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Originalism, the Administrative State, and the Clash of Political Theories

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KEY TAKEAWAYS

It will require a President of extraordinary determination and political skill to undo the modern administrative state and living constitutionalism.

Thus, if President Trump's efforts succeed, he will rank alongside Franklin Roosevelt as a President of transformative significance for American government.

There is no doubt that, both as a matter of political theory and constitutional theory, much depends on the outcome of the contest the President has undertaken.

Thank you, John, and thank you to The Heritage Foundation for inviting me to give the fourth annual Edwin Meese Originalism Lecture. It is a great honor to give a lecture named after Edwin Meese, especially on this 40th anniversary of his appointment as Attorney General. Mr. Meese is one of the most important figures in the history of originalism. Through both rhetoric and policy, he played a pivotal role in the rise of originalism within the federal judiciary and in American politics. As we look back on the many originalist victories over the last few years and look ahead to many more such victories for the rule of law in the years to come, we rightly thank and honor Mr. Meese for making this astonishing period in American constitutional law possible.

And it is an *astonishing* period in which we are living. Less than a decade ago, it was difficult to imagine a world in which six justices of the Supreme Court

would place significant weight on the original meaning of the Constitution and five would be self-proclaimed originalists. When I began my Supreme Court clerkship in the summer of 2016, the notion that we were only a few years away from the overruling of *Roe v. Wade*,[1] *Lemon v. Kurtzman*,[2] and *Chevron v. Natural Resources Defense Council*[3] would have seemed hopelessly optimistic. Yet here we are. Because President Trump and his allies in the Senate systematically appointed committed originalists to the federal courts in the face of determined and unyielding opposition, originalism is ascendant, and because it is ascendant, *Roe*, *Lemon*, and *Chevron* are no more.

The first three months of the *second* Trump Administration have witnessed an extraordinary change in the policies and operation of the Executive Branch, a peacetime transformation of government perhaps without precedent since the early days of the New Deal. Like Franklin Delano Roosevelt's transformation of government, President Trump's transformation implicitly relies on a distinctive understanding of the Constitution, and because how one understands the Constitution depends on antecedent questions of political theory,[4] the historic changes we are witnessing can only be grasped through a greater appreciation of the rival political theories that suffuse our debates over the administrative state.

To be clear, I am not saying that President Trump's administration has a single, monolithic political theory or constitutional theory. That is very unlikely to happen in any administration, since the political movements that bring an administration to office necessarily have to accommodate many different intellectual currents and perspectives. But many of President Trump's actions seem to presuppose politico-theoretical premises that are antithetical to the administrative state and supportive of originalism.

Those premises will be the subject of my lecture today. The administrative state is not just premised on a view about what the Constitution means; it is premised on a view about the nature of politics and, in turn, the nature of human beings.[5] The forceful pushback against the administrative state that we have seen unfold over the last three months represents a quite different view about what the Constitution means, and it therefore rests on quite different premises about politics and human nature. In short, originalists' rejection of the administrative state is not just the result of a disagreement with living constitutionalism's understanding of our fundamental positive law; it is also a disagreement with the political theory undergirding living constitutionalism and the administrative state.

In laying out that argument, I will proceed in three parts. First, I will show how the main pillars of the administrative state reflect certain progressive

politico-theoretical commitments. Second, I will describe an alternative set of politico-theoretical commitments that are often associated with opposition to the administrative state. Finally, I will show how living constitutionalism is the natural extension of the political theory supporting the administrative state and, conversely, how the politico-theoretical commitments opposed to the administrative state find a natural home in originalism as an approach to constitutional theory.

The upshot is that if President Trump's transformation of American government succeeds, it will be because the same principles that motivate opposition to the administrative state as a matter of political theory are consistent with the principles that will motivate an originalist Supreme Court to sustain that transformation as a matter of constitutional law. The stakes of this battle over the next few years go beyond a dispute about our positive law; they go to deep questions of political theory.

The Political Theory of the Administrative State

First, the political theory of the administrative state. I should preface my remarks in this first part of my lecture by acknowledging that there have, of course, been many theorists of the administrative state, and they have offered different accounts of the political theory undergirding it.[6] I do not claim, therefore, that what I am about to say is the *only* way to think about the administrative state's implicit political theory, but I do think the political theory I will identify is very widely held among supporters of the administrative state and played a highly influential role in its development.

The Four Pillars of the Administrative State. While this audience no doubt has a general sense of what I mean by the administrative state, it is worth setting out explicitly the four pillars on which the administrative state is built. These are the four transformations of constitutional law that enabled the rise of the administrative state.

Consolidation. The first pillar is the consolidation of lawmaking power into the hands of the federal lawmaker—that is, into the hands of Congress. The administrative state requires that the federal government break free from the doctrine of enumerated powers and sweep into its domain powers formerly thought to belong only to the states. The New Deal Court's dramatic expansion of federal authority under the Commerce Clause,[7] the Necessary and Proper Clause,[8] and the General Welfare Clause[9] enabled this consolidation of power.

Delegation. The second pillar is the delegation of this expansive federal lawmaking power from Congress to the executive branch. This was

accomplished through the Court's refusal to enforce the non-delegation doctrine after 1935.[10]

Insulation. Once this expansive federal lawmaking power has been delegated to administrative agencies, the third pillar becomes necessary: the insulation of many executive officers from meaningful supervision by the President. This was accomplished through the Court's decisions in *Humphrey's Executor v. United States*[11] and, later, *Morrison v. Olson*,[12] which upheld restrictions on the President's authority to remove his subordinates.

Deference. With many agencies wielding Congress's lawmaking power and insulated from presidential control, the fourth step in the creation of the administrative state is the further insulation of agencies from the final significant check on their power—the check that would otherwise come from the third branch, the federal judiciary. This further insulation occurred through various doctrines of judicial deference, such as *Chevron* and *Auer v. Robbins*.[13]

Thus, there are four pillars: consolidation, delegation, insulation, and deference. The net result was the creation of an administrative state that, in aggregate, exercised something close to a general police power delegated to it by Congress, without meaningful presidential supervision over substantial parts of it, and with deference from the courts, making the administrative state in effect a fourth branch of government. *Chevron*, thankfully, has now been overruled, and *Auer* only survived after gruesome surgery performed by its defenders on the Court in *Kisor*,[14] though its eventual overruling would be a salutary development.

Over the last three months, we have seen President Trump directly challenge the delegation of power by Congress to administrative agencies and the insulation of power from presidential supervision. The President's insistence that questions of public policy like student-debt transfers ought to be resolved by Congress rather than through agency action, and that the entire executive branch is ultimately accountable to the President—who is elected by the American people and who is vested with the whole of the executive power—are attempts to bring the administrative state in line with the original meaning of the Constitution. Contrary to the press's depiction of such actions, they are hopeful developments for the rule of law.

We will now see that each of the four pillars of the administrative state reflect a particular politico-theoretical commitment. We will explore those commitments by examining Woodrow Wilson's landmark article, "The Study of Administration," which appeared in *Political Science Quarterly* in 1887.[15] In that article, Wilson charted the intellectual path for the creation of the administrative state, and given Wilson's deep knowledge of political

theory and his prominent role as President in making his vision a reality, re-reading his article is always worthwhile.

Wilson and the History of the Study of Administration. Wilson begins by considering why what he calls "the science of administration"[16] has not received more attention among political theorists until the late 19th century. He suggests that theorists have been more focused on "[w]ho shall make law, and what shall that law be?"[17] They focused on what sovereignty was and where it resided, rather than how to administer government well.[18] Those questions seemed more relevant to earlier theorists, in Wilson's view, because "[t]he functions of government were simple, because life itself was simple....Populations were of manageable numbers; property was of simple sorts. There were plenty of farms, but no stocks and bonds: more cattle than vested interests."[19]

But by the late 19th century, the economy and society had become more complex, and in Wilson's words, "It [was] getting to be harder to run a constitution than to frame one."[20] He gives as examples the rise of railroads, large monopolies, and complex financial instruments.[21] Here Wilson makes an argument in favor of the administrative state that remains ubiquitous today: that the complexity of modern society requires a powerful administrative government. It is the same premise, for example, with which Justice Elena Kagan begins her plurality opinion in *Gundy v. United States*.[22] And it is the premise for the first pillar of the administrative state: the consolidation of power formerly belonging to the states into the hands of the central government. A federalist system with a diffusion of power might have worked in a simpler society, but it is inadequate to our complex society. Centralization of authority is necessary to meet these novel challenges, according to Wilson.[23]

Nonetheless, Wilson argues that there is a major obstacle to making America a better-run country: what Wilson calls popular sovereignty. Our system requires persuading the public of the soundness of policies:

> An individual sovereign will adopt a simple plan and carry it out directly: he will have but one opinion, and he will embody that one opinion in one command. But this other sovereign, the people, will have a score of differing opinions. They can agree upon nothing simple: advance must be made through compromise, by a compounding of differences, by a trimming of plans and a suppression of too straightforward principles.[24]

Note here Wilson's antipathy towards compromise and popular opinion, a theme that recurs throughout his essay. He describes the people, for

example, as "selfish, ignorant, timid, stubborn, or foolish," while noting that "there are hundreds who are wise."[25] He later says: "The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes."[26] So Wilson sees the complexity of modern society as necessitating a new form of powerful and intelligent administration, but he regards popular sovereignty as an obstacle to the realization of that objective.

Wilson and the Object of Administration. The object of administrative study, then, is, in Wilson's words, "to rescue executive methods from the confusion and costliness of empirical experiment and set them upon foundations laid deep in stable principle."[27] By placing the government on "stable principles," Wilson means freeing it from the messiness and compromises of the political process. As Yuval Levin reminds us in his recent book, American Covenant, our Constitution was deliberately designed to govern a pluralistic nation by dividing and allocating power in a way that would require broad consensus before major policy action could be undertaken, which means that major policy action in our system is almost always going to be the product of compromise.[28] This, to Wilson, was a significant drawback of our politics.

Wilson thus believes that it is crucial to insulate administration from the vagaries of politics, and that is why he pays close attention to the issue of removal of executive officers.[29] Through restrictions on removal, Wilson seeks to further "the truth already so much and so fortunately insisted upon by our civil-service reformers."[30] And what is that truth? "[T]hat administration lies outside the proper sphere of *politics*. Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices."[31]

Here we have the politico-theoretical premise motivating the insulation of executive officers through for-cause removal protections: The administration of the government "lies outside the proper sphere of politics" because "[a]dministrative questions *are not political questions*."[32] If one accepts this view of politics, the fact that removal protections shield bureaucrats from political accountability is an affirmative *good* because political accountability is better characterized as political *interference*, an unjustified intrusion of the politics of compromise into the non-political process of principled administration. Under this view, "Politics is...the special province of the statesman, administration of the technical official."[33]

Note the description of administrators as "technical officials" unconcerned with politics. It reflects a conception of administration as entrusted to a-political experts who are resolving empirical—rather than essentially political—questions. This premise is central to Wilson's thought, and it has

broad implications. Wilson argues, for instance, that because administrative questions are technical questions, not political questions, we must "discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials," granting them "large and unhampered discretion."[34] In Wilson's memorable statement, "The cook must be trusted with a large discretion as to the management of the fires and the ovens."[35]

Here, we see Wilson arguing for the second pillar of the administrative state: the delegation of "large and unhampered discretion" to administrative agencies. Under Wilson's view, if so much of modern public policy is the stuff of technical expertise, and if politics would hamper the discovery of those technical solutions, then just as administrators should be insulated from political accountability to the President, they—rather than Congress—should have control over public policy.

Likewise, under Wilson's view, if administration is a matter of technical expertise, it largely lies outside the legal domain of the courts. Wilson explicitly distinguishes between constitutional law and administrative action: "The broad plans of governmental action are not administrative; the detailed execution of such plans is administrative. Constitutions, therefore, properly concern themselves only with those instrumentalities of government which are to control general law."[36] That is to say, constitutional law—and the judicial enforcement of limitations on administrative power—ought not concern itself with "the detailed execution" of legislation. Here we have the seeds of judicial deference to administrative action that eventually manifest themselves in doctrines like *Chevron* and *Auer*.

To be clear, I am not arguing that all four components of the administrative state emerged fully formed out of the mind of Woodrow Wilson. Those four components were constructed out of the materials supplied by many different theorists, and there were innumerable contingent historical events that resulted in the rise of the administrative state as we know it today. But Wilson's article gives us a sense of the early political theory of the administrative state, and I would suggest that Wilson's views live on as part of the DNA of the administrative state. His arguments about the complexity of modern society necessitating a powerful administrative state, the distinction between administrative questions and political questions, and the need for clear principles in administration and the drawbacks of political compromise, are all found in judicial opinions and scholarship defending the administrative state today. Wilson has long since passed from our world, but his ideas remain very much alive.

The Political Theory Opposing the Administrative State

Those ideas were, however, contested by alternative accounts of politics and human nature in 20th-century political theory, though the theorists promulgating those contrary ideas did not always have Wilson in mind. As with the first part of my remarks, I would like to use a single essay as the basis for this second part. Let us turn then to Michael Oakeshott's "Rationalism in Politics."[37] I should preface my remarks here, once again, by acknowledging that there are many strains of political theory that one could choose to contrast with Wilson's views, but I find Oakeshott's essay to be both particularly on-point and too often neglected in American discourse surrounding the administrative state.

Rationalism Defined. Oakeshott begins his essay with his piercing definition of rationalism, which is worth reading in full: A rationalist, he writes, stands:

> for independence of mind on all occasions, for thought free from obligation to any authority save the authority of 'reason'. His circumstances in the modern world have made him contentious: he is the *enemy* of authority, of prejudice, of the merely traditional, customary or habitual. His mental attitude is at once sceptical and optimistic: sceptical, because there is no opinion, no habit, no belief, nothing so firmly rooted or so widely held that he hesitates to question it and to judge it by what he calls his 'reason'; optimistic, because the Rationalist never doubts the power of his 'reason' (when properly applied) to determine the worth of a thing, the truth of an opinion or the propriety of an action.[38]

At first glance, this definition of rationalism—which includes a disparagement of authority—might seem at odds with Wilson's proposal of administrative agencies wielding broad authority, but note that Oakeshott is here describing an antipathy towards *authority over ideas*, a rejection of the authority—even presumptive—of tradition or experience. The rationalist does *not* reject the notion of some people having more political authority than others, and that is the kind of authority Wilson has in mind.

The rationalist, in Oakeshott's words, "has no sense of the cumulation of experience, only of the readiness of experience when it has been converted into a formula: the past is significant to him only as an encumbrance."[39] Rather, the rationalist is characterized by "the rapidity with which he reduces the tangle and variety of experience to a set of principles which he will then attack or defend only upon rational grounds."[40] Oakeshott's description of the rationalist mindset is strikingly similar to Wilson's description of the science of administration: to "rescue executive methods from the confusion and costliness of empirical experiment and set them upon foundations laid deep in stable principle."[41]

Oakeshott says that politics might seem the least-amenable domain of life to rationalism, given how constrained it is by contingent circumstances rather than formulas, but he observes the rationalist does not see it that way.[42] The rationalist sees politics as a form of engineering, characterized by "perfection" and "uniformity."[43] "[M]uch of his political activity consists in bringing the social, political, legal and institutional inheritance of his society before the tribunal of his intellect; and the rest is rational administration...."[44] Here again we hear echoes of Wilson's understanding of rational and efficient administration that is not contaminated by compromises, of administration as a "science." There is an unmistakable strain of arrogance and condescension in the rationalist mindset, as Oakeshott defines it, a dismissiveness towards whatever is found wanting before the tribunal of what the rationalist calls "reason."

And what is the rationalist's form of reasoning? Oakeshott says that the distinction between rationalists and non-rationalists can be understood by distinguishing between two forms of knowledge. The first is technical knowledge, which is characterized by rules that can be learned in a book, remembered, and applied (e.g., cooking recipes, the scientific method, etc.).[45] The other is practical knowledge, which cannot be formulated into rules and is characterized by skills that one learns through experience and apprenticeship (e.g., painting, music, etc.).[46] Oakeshott claims that both forms of knowledge—technical and practical—are necessary to any human activity.[47] The problem, as he sees it, is that the rationalist only acknowledges technical knowledge as true knowledge, ignoring and disparaging practical knowledge.[48]

The Critique of Rationalism. Oakeshott thinks the rationalist approach to politics is both mistaken and dangerous. It is mistaken because we know that practical experience really is necessary to carrying out most, if not all, human tasks well. Oakeshott gives an example that, presumably without intending to, serves as a refutation of Wilson's example of the cook who is entrusted with broad discretion. Oakeshott compares the rationalist to kitchen porters who have been called upon suddenly to stand in for an absent chef.[49] Just because they know recipes from cookbooks does not mean they actually know how to cook, since cooking requires the kind of practical knowledge that comes with experience.[50]

In a passage that eerily foreshadows controversies in our politics today, Oakeshott observes that a rationalist politics is one approving "the claim of the 'scientist' as such (the chemist, the physicist, the economist or the psychologist) to be heard in politics."[51] Think here of our recent experience with the COVID-19 pandemic, in which administrators claiming technical

knowledge demanded that politics conform to their prescriptions, while largely ignoring insights gleaned from practical knowledge—the knowledge of human nature derived through experience. Or consider the demands of agency administrators claiming technical knowledge to reorder America's economy to mitigate climate change or to redefine human nature to advance transgender ideology. These are examples of what Oakeshott has in mind by a rationalist politics.

In his view, rationalism is not just mistaken; it is dangerous. It rests on an identifiable error (i.e., that only technical knowledge matters) that not only leads to erroneous conclusions but, even worse, that cannot be easily corrected, since the cure requires disclaiming rationalism itself.[52] In other words, rationalism is a kind of intellectual trap, which is very difficult for the rationalist to escape.

It also, in Oakeshott's view, inevitably seeks to infect all of education with itself, thereby propagating its error. This is a fascinating conclusion to Oakeshott's essay, and it has proven prescient in many ways. Place the rationalist in control of administration, and we can expect him to use the machinery of public education to spread rationalism throughout society, since the rationalist genuinely believes that only technical knowledge is true knowledge.[53] Customs, traditions, practical experience—all these are set aside in the rationalist approach to education. The first step in the rationalist approach to education is "to administer a purge, to make certain that all prejudices and preconceptions are removed, to lay his foundation upon the unshakable rock of absolute ignorance."[54] Again, I suggest that there are obvious parallels to American debates over the administrative state and public education today.

Finally, notice that we can readily see how Oakeshott's critique of rationalism lends itself to a form of populism. If one of the primary errors—if not *the* principal error—of rationalism is the exclusive reliance on technical knowledge and the disparagement of knowledge gleaned from practical experience, then rationalism will inevitably devolve into a form of elitism. After all, only a privileged class will have access to the technical knowledge, while a key feature of practical knowledge is that it is accessible to all people in their everyday lives. Recall Wilson's description of the popular sovereign as "selfish, ignorant, timid, stubborn, or foolish."[55] These are the words of someone in thrall to rationalism.

Oakeshott, then, helps us understand the implicit premises about epistemology and human nature that undergird the Wilsonian political theory from which we derive so many principles of the administrative state, and we can point to many real-life examples that seem to support Oakeshott's

description of that political theory as rationalist, with the all the flaws of that theory that Oakeshott identifies.

Originalism and the Political Theory of the Administrative State

That leads us to the last part of my lecture: how do these competing political theories—one rationalist and the other non-rationalist—map on to the living constitutionalist/originalist divide?

Living Constitutionalism. Once again, we can look to Wilson to get a sense of the constitutional theory required by his vision of the administrative state. That is because Wilson was not just a theorist of administration; he was also a constitutional theorist who influenced the early form of progressive constitutionalism that continues to have influence today. His speech, "What Is Progress?"[56] delivered during his successful 1912 presidential campaign, is justly famous among scholars for its articulation of a nascent form of living constitutionalism.

In that speech, Wilson begins with the same premise that motivates his advocacy for a powerful administrative state: The world has changed significantly since the Founding, both economically and socially, and the nation's laws and institutions have not kept up.[57] This leads Wilson to distinguish between two ways of thinking about our Constitution: the Newtonian framework and the Darwinian framework.

According to Wilson, the Newtonian framework was the dominant theoretical understanding at the Founding.[58] It saw a constitutional system as composed of clear and unchanging rules, which give order to the system, much like Newton's laws of motion.[59] This understanding of our system led to an emphasis on checks and balances and a separation of powers that placed institutions of government in competition with each other,[60] as ambition counteracted ambition, in Madison's words in *Federalist 51*.[61]

Wilson explicitly rejects this understanding of politics and constitutionalism. Rather, he embraces a Darwinian theoretical framework, which he sees as a "[l]iving political constitution[]" that "must develop" or "evol[ve]."[62] In Wilson's words: "No living thing can have its organs offset against each other, as checks, and live. On the contrary, its life is dependent upon their quick co-operation, their ready response, to the commands of instinct or intelligence, their amicable community of purpose."[63]

Here, Wilson wages a frontal attack on the separation of powers and federalism. If, like Wilson, we see various centers of power within our system as "organs" in the body politic, then they must function as a single entity, not as

rivals for power as envisioned by *Federalist 51*. The concentration of power into the hands of Congress, as well as the delegation of that power from Congress to administrative agencies, is consistent with a constitutional theory that regards the separation of powers and federalism as "fatal"[64]—to use Wilson's word—to the "cooperation" that is "indispensable" to the adaptation and progress of constitutional law.[65]

Wilson's invocation of Darwinism was very common among progressives during the early 20th century, as seen, for example, in the work of John Dewey.[66] These early progressives saw a parallel between a constitution as a living organism and the evolution of species.[67] And just as the evolution of species was understood to adapt living organisms in ways that improved their chances of survival, the progressives of this era saw living constitutionalism as the evolution of constitutional law in the direction of improvement.[68]

But unlike the evolution of species, which occurs naturally and without the species consciously directing its own evolution, the evolution of a constitution requires deliberate human action. Who is to determine how the Constitution will evolve? Because Wilson's goal is for the Constitution to change sufficiently to allow for the rise of the powerful administrative state he believes is necessary, his answer seems to be that the Constitution will evolve to whatever extent agency administrators think necessary for them to carry out their tasks. So it is the experts who occupy positions of power within the administrate state who guide the Constitution's evolution.

Consider this example from *What Is Progress*? Wilson compares the economic system of that time to a "family residence" that was constructed "haphazard[ly]."[69] It is up to society's "engineers"[70]—his word—to:

> undertake…to systematize the foundations of the house, then to thread all the old parts of the structure with the steel which will be laced together in modern fashion, accommodated to all the modern knowledge of structural strength and elasticity, and then slowly change the partitions, relay the walls, let in the light through new apertures, improve the ventilation; until finally, a generation or two from now, the scaffolding will be taken away, and there will be the family in a great building whose noble architecture will at last be disclosed, where men can live as a single community, cooperative as in a perfected, coordinated beehive….[71]

One wonders what is left of the original home after this complete renovation has been completed. When read against the backdrop of Wilson's *Study of Administration* article and his subsequent actions as President, there can

be little doubt that the "engineers" Wilson has in mind are administrative agencies whose expertise allows them to carry out this extensive renovation project, a project that can only occur if the prior constitutional restrictions on the engineers' powers are removed and they are insulated from the non-expert views of those who will live inside the house later on—namely, the American people. And the resulting new house is both a manifestation of, and a cause of, human progress, where we can live in perfect cooperation.

We can see, then, the rationalism implicit in both Wilson's vision of the administrative state and his living constitutionalism. Both share a rationalist's confidence in human progress through history—as represented by the comparison to the evolution of species. That is, both share what John Stuart Mill described as a conception of man as "a progressive being."[72] And with that premise comes a concomitant skepticism of the past, the merely traditional or customary, since the past is by definition dominated by less enlightened thinking.

The rationalism undergirding both the administrative state and living constitutionalism also implies a preference for rule by experts over rule by the people. Both see the messiness and compromises of politics as antithetical to the rational and stable principles that should serve as the foundation of our evolving constitution and of the administrative state.

Originalism. The politico-theoretical premises that tend to undergird originalism, by contrast, are more in line with the non-rationalist conception of knowledge and human nature reflected in Oakeshott's essay. That is not to say that all originalist theories reflect a non-rationalist political theory; some are much more in line with Wilson's vision than with Oakeshott's.[73] But, as a general matter, originalism rests on a political theory quite different from the rationalism that supports both living constitutionalism and the administrative state.

Originalism understands the law of our Constitution to be fixed at its creation.[74] The Constitution's meaning and content remain the same today as they were then, unless they have been lawfully changed in the interim.[75] This necessarily makes originalism a backwards-looking constitutional theory, and that is where its contrast with the rationalism undergirding the administrative state and living constitutionalism becomes clear.

Originalism looks to the past to determine the content of our law today. This posture is antithetical to a rationalist political theory that sees the law of the past as both too simple for our complex society and as less enlightened than a constitution that we could create in the present. By treating law as fixed in the past, originalism reflects an understanding of human nature as susceptible to decay—or "rot" in Justice Antonin Scalia's words[76]—not as

a story of evolution towards inevitable progress. An originalist constitution is a hedge against the possible deterioration of society in the future away from the principles that animated the Constitution at its creation.[77]

Indeed, at its core, originalism presupposes the authority of the dead to impose obligations on the living.[78] It presupposes that decisions made in the past remain binding on us today. But the principal justification for both the administrative state and for living constitutionalism—the rationalist premise that our increasingly complex world requires the constant adaptation of our governing institutions to today's more progressive views—is fundamentally at odds with that originalist premise.

Insofar as originalism is justified by a theory of popular sovereignty—in which the act of popular ratification is necessary to the Constitution's moral legitimacy[79]—originalism is also opposed to the rule of experts championed by the administrative state and by at least some versions of living constitutionalism. This gives originalism a similar kind of populist flavor as Oakeshott's non-rationalist political theory, which is hard to reconcile with Wilson's disdain for popular sovereignty.

None of this is to say that originalism *in application* will always be hostile to a large and powerful administrative state. One could design a constitutional system that specifically authorized a powerful administrative state, and, if it did that, an originalist approach would require safeguarding leviathan. But even in that scenario, whatever limits or structures the hypothetical constitution placed on the administrative state would someday prove inconvenient in responding to some social problem, and the progressive, rationalist ideology of the administrative state would eventually come into conflict with an originalist insistence on obedience to rules laid down in the past.

This hypothetical, however, raises an important question worthy of more attention by originalists than they have devoted to it thus far: What would a constitutional form of administration look like? In other words, what is the *affirmative vision* of administration that originalists and conservatives more generally can embrace? One way to get at this question would be to look to practices of administration in the early republic and see how those practices might be adapted to modern circumstances. I leave these important questions to other scholars and for another day.

Conclusion

Originalism's politico-theoretical premises, then, are hostile to the premises undergirding the administrative state and living constitutionalism. The

concentration of lawmaking power into the hands of the federal legislature, the delegation of that lawmaking power from Congress to administrative agencies, and the insulation of administrative power from presidential and judicial accountability are not just violations of our fundamental positive law—which would be a contingent conflict that could be obviated by amendments to our Constitution. The conflict runs much deeper, to differing conceptions of the human person and of politics. As Wilson recognized, a political theory that elevates a Founding-era conception of our Constitution will always be in conflict with the political theory of living constitutionalism and administrative power.

And that is why the stakes of the Trump Administration's ambitious efforts to dismantle the administrative state are so high. This is not just a matter of clashing interpretations of the scope of administrative authority under our law; it is a clash of opposing political theories.

That is not to say, of course, that originalist judges do or should decide cases by applying political theory to the facts of a case. I strongly oppose such freewheeling normative reasoning by judges in deciding cases. But it is to say that, in applying originalist methods to resolving cases according to law, originalist judges are relying on a constitutional theory whose implicit normative premises are hostile to the political theory of the administrative state, so it should not surprise us that originalism will often stand opposed to the administrative state.

It required two progressive Presidents of extraordinary determination and political skill—Woodrow Wilson and Franklin Delano Roosevelt—to create the administrative state and impose a progressive constitutional and political theory on our structure of government. It stands to reason that it will require another President of extraordinary determination and political skill to undo what his predecessors accomplished.

Whether President Trump's efforts will succeed remains to be seen. If they do, he will rank alongside FDR as a President of transformative significance for American government. There is no doubt that, both as a matter of political theory and constitutional theory, much depends on the outcome of the contest the President has undertaken. Thank you.

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Endnotes

1. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
2. 403 U.S. 602 (1971), *overruled by* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).
3. 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. V. Raimondo, 603 U.S. 369 (2024).
4. *See* J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 Va. L. Rev. 1711, 1735–67 (2021).
5. *See generally* Charles J. Cooper, *Confronting the Administrative State*, Nat. Aff. 96 (Fall 2015).
6. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State (2020).
7. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).
8. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).
9. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936).
10. *See* ALA Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
11. 295 U.S. 602 (1935).
12. 487 U.S. 654 (1988).
13. Auer v. Robbins, 519 U.S. 452 (1997); *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
14. Kisor v. Wilkie, 588 U.S. 558 (2019).
15. Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197 (1887).
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18. *Id.* at 198–200.
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20. *Id.* at 200.
21. *Id.* at 201.
22. 588 U.S. 128, 135 (2019).
23. Wilson, *supra* note 15, at 201–03.
24. *Id.* at 207.
25. *Id.* at 208.
26. *Id.* at 209.
27. *Id.* at 210.
28. *See* Yuval Levin, American Covenant: How the Constitution Unified Our Nation—and Could Again 1–4, 41–63 (2024).
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40. *Id.*
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42. Oakeshott, *supra* note 37, at 7.

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44. *Id.* at 8.
45. *Id.* at 12, 14–15.
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47. *Id.* at 12.
48. *Id.* at 15.
49. *Id.* at 27.
50. *Id.*
51. *Id.*
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53. *Id.* at 38–40.
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57. *Id.* at 33–44.
58. *Id.* at 45.
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61. The Federalist No. 51 (James Madison).
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78. *See generally* Joel Alicea, *Originalism and the Rule of the Dead*, Nat'l Aff. 149 (Spring 2015).
79. *See* Alicea, *supra* note 74, at 24–43.