

Have the American People Irrevocably Ceded Control of Their Government to the Modern Administrative State?

By Ted Hirt

Administrative Law & Regulation Practice Group

A Review of:

Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century, by John Marini, edited by Ken Masugi
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About the Author:

Ted Hirt is a Professorial Lecturer in Law at the George Washington University Law School. He previously was a career attorney in the United States Department of Justice’s Civil Division for almost 37 years. The views he expresses are his own.

Note from the Editor:

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The past few years have witnessed a surge of writing by conservative intellectuals about the modern administrative state, including how its expansive reach might be constrained or reversed.1 The most recent contribution to this important development in our civic discourse is Professor John Marini’s Unmasking the Administrative State: The Crisis of American Politics in the Twentieth-First Century. Marini contends that our modern centralized administrative state, with the active support of many prominent nineteenth and twentieth century social scientists, upset and supplanted America’s original political theory of liberal constitutionalism, under which our nation had a limited government that distinguished between the public and private spheres and between the state and broader civil society.2 Our nation’s original theory of limited constitutional government, Marini argues, was based on “a reasonable and realistic understanding of the relationship of theory and practice, of ends and means.”3 That understanding was based on the virtue of “prudence, not science,” insofar as prudence “presupposes the possibility of moral virtue to direct men to the right, or good, ends.”4 But the modern administrative state has replaced those principles with reliance on a technocratic bureaucracy that is convinced that rational administration can solve economic and social problems.5 This transformation has replaced the “sovereignty of the people” established in the Constitution with the “sovereignty of government,” under the auspices of the modern rational administrative state.6

Marini is a professor of political science at the University of Nevada, Reno and a Senior Fellow of the Claremont Institute in California. He received his PhD in government at the Claremont Graduate University, and he also has taught at Ohio University and the University of Dallas. During the Reagan Administration, Marini served as a Special Assistant to then-Chairman of the Equal Employment Opportunity Commission, Supreme Court Justice Clarence Thomas.

The book’s editor, Ken Masugi, a Senior Fellow at the Claremont Institute, says in his introduction that, in October 2016, Justice Thomas mentioned him and Marini as having

1 See, e.g., PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018) (hereinafter “Wallison”); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).
2 JOHN MARINI, UNMASKING THE ADMINISTRATIVE STATE: THE CRISIS OF AMERICAN POLITICS IN THE TWENTIETH-FIRST CENTURY (2018) (hereinafter “Marini”) at 5-7.
3 Marini, at 9.
4 Id.
5 Id. at 8-9.
6 Id. at 13.

been his first “mentors” on the Constitution.⁷ *Unmasking the Administrative State* is a compilation of Professor Marini’s essays and presentations, written or delivered during the past several decades.⁸ Although the collection contains material going back to the 1970s, it nevertheless has a contemporary focus. Two chapters offer Marini’s reflections on President Donald Trump’s successful 2016 election campaign and his presidency.⁹ Although the book’s essays address discrete political issues, *Unmasking the Administrative State*’s overall theme is that our modern administrative state is an unconstitutional centralization of political power in the federal bureaucracy.¹⁰

I. HOW DID THE ADMINISTRATIVE STATE TRIUMPH OVER THE CONSTITUTION?

Marini traces the establishment of the modern administrative state in the United States, in large part, back to President Franklin D. Roosevelt’s “reinterpretation” of the Constitution when his administration, supported by Congress, launched the New Deal programs.¹¹ In a September 1932 speech, President Roosevelt asserted that the relationship of the government to the people was essentially contractual—“rulers were accorded power, and the people consented to that power on consideration that they be accorded certain rights.”¹² That formulation enabled the government to determine the conditions of a new social compact, which diminished the authority of the Constitution and undermined popular sovereignty.¹³ This new understanding of the government as the “arbiter” of both economic and political rights enabled the government to place the expertise of the bureaucracy in charge of policymaking, thereby replacing the “moral authority of the people’s compact.”¹⁴

Roosevelt’s political triumph had been preceded by decades of Progressive thinking that posited that rights were not natural or individual in origin, but instead were based in societal norms.¹⁵ The noted philosopher John Dewey criticized the founders for their belief that liberty is derived from natural rights, arguing that their understandings were “historically conditioned” and did not take into account the idea of “historic relativity.”¹⁶ In 1917, the eminent legal scholar Roscoe Pound observed that modern legal philosophy asked for “a definite, deliberate, juristic program as part of an intelligent social program, and expects that program to

take account of the maximum of human demands and to strive to secure the maximum of human wants.”¹⁷

American Progressivism, Marini contends, was the “political manifestation of a theoretical revolution in political thought,” derived ultimately from a “philosophy of History.”¹⁸ The German philosopher Immanuel Kant argued that the moral law could not be established on natural law or natural rights.¹⁹ Progressive intellectuals like Woodrow Wilson understood “natural laws only in terms of science, not ethics or morality,” and they concluded that the founders’ reliance on natural law principles was obsolete and had been superseded by scientific progress.²⁰ The Progressives, influenced by German philosopher Georg Wilhelm Friedrich Hegel, also concluded that the modern state would become the vehicle for progress, with politics and religion replaced by the rational science of economics and society.²¹ American Progressive political scientists believed, like their European counterparts, in a theory of social justice under which the government would provide political solutions to contemporary social and economic problems.²²

Marini points out that one danger of the philosophy of History is that it obscures a correct understanding of the “reality of tyranny” because the philosophy rests on the assumption that rationalism will triumph over time.²³ The noted political scientist Leo Strauss observed that political science failed to recognize the persistence of tyranny across time, and that even though tyrannies like Hitlerism and Stalinism were destroyed, a modern tyranny that relies on science and technology remains an ongoing danger.²⁴ A liberal or constitutional democracy that retains a limited government and the rule of law could be a bulwark against the growth of a modern, centralized administrative state that also could be tyrannical.²⁵

Marini contrasts the philosophy of scientific rationalism with the founders’ alternative vision of a moral law that is derived from the laws of nature.²⁶ The principles of the Declaration of Independence and the political theory embodied in the Constitution rested on the idea that individual natural rights are the best basis to ensure the people’s sovereignty and security.²⁷ In the Declaration, Thomas Jefferson invoked “the Laws of Nature and of Nature’s God,” and the Constitution’s Preamble

7 *Id.* at 1.

8 *Id.* at 2-3.

9 *Id.* at 29-39, 273-86.

10 *Id.* at 6-9, 13.

11 *Id.* at 15-17.

12 *Id.* at 16 (quoting from 1 FRANKLIN D. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* (1938)).

13 *Id.* at 17.

14 *Id.* at 17-18.

15 *Id.* at 18-20.

16 *Id.* at 19-20 (quoting John Dewey, *Liberalism and Social Action*, in 11 *THE LATER WORKS*, ed. Jo Ann Boydston (1987), 25-26).

17 *Id.* at 22 (quoting Roscoe Pound, *Juristic Problems of National Progress*, 22.6 *AM. J. OF SOCIOLOGY* 721-33 (May 1917), available at <https://www.jstor.org/stable/2764004>).

18 *Id.* at 224.

19 *Id.* at 224-25.

20 *Id.* at 225-26.

21 *Id.* at 226-29.

22 *Id.* at 235.

23 *Id.* at 260-61.

24 *Id.* at 260-62.

25 *Id.* at 264-65.

26 *Id.* at 233.

27 *Id.* at 15.

emphasized that the people of the United States had “ordain[ed]” and “establish[ed]” the Constitution, making them sovereign.²⁸ The founders believed that natural rights existed prior to the government’s creation, and that the government’s responsibility was to defend and secure those rights, not to create them.²⁹ The founders intended that all three branches of the newly-formed government would derive their authority from the Constitution, and that the branches would exercise that authority on behalf of the common good.³⁰

The Constitution therefore structured our federal government so that none of the branches could dominate the others, and so that political conflict would be regulated and resolved within that structure.³¹ There would be diverse views of the public good within the government—the separation of powers would ensure that the different branches would not coalesce around a single vision of the common good—and there would be “independent constituencies” in support of each branch.³² This would, by design, make it difficult for the government to create and justify a “unified will” as the basis for a political right to govern.³³

In one essay, *Tocqueville’s Centralized Administration and the “New Despotism,”* Marini illustrates the tension between individual liberty and the pressure toward centralized government through the work of French writer Alexis de Tocqueville, who compared the early American government to the monarchies (and successor governments) of Europe.³⁴ According to Marini, in *The Old Regime and the Revolution and Democracy in America*, Tocqueville observed a “democratic tendency” towards centralized government.³⁵ The French Revolution accelerated that tendency and destroyed the elements of French society that could resist it.³⁶ Tocqueville predicted—with prophetic insight—that socialism and centralization would “thrive on the same soil,” insofar as both ideologies advocate expansive government powers and the elimination of all class distinctions, resulting in a single authority over the public and no outlet for public opinion but the dominant state itself.³⁷

Marini also observes that Tocqueville was impressed by early nineteenth-century America’s local decentralization, which facilitated a “civic spiritedness and love of liberty” that kept individuals from an exclusive focus on their self-interest.³⁸ But Tocqueville was concerned that the loss of that localized power

would enable a centralization that would lead inevitably to despotism.³⁹ Tocqueville also observed that a nation’s laws need to preserve to each citizen a “political existence” that encompasses both rights and duties, with a resulting “civic conscience.”⁴⁰ Functioning within local institutions, citizens can exert their efforts to maintain individual liberties while participating in government.⁴¹

Tocqueville identified an additional danger to democratic societies: the philosophy of human perfectibility, which, when combined with notions of equality, can result in a loss of individual identity and an obsession with unity.⁴² The democratic spirit, when combined with the idea that humans are “endowed” with an “indefinite faculty for improvement,” results in understanding equality as something to be implemented through “uniform human legislation.”⁴³ Centralized government and an isolationist individualism are the ultimate results of such a philosophy.⁴⁴ The two go together because isolation results in dependency on government rather than self-government.⁴⁵ Equality “places men beside one another without a common bond to hold them.”⁴⁶ Tocqueville urged a renewed commitment to individual liberty as the only antidote to a human tendency to accept centralization as a solution to civil society’s challenges.⁴⁷ But Marini also senses in Tocqueville an almost fatalistic acquiescence to the process of centralization and bureaucratization, traceable, Marini contends, to Tocqueville’s acceptance of the view that “will had replaced reason as the distinctive characteristic of man.”⁴⁸

Taken together, the founders’ principles and Tocqueville’s reflections on democracy and equality sharply differ from the Progressives’ “philosophy of History” under which the state would become the rational scientific planner of both law and politics.⁴⁹ In a land governed according to the latter theory, the sovereignty of an enlightened people would be replaced by a government that was increasingly indifferent to their interests and no longer

28 *Id.* at 15-17.

29 *Id.* at 53.

30 *Id.*

31 *Id.* (citing THE FEDERALIST No. 49 (James Madison)).

32 *Id.* at 53-54.

33 *Id.* at 54.

34 *Id.* at 149-75.

35 *Id.* at 151-53.

36 *Id.* at 151.

37 *Id.* at 152.

38 *Id.*

39 *Id.* at 156.

40 *Id.* at 161 (quoting from Roger Boesche, *Tocqueville and Le Commerce: A Newspaper Expressing His Unusual Liberalism*, J. OF THE HIST. OF IDEAS 44 (April-June 1983)).

41 *Id.* at 161-62.

42 *Id.* at 165-66.

43 *Id.* at 165-66 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 427 (trans. Harvey Mansfield and Delba Winthrop 2000)) (hereinafter “*Democracy in America*”).

44 *Id.* at 172 (quoting *Democracy in America*, 641).

45 *Id.* at 173.

46 *Id.* (quoting *Democracy in America*, 485).

47 *Id.* at 174-75.

48 *Id.* at 184. Marini also discusses Tocqueville’s views in a related essay, *On Harvey Mansfield’s Jefferson Lecture: How to Understand Politics*, *Id.* at 177-84, in which Marini salutes the work of renowned political scientist Harvey Mansfield. Mansfield, like Tocqueville, links liberty to “human greatness.” *Id.* at 178.

49 *Id.*

needed to justify its legitimacy or mode of governance to them.⁵⁰ Constitutionalism would thus become a historical anachronism.⁵¹

Marini therefore poses the question of whether the modern administrative state has irrevocably undermined the principles of limited government, separation of powers, American federalism, and self-government.⁵² Marini traces our contemporary plight to our political institutions, and allied constituencies, which have adapted to the centralized bureaucracy and have permitted its continuous expansion.⁵³

II. IS CONGRESS COMPLICIT IN THE EXPANSION OF THE ADMINISTRATIVE STATE?

Just as Progressive thinkers like Woodrow Wilson and political leaders like Franklin D. Roosevelt vigorously advocated creation of an administrative state to address perceived economic and social needs, Congress also has “enabled” the expansion of the administrative state.⁵⁴ Congress initially resisted centralized administration because it wanted to keep its “deliberative, representative, and lawmaking functions.”⁵⁵ With President Lyndon Johnson’s 1964 landslide election victory, however, Congress acquiesced to the expansion of social programs that destroyed federalism and undermined the separation of powers.⁵⁶ With the enactment of Great Society legislation, Congress adapted to a new function as “guardian” of the administrative state.⁵⁷ Congress and the president took for granted the legitimacy of the administrative state, and they no longer questioned whether its centralizing powers were consistent with the Constitution’s limits on such powers.⁵⁸

Marini is pessimistic as to the prospect that Congress will try to dismantle the administrative state.⁵⁹ He believes that the Washington establishment has little incentive to change how it does business.⁶⁰ One obstacle to Congress taking on this responsibility is the federal bureaucracy itself, which, Marini contends, has become an independent political faction.⁶¹ In addition, government is increasingly driven by the necessity of accommodating “various organized, political, economic, demographic, or social” groups that have “coalesced around the administrative state.”⁶² Furthermore, the bureaucracy can

replace political decision-making “by substituting administrative rulemaking for general lawmaking, and rule by expert in place of that of elected official”;⁶³ this enables legislators to avoid accountability to voters for their decisions, as they pass the buck along to unknown administrators who do not have to face reelection.⁶⁴ The representative role of political parties in the national legislative process also has diminished; “bureaucratic patronage became more important than party patronage.”⁶⁵ Members of Congress—and the interest groups that interact with them—have determined that it is more efficient to effect (or resist) policy changes by advocating their views directly to agency officials rather than making their case to the American people.⁶⁶ This focus has contributed to a centralization of policymaking.⁶⁷

In addition, members of Congress face an inherent conflict between advancing the interests of Congress as a functioning, legislating body, and advancing their self-interest by serving the parochial interests of their districts.⁶⁸ The challenge of reinvigorating Congress may thus depend in part on how individual members can be incentivized to make their success more dependent on “institutional performance and less dependent on their personal efforts.”⁶⁹

Congress has also ceded to the federal judiciary the sole responsibility to determine the legitimacy of administrative actions.⁷⁰ The judiciary, in turn, has deferred to Congress’s decisions to delegate wide swaths of its authority to the agencies.⁷¹ The courts, by not holding Congress responsible for enacting “purposely unfinished laws,” allow agencies and affected interest groups to negotiate the rules that govern our society.⁷² The satisfaction of interests replaces the rule of law.⁷³ The political branches and the national political parties, “organized around the private interests of national elites,” have thus created a centralized administrative state that includes various kinds of elites but excludes the broader electorate. The broader electorate, in turn, can access the government only through the political parties, but the parties no longer serve as a true “link” between the people and their government.⁷⁴

In his 1959 book, *Congress and the American Tradition*, James Burnham expressed concern about Congress’s ability to

50 *Id.* at 56.

51 *Id.* at 57.

52 *Id.* at 59.

53 *Id.*

54 *Id.* at 43-49.

55 *Id.* at 43.

56 *Id.* at 61.

57 *Id.* at 43.

58 *Id.* at 45, 69.

59 *Id.* at 47.

60 *Id.*

61 *Id.* at 48.

62 *Id.* at 46.

63 *Id.*

64 *Id.* at 205, 208-09.

65 *Id.* at 43.

66 *Id.* at 77.

67 *Id.*

68 *Id.* at 196.

69 *Id.* (quoting Morris Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in *CONGRESS RECONSIDERED* 345 (ed. Lawrence Dodd and Bruce Oppenheimer, 2d ed., 1981)).

70 *Id.* at 44, 55.

71 *Id.* at 76.

72 *Id.*

73 *Id.* at 77.

74 *Id.*

survive in an era of executive “dominance.”⁷⁵ Burnham advocated a strong Congress that would craft public policy rather than allow the executive branch and administrative agencies to make those judgments.⁷⁶ The problem, Marini observes, is that while Congress has retained its autonomy and authority, it has engaged in a “wholesale delegation” of power to administrative agencies.⁷⁷ Congress is therefore the agencies’ “overseer,” with committees and individual members primarily engaged in overseeing the departments and agencies.⁷⁸ And, although Congress has strengthened its oversight of agencies, individual members only intervene in the “execution phase” of the governing process, leaving policymaking still in agency hands.⁷⁹

Marini identifies several events that contributed to the dilution of congressional authority.⁸⁰ For example, after the 1994 midterm elections, then-Speaker Newt Gingrich and his supporters altered the committee system to centralize control from his office, weakening “deliberation, representation, and the accommodation of interests that culminate in lawmaking on behalf of a public good.”⁸¹ With reduced membership participation and centralization of authority in the Senate and House majority leadership staffs, there is less expertise, more influence by private stakeholders, and ultimately a strengthened administrative state.⁸² Marini also contends that, after the September 11, 2001 terrorist attacks, the George W. Bush presidency expanded executive power through the new Department of Homeland Security and created more opportunities for centralization of power in congressional leadership through its use of emergency powers.⁸³ Marini concludes that it is “politically difficult to defend the principle of constitutionalism when there is no consensus on the necessity of limiting the power of government.”⁸⁴

III. THE ADMINISTRATIVE STATE IN PRACTICE: BUDGETS, BUREAUCRACY, AND IMMIGRATION

Unmasking the Administrative State includes several essays that discuss how the administrative state has compromised our society’s ability to grapple with important public policy problems.⁸⁵ Marini applies his critique of the administrative state’s dominance to these problems.

In *Budgets, Separation of Powers and the Rise of the Administrative State*, Marini explains how the expanding

administrative state has contributed to Congress’s persistent inability to resolve budgetary problems.⁸⁶ The phenomena of federal government shutdowns and the contentious debates over raising the nation’s debt limit are symptoms of the deterioration of our constitutional separation of powers that Marini attributes, in part, to the centralized administrative state.⁸⁷

Marini also situates historic controversies in the context of the problem of bureaucratic dominance. President Richard Nixon clashed with Congress, ultimately leading to his resignation in 1974. Most Americans probably associate this clash with the 1972-74 Watergate scandal, which culminated in the House of Representatives voting to impeach President Nixon for complicity in covering up the June 1972 Watergate Hotel burglary.⁸⁸ For Marini, however, the clash between President Nixon and Congress must be understood in a different context—the legitimacy of presidential power in national politics.⁸⁹ President Nixon claimed that his 1972 election victory was a mandate to curb the federal bureaucracy and centralized power more generally.⁹⁰ Marini argues that the bureaucracy itself played a substantial role in the Watergate crisis.⁹¹

In his 1972 reelection campaign, President Nixon deplored the increasing growth of the size and power of the centralized administration.⁹² Nixon’s solution was to further centralize executive power into the White House and away from the “permanent government.”⁹³ Nixon also intended to reverse the flow of power to Washington by restoring decision-making to the states and localities.⁹⁴ Nixon felt a personal mandate, arising out of his landslide victory over Senator George McGovern, to exercise power as president to achieve those difficult objectives—objectives that certainly would be opposed by political opponents, organized interest groups, elites, and the national media.⁹⁵

Nixon promptly articulated his goal of reversing the “the age of centralism” in American government.⁹⁶ In his January 5, 1973 message to Congress, Nixon deplored the “balkanization of the departments and agencies,” and the loss of independence of state and local governments.⁹⁷ Nixon earlier had attempted to reorganize the executive branch by abolishing several agencies and consolidating their functions.⁹⁸ Nixon’s efforts in 1971

75 *Id.* at 63.

76 *Id.*

77 *Id.* at 65.

78 *Id.*

79 *Id.* at 205.

80 *Id.* at 65-70.

81 *Id.* at 66.

82 *Id.* at 69.

83 *Id.* at 67.

84 *Id.* at 67-68.

85 *Id.* at 81-85 (*Budgets, Separation of Powers and the Rise of the Administrative State*); *id.* at 125-45 (*Politics, Rhetoric, and Legitimacy: The Role of Bureaucracy in the Watergate Affair*).

86 *Id.* at 81-85.

87 *Id.* at 82.

88 *Id.* at 125.

89 *Id.* at 126.

90 *Id.* at 126-27.

91 *Id.* at 127.

92 *Id.* at 132.

93 *Id.*

94 *Id.* at 133.

95 *Id.* at 133-34.

96 *Id.* at 134.

97 *Id.*

98 *Id.* at 135-36.

encountered resistance, so, in 1973, he turned to his own executive powers to accomplish the reorganization of executive agencies.⁹⁹ Nixon's budget for fiscal year 1974 also tried to restore more authority to states and localities.¹⁰⁰ Congress, however, did not react favorably—it counterattacked.¹⁰¹ In February 1974, the Senate voted to require Senate confirmation of the Budget Director, a position that had been filled by presidential appointment, without Senate confirmation, since its creation 52 years before.¹⁰² Thus, one legacy of the Watergate scandal was that a presidential effort to assert control over the administrative state failed.¹⁰³

Marini's most provocative essay addresses the influence of the ideology of the administrative state on our nation's immigration policies.¹⁰⁴ At first (or second) glance, it may be difficult for the reader to understand the relevance of immigration policy to the administrative state. But Marini succeeds in showing how this contentious issue fits within his overall narrative.

Marini contends that the problem of immigration is not intelligible unless one understands what constitutes "the ground of unity or common identity" as a nation.¹⁰⁵ In the founding era, the United States was identified as a "regime of civil and religious liberty," unlike European nations where a common religion was the original basis of citizenship.¹⁰⁶ In 1790, President Washington wrote his famous letter to the Hebrew Congregation in Newport, Rhode Island, in which he identified the United States as the nation in which everyone could "possess alike liberty of conscience and immunities of citizenship," and in which all could exercise "their inherent natural rights," and the government simply required that citizens "who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support."¹⁰⁷ President Abraham Lincoln later reflected that, although nineteenth-century immigrants were not related to the founders by blood, the principles of the Declaration of Independence united immigrants with the native born.¹⁰⁸ America's social compact was founded on ideas of freedom and opportunity rather than birth and privilege.¹⁰⁹

The founders' ideas of natural rights and the social compact that provided the early American understanding of citizenship and immigration were fundamentally altered by the acceptance of

Progressive-era thinking.¹¹⁰ Progressive intellectuals like Herbert Croly viewed the ideal democracy as one in which an individual would "serve the nation in the very act of contributing to his own individual fulfillment."¹¹¹ John Dewey viewed individuals and society as "organic to each other," with the state representing that organized relationship.¹¹² These thinkers and others rejected the idea of a social compact made by individuals, thus repudiating Lincoln's idea of a Union built on that compact.¹¹³ Ironically, Marini notes, some post-Civil War intellectuals, in rejecting Lincoln's equality principle, also endorsed theories of race and color that would restrict immigration to northern Europeans.¹¹⁴

Marini thus characterizes the restrictive Immigration Act of 1924, which imposed strict national and group quotas on immigration, as the culmination of the almost fifty years of an ideology that "celebrated the rational state as the embodiment of the moral will of a people," which will had now been defined by "blood, race, class, or culture."¹¹⁵ In 1916, the *New Republic* editorialized that freedom of migration from one country to another country was an element of nineteenth-century liberalism "that is fated to disappear."¹¹⁶

Immigration policy shifted again, however, with the Immigration and Nationality Act of 1965.¹¹⁷ The national origins quota system was replaced by individual criteria, with an emphasis on admitting immigrants based on their skills.¹¹⁸ But Marini argues that both Presidents John F. Kennedy and Lyndon B. Johnson would have understood that the new immigrants would be "shaped by the expectations created by government, and not those of a free society," thus making those immigrants constituencies for the Democratic Party.¹¹⁹ By denying any "moral basis" for determining the character of prospective citizens, the two presidents promoted policies that would encourage immigrants to seek benefits from, or become dependent on, the administrative state.¹²⁰ It became less important for immigrants to become naturalized citizens or to participate in the political process.¹²¹

99 *Id.*

100 *Id.* at 137-38.

101 *Id.* at 139.

102 *Id.* at 139-40.

103 *Id.* at 141-44.

104 *Id.* at 87-124 (*Progressivism, Immigration, and the Transformation of American Citizenship*).

105 *Id.* at 87.

106 *Id.* at 93.

107 *Id.* at 95 (quoting from THOMAS G. WEST, *VINDICATING THE FOUNDERS* 149 (1997)).

108 *Id.* at 96.

109 *Id.* at 98.

110 *Id.* at 99.

111 *Id.* at 100 (quoting HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 418 (1911)).

112 *Id.* at 102 (quoting from JOHN DEWEY, *THE ETHICS OF DEMOCRACY* 6, 7, 13-14, 15 (1888)).

113 *Id.* at 106.

114 *Id.* at 109-10.

115 *Id.* at 113, 115-18.

116 *Id.* at 114 (quoting from DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 146-47 (2002)).

117 *Id.* at 120-22.

118 *Id.* at 120.

119 *Id.*

120 *Id.* at 120-21.

121 *Id.*

Marini concludes this chapter on a pessimistic note.¹²² In his opinion, the government's efforts to address the problems of citizenship and immigration have not lessened underlying conflicts about the protection of fundamental rights.¹²³ The result has been a correlation of the rights of citizenship with the state or with "group identity."¹²⁴ That places opponents of that policy in jeopardy of being accused of racism.¹²⁵ Accordingly, one legacy of the Progressive understanding of freedom is a modern state in which notions of race and class displace our original understanding of American citizenship that was based on an equality principle.¹²⁶

IV. REVERSING THE EXPANSION OF THE ADMINISTRATIVE STATE

Marini observes that in January 1981, President Ronald Reagan articulated a vigorous denial of the Progressive principle that a bureaucratic government could provide security consistent with the preservation of individual freedom.¹²⁷ Reagan urged a course of action opposite to FDR's New Deal, questioning whether government by "an elite group" was superior to a tradition of self-governance and individual liberty.¹²⁸ Marini credits Reagan with moving public sentiment against the excesses of big government and with reviving a public debate about the importance of limited government in maintaining a free society.¹²⁹

Reagan's concerns about the bureaucratic state and governance by elites foreshadowed—albeit in a different national and global context—the 2016 presidential campaign and the election of President Donald Trump.¹³⁰ It is not surprising that *Unmasking the Administrative State* includes two essays that address our contemporary political situation.¹³¹ The 2016 election, Marini asserts, can be seen as a repudiation of the Progressive policies that have dominated both Democratic and Republican parties in domestic and foreign affairs since the end of the Cold War.¹³²

That repudiation, Marini contends, is also of the nation's governance by "professional elites" and a "policymaking establishment" based predominantly in Washington.¹³³ The authority of intellectuals (liberal and conservative) previously had been unquestioned, and this was particularly pronounced in "official Washington," which had a critical stake in maintaining

the status quo.¹³⁴ But then-candidate Trump challenged even the intellectual authority of the leaders of organized conservatism.¹³⁵ Trump also appealed to American citizens as citizens, not as members of discrete interest groups, and he also avoided making appeals to political leaders and political organizations.¹³⁶ Marini attributes that latter strategy, in part, to Trump's recognition that political parties are weakly linked to the citizenry.¹³⁷ In addition, Marini contends, the political parties themselves have too often agreed with the principles of the Progressives and their intellectual descendants.¹³⁸ The notion of a common good had been eroded in favor of interest group and identity politics, but Trump rejected those categorizations.¹³⁹ Trump's appeal, and electoral success, thus reflected the public's dissatisfaction with cultural transformations that occurred "almost completely outside the political process of mobilizing public opinion and political majorities."¹⁴⁰

Looking forward, Marini suggests some pathways by which the "centralization of politics, economics, administration, and public opinion" may be reversed or modified.¹⁴¹ First and foremost, the power of state and local governments must be restored.¹⁴² There also needs to be a revival of the "ground of politics" in the nation as a whole, an effort that could reinforce distinctions between "the social and the political," and the "public and the private," with a focus on reviving the institutions of civil society.¹⁴³ Indispensable to this mission is a decentralization of authority from Washington, D.C.¹⁴⁴

Marini questions whether conservatism, properly understood, is simply an "antidote to liberalism."¹⁴⁵ He goes on to present his own affirmative vision of conservatism. If conservatism means anything, Marini contends, it must "require a defense of the good as established by a tradition that has preserved the best of the past."¹⁴⁶ That includes a defense of civil and religious liberty, founded in constitutional government.¹⁴⁷ Marini urges conservatives to evaluate President Trump with reference to what he has accomplished since he has been in office.¹⁴⁸ Marini notes that, if he wishes to "restore the political rule of the people

122 *Id.* at 122-24.

123 *Id.*

124 *Id.* at 123.

125 *Id.*

126 *Id.* at 120.

127 *Id.* at 185.

128 *Id.* at 190.

129 *Id.* at 191.

130 *Id.* at 29-30.

131 *Id.* at 29-39 (written in July 2016), 273-86 (written before the 2018 midterm elections).

132 *Id.* at 274.

133 *Id.* at 34, 274.

134 *Id.* at 275.

135 *Id.*

136 *Id.* at 278.

137 *Id.* at 279.

138 *Id.* at 33.

139 *Id.* at 30-32.

140 *Id.* at 38.

141 *Id.* at 276.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 281.

146 *Id.*

147 *Id.*

148 *Id.* at 283.

as a whole,” President Trump needs a “governing coalition” and Congress’s cooperation.¹⁴⁹ This statement, written before the Democrats gained control of the House of Representatives in the 2018 midterm election, may be a statement of impossibility in the short term.

Marini, as a political scientist who has studied the rise of the administrative state over several decades, has succeeded in diagnosing fundamental problems of democracy and accountability in an agency-driven policymaking state. The central question that he poses is how to “restore the political rule of the people as a whole.”¹⁵⁰ *Unmasking the Administrative State* is an erudite, if sometimes esoteric, explanation of political philosophy. That is both a weakness and a strength. It is a strength because Marini offers a historical, systematic analysis of how our nation’s constitutional thinking has evolved. But unfortunately, this book, in my judgment, does not provide a roadmap on how to restore our lost constitutionalism.¹⁵¹

This shortcoming may be the inevitable result of the problem of reconciling democratic processes, embodied in an elected Congress, with Congress’s longstanding pattern of delegating its legislative powers to the presumed expertise of officials within cabinet agencies and so-called independent agencies.¹⁵² Critics and reformers must continue to focus on tangible steps that can reconcile democratic governance with the need to address complex problems in our highly technological society.¹⁵³ Marini has identified one important change in direction—reallocating government power away from the central federal government to states and localities—which could be part of a practical solution to the centralizing of government functions.¹⁵⁴ It remains to be seen how other thinkers will supplement this solution with a more complete vision of renewed constitutionalism.

149 *Id.* at 283-84.

150 *Id.* at 284.

151 Unlike some other critics of the administrative state, Marini does not attempt to document specific failings or instances of overreach by agency officials. *See* Wallison at 2-19.

152 *See* *Gundy v. United States*, 139 S. Ct. 2116, 2129-30 (2019) (holding that a statute authorizing the Attorney General to specify the applicability of various statutory requirements to sex offenders convicted of offenses before the statute’s enactment did not violate the non-delegation doctrine); *see id.* at 2139-41 (Gorsuch, J., dissenting) (criticizing Supreme Court jurisprudence that has upheld the constitutionality of statutory delegations of authority to agencies).

153 *See* THE FEDERALIST NO. 37 (James Madison) (“Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government.”).

154 *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS, STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17 (2018) (explaining that state constitutional law “respects and honors” differences between and among States “by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history”); *Id.* at 213-14 (emphasizing how our constitutional structure, including federalism, preserves liberty).

