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Among the controversies surrounding the rise of the administrative state, the role of civil service reform tends to attract little attention. Legal scholars have given considerable attention to the delegation of legislative power to administrative agencies, as well as the President's authority to remove administrative officers, and other legal questions, but the role of civil service in the appointment process is commonly left to scholars in public administration.

Nevertheless, nonpartisan, civil service appointment plays a fundamental role in the dynamics of how the administrative state functions. Given the inevitable limits on presidential oversight of the entire federal bureaucracy, combined with the (increasing) limits on Congress's capacity to conduct oversight, the ability to control the appointment of the administrative state's personnel takes on great importance. Whether these officers are appointed by the President or by a nonpartisan commission on the basis of competitive examinations will determine, to a great extent, the measures pursued by the administration.

The issue of staffing the federal bureaucracy involves much deeper questions than simply the policies to be pursued by the administration, however. The existence of a powerful administrative state bears on questions of constitutional principle, such as the accountability of the administration to the electorate, the representativeness of administrative officers, and the ability of government to address policy questions efficiently and expertly. How the law answers the question of personnel, therefore, will implicate constitutional principles and questions.

Given that these constitutional issues are at stake, as well as questions of policy, it is important to understand the evolution of the civil service system in the United States both historically and theoretically. The underlying principles guiding the selection of administrative personnel have shifted dramatically over the course of American political development, and constitutional principles have been central to the controversies surrounding these shifts.

This article describes the gradual evolution of the United States Civil Service system from a focus on merit to an emphasis on expertise – and back again to merit. While both principles of merit and expertise have been invoked in support of the establishment of a civil

service system, and thus seem to point in the same direction, the shifts between the two have changed the nature of the civil service in important ways. The Pendleton Act's creation of a merit system in 1883 did not enshrine the rule of experts, but was more narrowly focused on purifying administration by removing bare political considerations in the appointment of personnel. Part I of this article describes the approach to administrative personnel before the enactment of the Pendleton Act. The principle of merit or individual competence was followed prior to the election of Andrew Jackson in 1828, when the principle of patronage began its ascendancy.

Part II then explores the rise of civil service reform ideas, focusing on the 1871 civil service reform movement during the Grant Administration, which presaged the debate over the Pendleton Act. Part III explains the politics behind the Pendleton Act and examines the specific provisions of the Act itself. Neither the Pendleton Act nor the ideas which led to it embraced the notion that policy should be made by experts trained in the social sciences. It was merit, not expertise, that inspired the reforms embodied in the Pendleton Act, as illustrated by the relatively small percentage of federal employees actually covered initially by the Act. Part IV argues that the idea of an expert civil service did not emerge until the arguments of Progressive reformers made new arguments about the separation of politics and administration. Both politics and ideas worked together to bring about the expansion of the civil service during the early 20th Century. While Franklin Roosevelt's presidency presents a curious anomaly, the percentage of employees in the merit system quickly increased to the point where the vast majority of federal employees were civil servants.

Part V of the article examines the controversies over the New Deal, the Brownlow Committee, and the Hoover Commission, which sought to reform dramatically the civil service system that had emerged over the previous decades. It also briefly covers the changes in the civil service system that have occurred since the New Deal. Part VI concludes by discussing some of the lessons that emerge from this historical examination of the evolution of the civil service system.

Part I: Competence and Merit in Early American Administration

A. 1879-1828: The De Facto Merit-Based System

The first six Presidents of the United States, from George Washington to John Quincy Adams, generally followed the same approach to administrative appointments. There was no Civil Service Commission or competitive examination system, of course, but these presidents nevertheless sought to make appointments on the basis of individual competence and stability rather than political patronage. As a matter of fact, if not of law, a system of merit generally prevailed in the early republic. In a work regarded as a classic text in public administration, Frederick Mosher characterizes the period from 1789-1829 as a period of “Government by Gentlemen” in the administrative offices.¹ He writes that “Washington himself insisted that no considerations other than ‘fitness of character’ should enter into his nomination for public office, and the evidence indicates that in the main this prescription was upheld.”² Fitness of character, of course, is an ambiguous criterion, and it rested in part on reputation and “local public standing among peers,” a feature which inevitably “brought politicians into administration, there being no conception or practice of neutral expertise.”³ As Herbert Kaufman writes, Washington’s criteria for “fitness, his measures of ability and criteria of competence, were not precisely what ours are today.”⁴ It certainly did not involve expertise, Michael Nelson notes, since the overwhelming majority of personnel were selected with little experience in their areas of jurisdiction, but from families that would be considered “the gentry.”⁵

Fitness of character, however, was “tempered by a sagacious regard for geographic representation” in the administrative offices, Mosher explains.⁶ Political considerations, especially geographic considerations, were on President Washington’s mind when he considered appointments. The new government’s legitimacy and authority would be best established, he thought, if the administration was reflective of the nation as a whole, rather than simply a part of it. Thus, presidents built into their understanding of “competence” some considerations that today would be thought of as political. Administrative officials should be representative, generally, of the people they govern. By the time Thomas Jefferson assumed the presidency in 1801, geographic balance in the civil service was a well-known and accepted principle. As

¹ Frederick C. Mosher, *DEMOCRACY AND THE PUBLIC SERVICE* 58 (1982).

² *Id.*, at 60.

³ Brian J. Cook, *Bureaucracy and Self-Government* 55 (2014).

⁴ Herbert Kaufman, “The Growth of the Federal Personnel System,” in *The Federal Government Service: Its Character, Prestige, and Problems* 22 (Wallace S. Sayre, ed., 1954).

⁵ Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 *Journal of Politics* 747 (1982), at 757-8.

⁶ Mosher, *supra* note X, at 60.

Jefferson wrote to Horatio Gates, “in our country you know, talents alone are not to be the determining circumstance, but a geographical equilibrium is to a certain degree expected. The different parts in the union expect to share the public appointments.”⁷ Jefferson was merely describing the approach taken by Washington and Adams, who in Leonard White’s words “took good care to secure a wide representation. All parts of the country contributed to the new public service, and all sections became acquainted with it.”⁸

Along with the idea of merit-based appointments came the notion of tenure in office. While there was no legal rule limiting the President’s power to remove administrative officials, as a matter of practice removals were scarce. This rule only applied to officials such as clerks, customs employees, surveyors, postal workers, and the like. Cabinet secretaries, ambassadors, and other high-ranking officials were routinely removed from office when the presidency changed hands.⁹ As Mosher summarizes, although lower-level employees could expect to remain in office after a sitting president left office, “The expectancy of job continuity of elite officeholders was, on the average, no greater then [*sic*] than it is for the political executives today.”¹⁰

In summary, the approach of the Federalist Era was to elevate merit, understood as fitness of character, experience, and integrity, combined with geographic considerations to ensure that the new government would be seen as broadly representative of all parts of the nation. These were general tendencies, of course, and should not be overstated. Paul Van Riper cautions, “To say that Federalist office-holders were generally honest and competent is one thing. To infer that Federalist appointments – among them Washington’s – were nonpolitical or were the results of an almost modern conception of a merit system is completely to distort the reality.”¹¹ Carl Friedrich is even more emphatic: “the spoils system in its modern form as a mainstay of political parties was initiated in the period of, if not by, Washington.”¹² Some version of patronage, to be sure, was present during the early republic, but there was a much greater emphasis on ensuring a

⁷ Jefferson to Gates, March 8, 1801 [complete cite]

⁸ Leonard D. White, *The Federalists: A Study in Administrative History* 256-7 (1947).

⁹ *Id.*, at 61-2.

¹⁰ *Id.*, at 62.

¹¹ Paul Van Riper, *History of the United States Civil Service* (1958), at 20.

¹² Carl Friedrich, *The Rise and Decline of the Spoils Tradition*, *Annals of the American Academy of Political and Social Science* 189 (1937), 12.

competent, honest, and representative administration. The Federalist approach combined, under the umbrella of political considerations, considerations of character as well as basic competence, but it did not emphasize the kind of scientific expertise that later civil service reformers would emphasize in the 20th Century.

B. 1828-1871: From Merit to Patronage

The merit-based system established as a matter of practice by Presidents Washington through John Quincy Adams began to transition to a patronage system with the election of Andrew Jackson in 1828. Though he is often understood today as a central figure in the rise of patronage politics, Jackson gave articulation to the constitutional rationale for patronage more than he actually practiced it. Leonard White's administrative history concludes that "the statistics show that the number of removals, though unprecedented, was small in terms of percentage" of employees."¹³ However, Michael Nelson explains, "almost half of those firings took place in the first 18 months" of Jackson's presidency, "thus setting the tone for the administration."¹⁴

More important, Jackson's words portended a reversal of the presumption that officeholders would retain their positions. In his first annual message to Congress Jackson famously asserted that "Offices were not established to give support to any particular men at the public expense. No individual wrong is, therefore, done by removal, since neither appointment nor continuance in office is a matter of right." Jackson proposed to limit the tenure of offices so that administrative officers would be forced to leave their positions after a specified period. This would, Jackson argued, "destroy the idea of property now so generally connected with official station, and...it would, by promoting that rotation which constitutes a leading principle in the republican creed, give healthful action to the system."¹⁵

Jackson's new principle of rotation in office and a more populist administration was a reaction to the excesses of the gentry-based model of administration that predominated under Washington's

¹³ Leonard White, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861* (1954), at 307. See also Joseph Postell, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO AMERICAN CONSTITUTIONALISM* (2017), at 338 n.32; Matthew Crenson, *The Federal Machine: Beginnings of Bureaucracy in Jacksonian America* 51 (1975). Most estimates suggest only about 10 to 20 percent of federal personnel were removed, but the removals were higher among senior officeholders.

¹⁴ Nelson, *supra* note X, at 760.

¹⁵ Jackson, First Annual Message to Congress, December 8, 1829.

(and his successors’) view of “fitness of character.” The notion that the administrative offices should be reserved for the elites quickly evolved into a system of permanent tenure, and even of property (and inheritance) in office.¹⁶ Customs collectors were routinely succeeded by their sons, prompting John Calhoun to write to President James Monroe that “the tendency to hereditary principle...in the inferior offices of our country merits great consideration.” Calhoun warned that this practice threatened to “ripen into a claim on the government” of a right to a government position.¹⁷

Jackson therefore connected removals from office – as well as the appointments to replace those removed – with a notion of republican government that emphasized the accountability and accessibility of government to the people. He largely rejected the notion of expertise in administration, asserting that “The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance.”¹⁸ For Jackson, administrative officers did not need to employ expertise in the execution of their functions, nor did they require much experience to become effective at their jobs. It followed that they could easily be replaced, and that the cost of attaining a more open and accessible government would not be high.

The other advantage of rotation in office, of course, was that it gave party machines greater rewards to offer their most faithful and effective supporters. Jackson’s republican ideal of rotation in office was also referred to as a “spoils system,” based on a famous statement by Senator William Marcy from New York in 1832: “to the victor belong the spoils of the enemy.” This aspect of the patronage system, namely its use by party machines to reward supporters rather than make appointments on the basis of merit and qualification, produced an almost immediate backlash.¹⁹

¹⁶ Nelson, *supra* note X, at 757-9.

¹⁷ Quoted in Leonard White, *Jeffersonians*, 357.

¹⁸ *Id.*

¹⁹ In addition, according to Michael Nelson, it prompted Jacksonian Democrats themselves to create a form of hierarchical, bureaucratic organization in ministerial positions. Because of the use of patronage, many incompetent officials were granted government positions, potentially leading to an incompetent administration that would cause voters to reject the Democrats. To avoid this, Democrats limited the discretion of their patronage appointees through internal rules and regulations. See Nelson, *supra* note X, at 760-1. Crenson similarly notes the beginnings of a more hierarchical and rule-bound administration in the Jacksonian period. See *supra* note X.

Thus, the idea of appointing people to the administration by competitive examinations arose almost simultaneously with the emergence of patronage. Again, according to another scholar's assessment Jackson's own appointments "reflected no less concern about ability and competence than did those of his predecessors."²⁰ Nevertheless, he "became a symbol and guide for his colleagues and successors."²¹ Certainly the federal office-holders took note of Jackson's statements. Henry Clay's assessment was likely exaggerated, but noteworthy: "Among the official corps here there is the greatest solicitude and apprehension. The members of it feel something like the inhabitants of Cairo when the plague breaks out; no one knows who is next to encounter the stroke of death; or which, with many of them is the same thing, to be dismissed from office."²² Coupled with the dramatic struggle over the Second National Bank, in which Jackson asserted an unlimited power to direct and control the discretionary actions of his subordinates in the executive branch, the emergence of patronage threatened to transform the constitutional system into an executive- and party-centered system rather than a congressional system.

An opposing political party, the Whigs, emerged in response to this development, and the leaders of the party focused in part on preserving the independence and integrity of administration. As one Whig senator proclaimed in the debate over the Bank, Jackson should be condemned for referring to the Treasury Secretary "as the Secretary of the President, and not the Secretary of the law."²³ If the President's appointees in the administration were required to simply take orders from the President rather than exercise their discretion according to their own judgment, Whigs argued, "they cannot be regarded as moral, independent, and responsible beings."²⁴ Whigs sought to preserve both a legislative-centered administration and an administration filled with such moral, independent, and responsible officers. In their view, according to Herbert Storing, administration was not "a closed hierarchy leading to the top" but rather "pools of official discretion, loosely connected but largely independent."²⁵

²⁰ Mosher, *supra* note 1, at 65.

²¹ *Id.*

²² Cited in White, JACKSONIANS, *supra* note X, at 330.

²³ Quoted in Cook, *supra* note X, at 78.

²⁴ Henry Clay, quoted in Cook, *supra* note X, at 79.

²⁵ Herbert Storing, *American Statesmanship: Old and New*, in *Bureaucrats, Policy Analysts, Statesmen: Who Leads?* 110 (Robert A. Goldwin, ed., 1980).

In pursuit of this goal, by the 1830s Whig politicians such as Daniel Webster began advocating for competitive examinations for office. Webster went even further and denied the President's constitutional power to remove officers, at least for a time.²⁶ In a few minor areas of the federal service, Whigs successfully lobbied for competitive examinations established by law. In 1853, for instance, Congress passed legislation creating a competitive examination system for clerks. Most of these were oral rather than written examinations, and only 700 clerks were covered by the act.²⁷ Their views on civil service reform would not become mainstream until after the Civil War, as the excesses of the patronage system became more marked and problematic in the eyes of the public.

Part II: Aristocracy and Talent in the Grant Administration

A. The Jenckes Civil Service Proposals

The excesses and corruption of the patronage system were almost immediately apparent, but it took decades to create sufficient political momentum to reform that system. As Michael Nelson writes, “spoils had become an easy target in the years after Jackson.”²⁸ In many cases the corruption was not veiled at all; one “Wanted” ad in a Washington newspaper offered “\$100 cash and 10 per cent of salary for one year...for a Position in any of the Departments.”²⁹ These abuses eventually became so pronounced, however, that they created an opening for reformers seeking to restore the older, more patrician vision for administration.

Thomas Jenckes, a Republican from Rhode Island, is not often credited as a leader of the civil service reform movement, but his efforts over a decade before the Pendleton Act was passed helped to lay the groundwork for later successes. Jenckes was not a progressive, but simply a wealthy New Englander who nostalgically longed for the return of the high-minded and aristocratic approach of the early presidents. He was elected to the House of Representatives in 1862, but lost his seat in 1870 because he refused to engage in patronage politics.³⁰ In an

²⁶ See Postell, *supra* note X, at 108-110. Brian Cook, however, suggests that Webster was eventually “convinced by [Chancellor James] Kent’s insistence that” the Decision of 1789 settled the question of the President’s removal power. See *supra* note X, at 83.

²⁷ Postell, *supra* note X, at 105-6.

²⁸ Nelson, *supra* note X, at 764.

²⁹ Quoted in Nelson, *supra* note X, at 764.

³⁰ Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883* (1961), at 81-2.

important speech in the House in January of 1867, Jenckes made what would become the standard rhetorical case for civil service reform. First, it would make government more efficient. Second, it would increase the level of talent in the federal administration. Third, it would free politicians to do more important work, by alleviating them of the time and energy spent on patronage efforts. Civil service reform, through this lens, would simply make government more efficient and cost-effective. In Jenckes' words on the House floor:

Very few who feel themselves competent to attain eminence or even reputable positions in the learned professions or in business, enter the subordinate grades of the civil service. It has no rewards or honors to stimulate ambition; it gives the individual no position either in society or in state. It must be confessed that this service has sunk into a sort of disrepute....The Government runs every custom-house and considerable post offices with more men and greater pay and with greater loss from inefficiency and dishonesty than every successful individual or corporation manages an equal amount of business....Yet what member of Congress does not find a large portion of his time taken from his legislative duties by the solicitations of office-holders and office-seekers? Who has not felt that his dignity has been lowered, as well as his time wasted...by waiting in the antechambers of Secretaries and heads of bureaus for his turn to see the high official about the appointment to or retention in office of perhaps some deputy collector, assistant assessor, customs inspector, or temporary clerk, whom his political friends recommend as having claims upon his attention?³¹

Jenckes' legislation and his speech, Ari Hoogenboom writes, "proved the prototype of the later Pendleton Act."³² There was no movement on Jenckes' proposals in 1867, but the election of Ulysses S. Grant as President in 1868 seemed to be a critical turning point. Grant was reform-minded on the issue of patronage, willing to take on the Republican "Stalwarts" who supported party machines (efforts which prompted their fellow Republicans to give them the nickname "Half-Breeds").

³¹ Congressional Globe, 39th Cong., 2nd Session, January 29, at 838.

³² Hoogenboom, *supra* note X, at 28.

The opponents of civil service reform predicted Grant's efforts to advance the reforms and sought to preempt those efforts by making constitutional arguments against it. John Logan, for instance, an at-large member of the House from Illinois, attacked the idea of civil service in a January 8, 1869 speech as "bad in theory, wrong in principle, opposed to the genius of our institutions and our people, and probably unconstitutional in its legal aspects."³³ Nevertheless, Grant asked for civil service reform in his 1870 annual message to Congress, and two of his Cabinet secretaries implemented civil service by executive order.³⁴

B. The Grant Civil Service Commission

The reformers' efforts culminated in the creation of the first Civil Service Commission, sometimes called the Grant Civil Service Commission, in 1871. The authority to establish the Commission was given to President Grant in an appropriations rider that grew out of a failed attempt to enact more moderate legislation that would have simply banned congressional solicitations for office.³⁵ Grant used this authority to set up the Commission, but it quickly acknowledged that its powers were merely advisory, limited to preparing rules for the President to apply voluntarily for the exercise of his appointment powers. As controversy embroiled the Commission over whether it could promulgate regulations and administer competitive examinations for the civil service, Attorney General Amos Akerman was called upon to weigh in on legal and constitutional questions. Akerman concluded that the Commission could administer examinations as long as those examinations were not binding on the President's authority.³⁶ If, however, the arrangement "place[d] the power of appointment in that board" it "would be at variance with the Constitution."³⁷

The Commission eventually drafted rules for filling vacancies in the civil service, which included the administration of competitive examinations by boards of examiners in each department. Competitive exams were administered by June of 1872 in the Treasury Department.³⁸ By the middle of Grant's second term, however, congressional support for the

³³ Congressional Globe, 40th Cong., 3rd Session, December 16, 1868, at 119.

³⁴ The two were Interior Secretary Cox and Treasury Secretary Boutwell. Cox's order covered appointments in the Patent Office, Census Bureau, and the Indian Office. See HISTORY OF CIVIL SERVICE MERIT SYSTEMS AND SELECTED FOREIGN COUNTRIES (1976), at 135.

³⁵ See the discussion in Civil Service Merit Systems, *supra* note X, at 138-42; Van Riper, *supra* note X, at 65-70.

³⁶ Civil Service Merit Systems, *supra* note X, at 144.

³⁷ Cited in Postell, *supra* note X, at 138.

³⁸ Civil Service Merit Systems, *supra* note X, at 144-5.

program began to waver. Grant's 1874 message to Congress called upon the legislature to enact positive legislation on civil service, or he would abandon the program entirely. Congress did not act and the Commission became defunct in 1875. The reform movement underwent a brief hiatus for several years, interrupted by the assassination of President James Garfield.

Part III: The Politics of the Pendleton Act

The basics of the story of the Pendleton Act's passage are well known. Garfield was assassinated by a disgruntled office seeker by the name of Charles Guiteau, who was said to have uttered "I am a Stalwart, and [Chester] Arthur is President now" as he surrendered to authorities. Garfield's lengthy death captivated the nation. Patronage practices seemed so out of control to much of the nation that it had claimed a sitting president.

Reformers seized the opportunity to turn Garfield's assassination into support for their cause, and in 1883 the Pendleton Act was enacted by Congress. The story of the Pendleton Act, however, is little-known beyond these basic facts. Two important aspects of the debate merit attention in relation to the evolution of civil service reform. First, politics played a pivotal role in the passage of the law. Democrats wanted to deny the Republican Party the ability to extract "assessments" from their patronage appointees. Republicans, at the same time, sought to lock in their appointments so that they could not be replaced by Democrats. Senator Joseph Brown of Georgia noted this aspect of the issue when he humorously moved, after the passage of the Act, "to strike out the words 'A bill to regulate and improve the civil service of the United States' and insert the words 'A bill to perpetuate in office the Republicans who now control the patronage of the Government.'"³⁹ Ari Hoogenboom explained that civil service concerns "played second place to [the Pendleton Act's] calculated effects on either party."⁴⁰ As one would expect, members of Congress were motivated by immediate partisan considerations as much as they were contemplating the costs and benefits of long-term structural reform.

The second critical aspect of the debate relates to the reasons for establishing a system of competitive examinations in the first place. Merit, not expertise, was the driving consideration for civil service reformers. In particular, the reformers agreed on the need to remedy the moral

³⁹ Cong. Record, 47th Cong., 2nd Session (1883), at 661.

⁴⁰ Hoogenboom, *supra* note X, at 243.

failures spurred by patronage excess, but no such consensus emerged about the need for technocratic expertise. The concern with merit rather than expertise was apparent at multiple stages of the discussion over the Pendleton Act. For instance, an amendment was introduced in the House to ensure that experience that was “practical in character” would be weighed in the evaluation of applicants for administrative positions.⁴¹ Acquiring practical experience, rather than advanced degrees in the social sciences, was the goal of many reformers.

Another indication that the target of the Pendleton Act was focused more on eliminating patronage corruption than creating an expert bureaucracy was the Congress’s discussion of the removal power. Warner Miller, senator from New York, noted during the debates that the Act “leaves it entirely within the power of the president or of the Secretaries or heads of Departments to remove officers even at will.”⁴² While members of Congress wanted political neutrality, they understood this in terms of preventing campaigning and assessments for office, similar to legislation introduced by Senator Trumbull in the 1870s.

In short, as Brian Cook has argued, “moral restoration” was a primary motivation of the civil service reformers who pressed for passage of the Pendleton Act.⁴³ The reformers, he writes, “aimed squarely at the moral degeneracy brought about, they thought, by the controllers of the spoils system the reformers sought to eradicate.”⁴⁴ Concerns over efficiency and expertise were part of some reformers’ vision. These concerns were not mutually exclusive.⁴⁵ But they were distinct, and to the extent that the reformers envisioned moral restoration, they resembled the older leaders’ concern for merit in the Federalist sense – as “fitness of character,” honesty, integrity, and competence.

Consistent with the foregoing, scholarly summaries of the Pendleton Act generally conclude that the Pendleton Act did not mark the beginning of a modern civil service system, and many supporters did not even squint in that direction. Steven Skowronek remarks that “the

⁴¹ Mosher, *supra* note X, at 69.

⁴² Cong. Record, 47th Cong., 2nd Session (1882), at 316

⁴³ See Cook, *supra* note X, at 88-92.

⁴⁴ Cook, *supra* note X, at 89.

⁴⁵ This is a point made well by Cook, *supra* note X, at 90-1, which explains that “the seemingly distinct views of civil service and progressive reformers were significantly intertwined.”

very concept of a merit *system* overstates the achievement of reform in these years.”⁴⁶ Frederick Mosher offers a similar assessment: “the campaign that led to civil service reform...was essentially a negative movement designed to stamp out a system which was disgrace to republican institutions” rather than an attempt to create a highly-skilled bureaucracy.⁴⁷ As Larry Walker summarizes, “The post-Civil War reform movement was fundamentally concerned with the morality and rightness of government, not with its efficiency.”⁴⁸

Again, this is not to say that concerns about efficiency and expertise were absent from the Pendleton Act debates. Many of the reformers had some version of neutral expertise in mind.⁴⁹ Ultimately, however, the majority that supported and enacted the law had more modest aims such as purifying a system that had become corrupted. As Brian Cook summarizes, “the Pendleton Act was a reform of the ‘second state’ rather than of the progressive effort to bring a true administrative, regulatory state into being.”⁵⁰

In the end, therefore, the Pendleton Act stopped well short of setting up a modern civil service. Fewer than 14,000 employees, or a little over 10% of the federal workforce, was placed in the classified service.⁵¹ One provision of the law, however, granted future presidents the discretion to increase that percentage. This provision proved to be of enormous consequence in later expansion of the merit system. Michael Nelson explains that “almost every nineteenth-century executive order subsequent to passage of the [Pendleton] Act dealt with coverage extension.”⁵² It was the political incentives, however, rather than a vigorous defense of expertise, that led to such extensions. During his first term in office, Grover Cleveland used his removal power to fire Republican employees not covered, and then immediately “blanketed” his own appointees to prevent their removal. This practice was followed by nearly every subsequent

⁴⁶ Steven Skowronek, *Building a New American State: The Expansion of National Administrative Capacities* (1982), at 68. Emphasis original.

⁴⁷ Mosher, *supra* note X, at 68. (Internal citations omitted.) See also Dwight Waldo, *The Administrative State* (1947), at 28.

⁴⁸ Walker, *Woodrow Wilson, Progressive Reform, and Public Administration*, 107 *Political Science Quarterly* 509 (1989), at 516.

⁴⁹ See Cook, *supra* note X, at 94-99.

⁵⁰ Cook, *supra* note X, at 102. By “second state” Cook is referring to the more positive and active state of the Progressive era, rather than the more restrained state that preceded it, borrowing from William James Hull Hoffer, *To Enlarge the Machinery of Government: Congressional Debates and the Growth of the American State, 1858-1891* (2007).

⁵¹ See *Civil Service Merit Systems*, *supra* note X, at 3.

⁵² Nelson, *supra* note X, at 767.

president.⁵³ Both politics and a new theory of administrative expertise lent weight to the idea that more of the federal administration should be insulated from political control. At the time of its enactment, however, the Pendleton Act is best understood as aiming for merit than expertise.

Part IV: Progressivism and the Emergence of Expertise

A. The Progressive Theory of Expertise

The explosion of the civil service occurred after the passage of the Pendleton Act, rather than as a direct result of its enactment. One study notes that “from 1883 to 1932 considerable expansion occurred until around 80 percent of Federal employees were under the merit system.”⁵⁴ In part, this was simply due to the political incentives built into the Pendleton Act itself. As noted above, the law authorized presidents to extend the civil service into other areas of the administration, essentially allowing presidents to “lock in” their own appointees by placing them in the merit system after they were appointed. Prior to the Supreme Court’s decision in 1935 in *Humphrey’s Executor*,⁵⁵ of course, subsequent presidents would have the power to remove officers appointed by a previous president, but the incentives to do so would be greatly diminished by the fact that they could not replace those officers with their own political friends. By the end of President McKinley’s first term in office, according to one estimate, the percentage of employees under the merit system had already grown to 41%.⁵⁶ Part of the story of the growth of the civil service, in other words, is simply political rather than philosophical.

A shift in political philosophy, however, would justify further increases in the percentage of covered employees during the administrations of Theodore Roosevelt and Woodrow Wilson. Both presidents were progressives as well as advocates of civil service expansion. (Wilson served as Vice President of the National Civil Service Reform League for two years.) Whereas the earlier justification for civil service reform, during the 1880s, was the elimination of corruption from political patronage, progressives offered a new argument: the need for neutral expertise in administration.

⁵³ Nelson, *supra* note X, at 767.

⁵⁴ Civil Service Merit Systems, *supra* note X, at 8.

⁵⁵ 295 U.S. 602 (1935).

⁵⁶ Civil Service Merit Systems, *supra* note X, at 305.

When progressives commented on the civil service reform efforts of the 1880s, they generally acknowledged it as a good first step towards administrative expertise, but only a first step. In his famous 1887 article “The Study of Administration,” generally acknowledged to be the starting point of American public administration,⁵⁷ Woodrow Wilson wrote that “we must regard civil service reform in its present stages as but a prelude to a fuller administrative reform. We are now rectifying methods of appointment; we must go on to adjust executive functions more fitly and to prescribe better methods of executive organization and action. Civil service reform is thus but a moral preparation for what is to follow....[B]y making the service unpartisan, it is opening the way for making it businesslike.”⁵⁸ Wilson’s distinction between making civil service unpartisan and making it businesslike captured the difference between the Pendleton Act’s advocates and later progressives. As Wilson’s reference to “moral preparation” indicates, the earlier reformers primarily wished to get rid of patronage and return public service to its earlier focus on merit, while the latter aimed to use civil service to implement a new vision for administrative expertise.

Wilson hinted at the future direction of civil service reform in the same essay: “It will be necessary to organize democracy by sending up to the competitive examinations for the civil service men definitely prepared for standing liberal tests as to technical knowledge. A technically schooled civil service will presently have become indispensable.”⁵⁹ In calling for a technically schooled civil service possessing technical knowledge, Wilson sounded less like the advocates of the Pendleton Act and more like European civil service reformers who emphasized the role of the expert in modern governance. The Pendleton Act provided the vehicle for the shift from merit to expertise, but a new way of thinking had to emerge for this shift to occur.

Other progressives came to the same conclusion. Frank Goodnow, in his foundational book *Politics and Administration*, like Wilson saw competitive examinations as but a small part of the larger task of creating an independent administrative power where experts could exercise discretion. As he explained, “Open competitive examinations for entrance into the civil service,

⁵⁷ Leonard White proclaimed that “the study of administration...dates from the brilliant essay by Woodrow Wilson” and Dwight Waldo called Wilson’s “Study of Administration” “the most important document in the development of the field.” White, *Introduction to the Study of Public Administration* (1939), at 10; Waldo, *The Enterprise of Public Administration: A Summary View* (1980), at 67 (emphasis in original).

⁵⁸ Woodrow Wilson, *The Study of Administration*, 2 *Political Science Quarterly* (1887), at 210.

⁵⁹ *Id.*, at 216.

although they embody in the minds of most people all the purposes of civil service reform, are really but a small part of this reform. Its ultimate object is the recognition of a function of government whose discharge, like that of administration of justice, shall be free from the influences of politics.”⁶⁰ Both Goodnow and Wilson ultimately wished for the separation of politics and administration, a separation in which administration would be much freer to act independently than it was in the 19th Century.⁶¹

The paradox in the Progressives’ argument is their attempt to separate politics and administration, and to place administration beyond the reach of political influence, coupled with their robust defense of more direct and pure democracy.⁶² Progressives wanted a more independent, expert, and neutral bureaucracy, but they were concerned about its potentially antibureaucratic character. In various ways, they sought to reassure the people that an expanded and insulated body of administrative experts could still be kept accountable through the directly-elected president.⁶³ This was a “paradox of progressive reform” that ultimately produced “the now infamous politics-administration dichotomy that has bedeviled public administration scholars ever since.”⁶⁴ In spite of the Progressives’ misgivings about the tension between bureaucracy and democracy, however, their emphasis on the scientific character of administration is indicative of an approach “that was far more sweeping in its reliance on neutral expertise and extended tenure in office than Hamilton’s vision and the more general Federalist notion of fitness of character” that predominated in the first decades of the republic.⁶⁵

For Goodnow, Wilson, and other progressives, in short, the civil service reforms of the 1880s were necessary first steps, but only a prelude to, their larger visions for the role administration would assume. As Herbert Kaufman writes, theirs was “The Quest for Neutral

⁶⁰ Goodnow, *Politics and Administration* (1900), at 120.

⁶¹ See Wilson, *Study of Administration*, at 210: “Most important to be observed is the truth already so much and so fortunately insisted upon by our civil service reforms; namely that the 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.” (Emphasis in original.)

⁶² Discussion of this tension is prevalent in much of the scholarship on the Progressive Era, and is treated especially effectively and carefully in Sidney Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy* (2009).

⁶³ See Milkis, *supra* note X.

⁶⁴ Cook, *supra* note X, at 128.

⁶⁵ Cook, *supra* note X, at 128.

Competence” rather than for cleansing the government of corruption.⁶⁶ Their theory led to “the now-familiar politics-administration dichotomy, according to which politics and administration are distinct and separable processes that should therefore be assigned to separate and distinct organs.”⁶⁷ The separation of politics and administration would entail a much greater commitment to keeping politics out of the appointment and removal processes for federal administrative officers. Once Progressive theorists became Progressive presidents, these changes began to accelerate.

B. Progressivism and the Civil Service

With the assistance of civil service reformers, who vigilantly pressed subsequent presidents to extend civil service protections, progressives largely succeeded in insulating administrative officials from presidential control. While President McKinley succeeded in rolling back some civil service protections, “[Theodore] Roosevelt extended the competitive service to numerous positions previously unclassified, as well as returning most of those placed removed [*sic*] during McKinley’s roll-back.”⁶⁸ Roosevelt placed 35,000 positions that were formerly unclassified within the merit system, and during his administration 93,000 new positions created under new federal programs were filled by the merit system.⁶⁹

Wilson’s record on the extension of the civil service was more mixed. Again, this is the result of politics rather than his shift in attitude or thinking. As the first Democratic president in almost two decades, he “was subjected to considerable pressure for spoils” to make up for lost time.⁷⁰ The Democratic Party was generally more willing to engage in spoils, owing to its more populist Jacksonian and Jeffersonian roots. Wilson did go against these trends in his own party on several occasions, most notably in providing for competitive selection of postmasters by executive order in 1917.⁷¹ Much of the work of extending the merit system, moreover, had already been accomplished by the beginning of Wilson’s presidency. When he assumed office in 1913, 60% of employees were under the merit system, and that figure had climbed to 79.7% by

⁶⁶ Herbert Kaufman, *Conflicts in Doctrines of Public Administration*, 50 *American Political Science Review* 1057 (1956), at 1059.

⁶⁷ *Id.*, at 1060.

⁶⁸ History of Civil Service Merit Systems, *supra* note X, at 206.

⁶⁹ *Id.*, at 206-7.

⁷⁰ *Id.*, at 215.

⁷¹ *Id.*, at 217.

the end of Wilson's presidency in 1921, according to one estimate.⁷² Unlike Theodore Roosevelt, Wilson's main contributions to the development of the civil service came from his scholarly and public advocacy, rather than his presidency.⁷³

By the end of the Progressive Era in 1920, the civil service had grown from a small portion of federal employees, under a statute designed merely to cleanse the political system of corruption, into a more modern, technically competent, and neutral civil service separated from political influence. These changes posed a theoretical problem that became apparent only after the dramatic expansion of the administrative state during the New Deal: how to square the existence of an independent bureaucracy with the need for executive organization and accountability.

Part V: A Clash of Ideas: The New Deal and the Brownlow Committee

A. The New Deal and the Merit System

The second term of Franklin Roosevelt is generally regarded as a new phase in the history of the civil service and American public administration. During Roosevelt's first term, curiously, the percentage of civil service employees plummeted, to a low of 60% by 1936. This was primarily due to the creation of a large number of new federal programs and administrative agencies, most of which were exempted by FDR from the merit system. As Paul Van Riper writes, "under FDR and the unprecedented problems of the thirties, all things including the offices, were subordinated to the politics of profound social change. Fortunately for those in the competitive service in 1933, enough new offices were created to forestall a patronage raid of the McKinley variety, but civil service reform was shelved for nearly five years."⁷⁴ Many of the agencies that were created were considered temporary, emergency agencies, which justified exempting them from the merit system.

Nevertheless, deeper concerns about the accountability of the emerging administrative state were also at play. The New Deal displayed the possible tension between the notion of administrative expertise and the ideas of executive leadership and accountability. Some agencies

⁷² Id., at 305.

⁷³ Walker, *supra* note X.

⁷⁴ Van Riper, *supra* note X, at 544.

which were already under the merit system were exempted from those protections during Roosevelt's first term. Congress gave FDR authority to hire additional members of the General Accounting Office outside of the merit system in June of 1934, for instance.⁷⁵ The large-scale exemption of federal employees from civil service protection became an important campaign issue in the 1936 election, and "Roosevelt, realizing his vulnerability on this issue, replied with a precedent-breaking Executive order...requiring all unclassified employees who thereafter might be placed within the classified service to pass at least a non-competitive examination" similar to those required prior to the Civil War.⁷⁶

But it was the creation of the Brownlow Committee, the informal name given to the President's Committee on Administrative Management, in March of 1936, which had the most significant long-term impact. The Brownlow Committee would present a new vision for the civil service that would shift the terms of debate for decades to come.

B. Accountability Returns: The Brownlow Committee Report

The report issued by the Brownlow Committee sparked a controversy that consumed much of Franklin Roosevelt's second term, and eventually produced the Reorganization Act of 1939. As Donald Brand summarizes, the Committee's report "identified the president as manager-in-chief of the federal bureaucracy" and "proposed a variety of reforms intended to enhance the ability of the president to play this role." In so doing, it prompted a "controversy over the role of president as chief administrator that erupted among New Dealers during Franklin Roosevelt's second term in office."⁷⁷

The controversy arose among progressive New Dealers because it divided progressives who were previously united in proposing to eradicate the patronage system that predominated in the 19th Century. While they all agreed that civil service should replace patronage, the difficulty arose in determining whether administrators should be accountable to the chief executive, promoting accountability and efficiency over expertise, or independent from politics, promoting expertise rather than efficiency. Where the Brownlow Commission "criticized independent

⁷⁵ Civil Service Merit Systems, *supra* note X, at 255.

⁷⁶ Van Riper, *supra* note X, at 335.

⁷⁷ Donald Brand, *The President as Chief Administrator: James Landis and the Brownlow Report*, 123 *Political Science Quarterly* 69 (2008), at 71, 70.

regulatory commissions as impediments to the realization of the managerial presidency,” James Landis (a more consistent advocate of the separation of politics and administration) “vigorously defended the commissions, arguing that they provided a means for enhancing the influence of experts in administration.”⁷⁸ In fact, the Brownlow Commission appealed to constitutional language to condemn the independent regulatory commissions as “a headless fourth branch of government, a haphazard deposit of irresponsible agencies and uncoordinated powers.”⁷⁹

While much of this criticism was focused on the removability of the heads of independent commissions, it also implicated larger questions about the future of the civil service. Should the civil service be a cadre of experts insulated from politics through competitive examinations, or should it be subjected to presidential management and control? The Brownlow Committee was the first and most prominent attempt to rein in the earlier progressive arguments about the authority wielded by independent experts in the administration. Indeed, the eminent scholar of public administration Herbert Kaufman identified, in the late 1950s, three core values that had come into conflict in the field of public administration.⁸⁰ These values were “representativeness, neutral competence, and executive leadership.”⁸¹ The ideal of representativeness predominated in the 19th Century, when spoils at the federal level and elections at the local level played the most important role in the selection of administrators.⁸² Now, however, the main conflict was between the values of neutral competence and executive leadership: “the courses of action indicated by the second and third values [neutral competence and executive leadership] have been not only different, but contradictory.”⁸³ The disagreement over the Brownlow Committee’s report was the most prominent indication of that disagreement.

As Kaufman explained, “the great stress on neutral competence” during the Progressive Era “proved to be a mixed blessing.” While it guaranteed greater expertise in administration, it also created fragmentation that “bred chaos...fomented conflict...opened gaps in the provision of service or regulation...was costly...And, most important of all, it led to irresponsibility.”⁸⁴

⁷⁸ Brand, *supra* note X, at 73.

⁷⁹ Report of the President’s Committee on Administrative Management (1937), at 36.

⁸⁰ Kaufman, *supra* note X.

⁸¹ *Id.*, at 1057.

⁸² For elaboration on the representativeness of 19th Century administration at the state and local levels, see Postell, *supra* note X, at 60-73.

⁸³ Kaufman, *supra* note X, at 1057.

⁸⁴ *Id.*, at 1063.

Franklin Roosevelt's attempt to restructure the federal bureaucracy was an attempt to bring executive leadership back to an increasingly leaderless bureaucracy. "Few clearer statements of the executive leadership value than the *Report of the President's Committee on Administrative Management*," he wrote, "have ever been published."⁸⁵

Roosevelt was only partially successful. The Reorganization Act of 1939, which resulted from the controversy over the Brownlow Committee report, authorized the President to submit reorganization plans to Congress for its approval, but Roosevelt's proposal to place the various independent regulatory commissions under the President's authority was rejected by Congress the year before.

Still, the change in emphasis in public administration, from neutral competence to executive management, had important implications for the future of the civil service. As Kaufman concludes, the new emphasis on executive management meant that "the politics-administration dichotomy fell out of favor in public administration, and the doctrine of the continuity of the policy-formulating process, better suited to the aims of executive leadership, began to replace it."⁸⁶ Personnel management took on new importance in public administration literature, and the offices of personnel management in the White House (today, the Office of Personnel Management) began to overtake the Civil Service Commission as the primary influence over civil service adjustments and reforms.

This shift in the intellectual community from neutral competence to presidential management found political expression in the First and Second Hoover Commissions. Although the Commissions were established in part by anti-New Dealers who wanted to curtail the scope and power of New Deal agencies, they quickly turned more to issues of organization and efficiency.⁸⁷ The First Commission's objectives focused on creating simpler structures and more direct accountability of agencies to the President. As Ronald More summarizes, the First

⁸⁵ Id., at 1065.

⁸⁶ Kaufman, *supra* note X, at 1067.

⁸⁷ See Gillian E. Metzger and Kevin M. Stack, *Internal Administrative Law Before and After the APA*, in *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw* 170 (Nicholas R. Parillo, ed., 2017): "the Commission was envisioned as a means of pulling back on the New Deal state. Instead, the Hoover Commission insisted on the importance of a managerial presidency to ensure political accountability, thereby reinforcing that the federal administrative state is here to stay." The story of how the Hoover Commission's anti-New Deal position was moderated is nicely told by William E. Pemberton, *Struggle for the New Deal: Truman and the Hoover Commission*, 16 *Presidential Studies Quarterly* 511 (1986).

Commission called “for an administrative system under the managerial control of the president. Although never mentioned by name, the influence of the 1937 Brownlow Committee report is unmistakable.”⁸⁸ Truman appreciated the Commission’s support for a more managerial presidency, and in 1953, the establishment of Schedule C rolled back merit system protections for many policy-making positions to give the President more influence over policy. This was a central recommendation of the Hoover Commission, formed after World War II to recommend structural changes to the executive branch. One leading scholar writes that the Hoover Commission’s real contribution was “that it masked the managerial presidency with the older values of administrative orthodoxy.”⁸⁹

It has become impossible, since the New Deal, to speak simply of the separation of politics and administration that the earlier progressives advocated for the administrative state. Public administration theory has come to emphasize the importance of presidential management of the administrative state, and deemphasized the role of neutral experts. Gradually, therefore, civil service reforms have brought more of the bureaucracy back under the supervision of the President, culminating in civil service reforms in 1978 creating the Senior Executive Service (SES), a portion of which can be filled through political appointments. This proposal, initially recommended by the Second Hoover Commission, finally made its way into law a few decades later. In short, today, the ideals of expert administration and presidential management are both central to explaining the structure of the civil service in the modern administrative state.

Conclusion: Merit and Expertise in the Administrative State

This brief and necessarily cursory history of civil service reform suggests several lessons for those seeking further reform in an era when the administrative state has become a central point of contention. First, while civil service reform is often portrayed simplistically, as a monolithic movement for neutral competence that sprung out of the events of the early 1880s, the underlying principles of civil service have actually shifted over time. Put differently, neutral competence and a merit system are not necessarily the same thing. Merit was understood broadly at different times in American history; both the Federalist period and the ideas of many

⁸⁸ Ronald C. Moe, *A New Hoover Commission: A Timely Idea or Misdirected Nostalgia?*, 42 *Public Administration Review* 270 (1982), at 272.

⁸⁹ Peri Arnold, *The First Hoover Commission and the Managerial Presidency*, 38 *Journal of Politics* 46 (1976), at 48.

supporters of the Pendleton Act indicate that one can be against patronage without being for neutral expertise.

Second, the development of the civil service over the course of the 20th Century was caused, in part, by the *abandonment* of the oversimplistic politics-administration distinction. Even by the time of the New Deal, problems of executive management were complicating this distinction. Scholars in public administration were well aware of the problems with the distinction, but scholarship outside this field has been insufficiently attentive to the extent to which the distinction was openly questioned less than a few decades after Woodrow Wilson and Frank Goodnow advanced the distinction in their work.

For those seeking to reform the federal bureaucracy today, a brief history of the civil service indicates that the challenge lies in balancing principles that are always to some extent in tension. Administration should be competent and administrators should be chosen by merit, but they also have to be responsive and accountable to the public. Technical expertise surely plays some role in the tasks undertaken by administrative agencies, but the issues agencies address are often political rather than simply technical, and thus technical expertise must be balanced against the need for political judgment. The history of civil service reform suggests that these tensions have always posed a challenge to American public administration because of the peculiar character of our regime and its principles.