in Europe’. In this regard, see Theodore D Woolsey, Political Science, vol 1 (Scribner, Armstrong & Co., New York, 1878) 169.

20 Theodore D Woolsey, Political Science, vol 1 (n 19) 190. Some of this portrait of political ethics conforms quite closely to what I have previously referred to as ‘the common law vision of a well-regulated society.’ Woolsey provides an almost classic statement of some of the basic components of this social and moral vision in his Political Science: ‘The considerations that men exist together in society, that they have an irresistible impulse towards society, that their perfection of soul and of outward condition can be secured only in social life, and, on the other hand, that recognition of rights and obligations alone make a social life a tolerable or even a possible thing, and that wherever men reflect on their own nature they admit the existence of certain classes of rights and shield them by public power. ... The destination for society; the means within human nature by which it is fulfilled; the means by which the individual and the community, when brought into society, are able to secure the good and avoid the evils possible in a state of coexistence—these form a complete, harmonious whole. ... A state of society is a state of nature, and the only true one.’ Theodore D Woolsey, Political Science, vol 1 (n 19) 23 and 24.


22 Theodore D Woolsey, Political Science (n 19); John W Burgess, Political Science and Comparative Constitutional Law (Ginn & Co., Boston, 1890); Woodrow Wilson, The State: Elements of Historical and Practical Politics (DC Heath & Co., Boston, 1904); Westel Woodbury Willoughby, An Examination of the Nature of the State: A Study in Political Philosophy (Macmillan & Co., New York, 1896).

23 For another indicator of this important shift in orientation note that Tocqueville began his classic 1835 investigation of American politics and culture with a chapter on ‘The Need to Study What Happens in the States before Discussing the Government of the Union.’ In contrast, James Bryce began his 1888 American Commonwealth directly with ‘The National Government.’ Alexis de Tocqueville, Democracy in America (n 1) 61 ff; James Bryce, American Commonwealth (Macmillan & Co., New York, 1888). On Bryce’s vision of himself as following in the footsteps of the great commentators on American politics see Bryce, ‘Hamilton and Tocqueville’.


25 Georg W F Hegel, Elements of the Philosophy of Right (Allen W Wood ed, CUP, Cambridge, 1991) 279; Johann K Bluntschli, The Theory of the State (n 16) 7 and 69. As Bluntschli characterized his differences with Hegel: ‘Hegel’s State is however only a logical abstraction, not a living organism, a mere logical notion, not a person.’ Citing Bluntschli, Burgess began his analysis of the state by distinguishing the idea (Idee) of the state from the concept (Begriff) of the state, noting that ‘the idea of the state is the state perfect and
complete ... . [T]he state is the world, and the principle of unity is humanity.’ In his Nature of the State, Willoughby elaborated the ‘Staatsidee’ further as the idea of the state in most general form ‘which embraces all that is essential to, and which is possessed by all forms of State life.’ Twenty-five years later, Willoughby still began his treatise on Public Law with the discussion of Bluntschli: ‘The idea (Idee) of the State presents a picture, in the splendor of imaginary perfection, of the State as not yet realized, but to be striven for.’ John W Burgess, Political Science and Comparative Constitutional Law, vol 1 (n 22) 49 ff.; Westel Woodbury Willoughby, An Examination of the Nature of the State (n 22) 14; Westel Woodbury Willoughby, The Fundamental Concepts of Public Law (The Macmillan Co., New York, 1924) 17.

26 Westel Woodbury Willoughby, An Examination of the Nature of the State (n 22) 10 and 31.

27 Morris Cohen, ‘Communal Ghosts and Other Perils in Social Philosophy’ (1919) 16 J Phil 673 ff. As David Runciman notes concerning the British ‘personality of the state’ debate, ‘[m]any of the arguments with which this book has been concerned belong to a past age.’ Ernest Barker reflected some of the exhaustion of the legal personality debate and the transition to more constructive sociological forms of inquiry into the nature of groups (like trade unions) and the state when he argued in 1951: ‘The real question, in any discussion of the relation of trade unions to the State, is not the question of whether they are persons, of whatever sort or character .... The “being” of the group (person or not-person? and, if a person, which sort of person, the moral or the legal?) is irrelevant to that question: the one thing relevant is what the group does, what its activity is, and whether that activity can, and should, be regulated by law.’ Ernest Barker, Principles of Social and Political Theory (OUP, Oxford, 1951) 75; David Runciman, Pluralism and the Personality of the State (n 24) 262.


29 Westel Woodbury Willoughby, An Examination of the Nature of the State (n 22) 141. Ward goes on to further suggest, ‘[o]ur Declaration of Independence, which recites that Government derives its just powers from the consent of the governed, has already been outgrown. It is no longer the consent, but the positively known will of the governed, from which Government now derives its powers.’ Lester F Ward, The Psychic Factors of Civilization (Ginn and Co., Boston 1893) 304.

30 Westel Woodbury Willoughby, An Examination of the Nature of the State (n 22) 4; see John W Burgess, Political Science and Comparative Constitutional Law, vol 1 (n 22) 49 ff.

31 John W Burgess, Political Science and Comparative Constitutional Law, vol 1 (n 22) 52, 55–6.

32 Johann K Bluntschli, The Theory of the State (n 16) 261 ff.

33 Woodrow Wilson, The State (n 22) 631 ff.

34 Like Wilson, Willoughby took pains to distinguish his ‘general welfare’ position from socialism per se. Willoughby concluded, ‘Now we may ask ourselves, whether or not the facts and the reasoning which have preceded, point necessarily to ultimate socialism? To this a categorical answer cannot be given .... . But in considering the bearing of an increase in State activity upon this question, it is to be noticed that not every assumption of the State of a new function is a step towards socialism.’ Westel Woodbury Willoughby, An Examination of the Nature of the State (n 22) 345 ff. Wilson was as critical of ‘those special classes of agitators’ dubbed ‘Socialists’ as he was of those other ‘extremists who cry constantly to government, “Hands off”, “laissez faire”, “laissez passer”, who look upon every act of government which is not merely an act of police with jealousy; who regard
government as necessary, but as a necessary evil; and who would have government hold back from everything which could by any possibility be accomplished by individual initiative and endeavor.’ But on the spectrum of extremes, both theorists tended toward a more socialist perspective in their state treatises. Wilson noted that despite their mistaken schemes, socialists ‘have the right end in view: they seek to bring the individual with his special interests, personal to himself, into complete harmony with society with its general interests, common to all … . They speak, too, of a revolt from selfish, misguided individualism; and certainly modern individualism has much about it that is hateful, too hateful to last.’ He elaborated, ‘If the name had not been restricted to a single, narrow, extreme and radically mistaken class of thinkers, we ought all to regard ourselves and to act as socialists, believers in the wholesomeness and beneficence of the body politic.’

Woodrow Wilson, *The State* (n 22) 629 ff.


36 Roscoe Pound, ‘The Need of a Sociological Jurisprudence’ (1907) 19 Green Bag 607. Pound began his famous discussion of ‘Mechanical Jurisprudence’ (1908) 8 Colum L Rev 605, by quoting Frederick Pollock: ‘There is no way by which modern law can escape from the scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice.’


38 Donald R Kelley’s wonderful synthesis *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press, Cambridge MA, 1990) xi, provides a good measure of the early legal roots of this tradition. As Kelley puts it, ‘[a] central premise of this book is that, historically, the principal questions, terminology, and lines of investigation of the study of humanity have been, over two millennia and more, the “science of law”—not the large universe of Physis, but the more familiar pasturage of Nomos, especially in the western legal tradition.’


Among the most important scholars to work with a more analytical conception of positive law in Germany alone in this period were Karl Friedrich von Gerber, Paul Laband, Georg Jellinek, Rudolf von Jhering, Rudolf Stammler, and Joseph Kohler. For an excellent general discussion, see Francis W Coker, *Recent Political Thought* (D. Appleton-Century Company, New York, 1934) 521 ff.


See for example, John Dewey, ‘Austin’s Theory of Sovereignty’ (1894) 9 Polit Sci Q 31 ff.; John R Commons, *A Sociological View of Sovereignty* (Reprints of Economic Classics, New York, 1965). Paul Vinogradoff provided something of an intellectual road map for expanding the analytical project, when he urged moving beyond Austin’s conception of law as command of the sovereign in the formal sense to a broader sociological conception: ‘The expansion of the formal definition is obviously connected with the necessity of giving an account of the material aim of the law. Order in the commonwealth has to be ensured by delimitation between the wills and interests of its members, a delimitation designated in ordinary speech by the term justice, while the share of interest and power claimed by the Commonwealth or the Sovereign in the legal arrangement takes into account the element of public policy. It is unnecessary to pledge ourselves to any particular form of rival theory in order to recognize that in one way or another the room must be found in analytical jurisprudence for these conceptions.’ Paul Vinogradoff, *Outlines of Historical Jurisprudence* vol 1 (OUP, London, 1920) 119.


John W Burgess, *Political Science and Comparative Constitutional Law*, vol 1 (n 22) 74.

John W Burgess, *Political Science and Comparative Constitutional Law*, vol 1 (n 22) 56 and 66. As Burgess noted about such a state: ‘It sets exact limits to the sphere in which it permits the individual to act freely. It is ever present to prevent the violation of those limits by any individual to the injury of the rights and liberties of another individual, or of the welfare of the community. It stands ever ready, if chance the measures of prevention prove unsuccessful, to punish such violations.’

Westel Woodbury Willoughby, An Examination of the Nature of the State (n 22) 180.


Roscoe Pound, ‘The Scope and Purpose of Sociological Jurisprudence: I’ (1911) 24 Harv L Rev 595. In particular, Woodrow Wilson’s endorsement of an analytical account of sovereignty in The State, 634–35 was more qualified. Wilson struggled to mesh sovereignty, positive law, and constitutionalism in his definition of law as ‘the command of an authorized public organ, acting within the sphere of its competence. What organs are authorized, and what is the sphere of their competence, is of course determined by the organic law of the state; and this law is the direct command of the sovereign.’ John Chipman Gray stated his reservations this way: ‘If Austin went too far in considering the Law as always proceeding from the State, he conferred great benefit on Jurisprudence by bringing out clearly that the Law is at the mercy of the State.’ John Chipman Gray, The Nature and Sources of the Law (n 42) 87. Also see the reservations of John Dewey in ‘Austin’s Theory of Sovereignty’ (1894) 9 Polit Sci Q 31 ff and John Commons in A Sociological View of Sovereignty (Reprints of Economic Classics, New York, 1965).

John Austin, Lectures on Jurisprudence, vol 1 (n 40) 298. John Dewey cites this passage of Austin in order to draw connections between Austin and T.H. Green: ‘The necessity of basing force upon some common interest and purpose, which Green urges against Austin, is not only recognized, but stated by Austin at considerable length … . He thus recognizes as distinctly as Green a moral end back of and controlling the political institution.’ John Dewey, ‘Austin’s Theory of Sovereignty’ (1894) 9 Polit Sci Q 33.


Association of American Law Schools, Rational Basis of Legal Institutions (n 59) xx, xxix.

As Holmes put it more explicitly in his essay ‘Ideals and Doubts’ (1915) 10 U Ill L Rev 3: ‘It is fashionable nowadays to emphasize the criterion of social welfare as against the individualistic eighteenth century bill of rights. I may venture to refer to a book of mine published thirty-four years ago to show that it is no novelty.’ He was referring, of course, to The Common Law (Little, Brown & Co., Boston, 1881).

Léon Duguit, Law in the Modern State (n 35) 51.


70 Woodrow Wilson, ‘The New Meaning of Government’ (n 68) 194.


74 Indeed, a host of nineteenth-century international legal and political commentators located in the common law and particularly the justices of the peace a compelling self-government alternative to Napoleonic state centralization. See, for example, the discussion of the jurisprudence of Rudolf von Gneist among others in Munroe Smith, *A General View of European Legal History and other Papers* (Columbia University Press, New York, 1927) 216 ff.

75 For the classic statement of the same theme with respect to the administration of the private business corporation see Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (The Macmillan Co., New York, 1932). As suggested in the discussion of state sovereignty, the parallels in debates about what is happening to the corporation and what is happening to the state is extraordinary.

76 Woodrow Wilson, ‘The Study of Administration’ (n 68) 197. Also see the insightful study of administrative law by Dwight Waldo, *The Administrative State* (n 65) 104 ff.
Max Weber, *Economy and Society*, vol 2 (Guenther Roth and Claus Wittich eds, University of California Press, Berkeley, 1978) 959 ff. He noted that one of the chief consequences of bureaucratic domination was, ‘The dominance of a spirit of formalistic impersonality: “Sine ira et studio”, without hatred or passion, and hence without affection or enthusiasm. The dominant norms are concepts of straightforward duty without regard to personal consideration.’ Weber also provided the best discussion of the separation of ownership and control: ‘It is a matter of principle that the members of the administrative staff should be completely separated from ownership of the means of production or administration. Officials, employees, and workers attached to the administrative staff do not themselves own the non-human means of production and administration. These are rather provided for their use, in kind or in money, and the official is obligated to render an accounting of their use. There exists, furthermore, in principle complete separation of the organization’s property (respectively, capital), and the personal property (household) of the official.’ Max Weber, *Economy and Society*, vol 1 (n 9) 218 ff.


Frank J Goodnow, *Social Reform and the Constitution* (n 78) 308.


Frank J Goodnow, *Social Reform and the Constitution* (n 78) 11 and 221.

Woodrow Wilson, ‘The Study of Administration’ (n 68) 213.

Frank J Goodnow, *Politics and Administration* (n 78) 85 ff. Only with regard to the executive function did Goodnow concede a great role for the function of politics.

Frank J Goodnow, *Social Reform and the Constitution* (n 78) 32.


