The Democratic Reconstruction of the Hegelian State in American Progressive Political Thought

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Abstract: Both critics and defenders of the modern American administrative state have recognized the influence of Hegelian ideas upon the American progressives. But existing scholarship on this connection has not delved into the institutional details of Hegelian political theory and its transformation in progressivism. This article traces the continuities and adaptations between Hegelian and American progressive theories of the administrative state through three conceptual pairs: individual rights and social welfare, civil society and the state, and legislation and execution. For both German Hegelian legal scholars and the American Hegelian progressives, these conceptual pairs staked out the basic normative and institutional tensions underlying the modern state. The progressives, however, gave these concepts a democratic interpretation, and thus sought to involve the public at multiple levels of the policy-making process. This Hegelian progressive theory provides a compelling basis for a public philosophy of the contemporary American state.

I. Introduction: The Shadow of Hegel on the American Administrative State

The German intellectual foundations of the American administrative state have proved ideologically contentious in recent years. Scholars such as Ronald Pescritto, Tiffany Jones Miller, Philip Hamburger, and Jean Yarbrough have argued that the American progressives introduced
dangerous, unconstitutional ideas about governmental power into the American context.\textsuperscript{1} They maintain that the progressives supplanted the Anglo-American heritage of natural rights, negative liberty, the separation of powers, and limited government with a Hegelian philosophy emphasizing the social and historical foundations of rights, a positive conception of freedom, and the necessity of an activist administrative state. The general thrust of this literature is to link the contemporary American state with the philosophy of American progressivism, and then to link progressivism to a supposedly authoritarian line of thought. The critique of progressive Hegelianism thus serves a broader conservative effort to delegitimize the contemporary American administrative state. At the same time, scholars more sympathetic to the progressive project, such as James Kloppenberg and Marc Stears, show some embarrassment at Hegel’s influence, and do not delve beyond a gloss of his metaphysics into a more serious engagement with the institutional features of his political theory.\textsuperscript{2} The discomfort over Hegel’s influence on the progressives is symptomatic of a more general anxiety about the administrative state, even among those who are not categorically opposed to an activist role for government. The state is seen to fit awkwardly with the constitutional scheme, to threaten the rule of law, and to undermine individual and collective autonomy.\textsuperscript{3}

The legacy of Hegel in American political thought is thus intertwined with persistent questions about the legitimacy of the American administrative state. This article challenges conservative indictments and liberal anxieties


concerning Hegel’s influence with a more positive assessment of the appropriation and transformation of his ideas in American progressivism. Whereas conservative critics have damned the American administrative state for its connection to progressive Hegelianism, and sympathetic critics of the state have wrung their hands over its fraught Germanic roots, I argue that Hegel set out a balanced and compelling vision that the progressives adapted and improved upon. Hegel articulated the requirements of individual freedom into a constitutional scheme which institutionalized conflicting demands for predictable and responsive law, negative and positive liberty, and public and private social ordering. Hegel, however, failed to recognize the link between individual freedom and collective self-determination. The progressives cured this democratic deficit in Hegel’s theory by envisioning a state that would be thoroughly permeated by public deliberation and participation. This democratic interpretation of progressivism challenges those who see the progressives as technocrats who worshiped the bureaucratic class to the exclusion of public participation and control.4

The reading of Hegel which informs my interpretation of progressivism is selective and, in some respects, controversial. It is selective in that it isolates those themes in Hegel which were elaborated by three nineteenth-century German public-law scholars—Lorenz von Stein, Robert von Mohl, and Rudolf von Gneist. Their applications of Hegelian ideas to problems of German constitutional and administrative law serve as a fulcrum in this study not because they fully captured the intentions of Hegel’s philosophical project, but rather because of their influence on American progressivism. My reading is controversial in that I focus on the conceptual and institutional tensions that drive Hegel’s analysis, rather than on its attempts at holistic reconciliation.5 This interpretive emphasis serves to identify some of the sources of


contemporary ambivalence about the administrative state, and to throw into relief the progressive efforts to grapple with them through democratic means.

In section II, I offer a brief reconstruction of Hegel’s political philosophy, highlighting three central conceptual oppositions: that between individual rights and social welfare; that between civil society and the state; and that between legislative authorization and executive discretion. For each pair, I show how Mohl, Stein, and Gneist built upon and elaborated Hegelian ideas. I argue that the German Hegelian vision sought to preserve the tension within each of these conceptual oppositions in service of the underlying ideal of individual freedom. In section III, I show how Woodrow Wilson, John Dewey, Frank Goodnow, and Mary Parker Follett adapted Hegel’s ideas. Their effort to democratize the Hegelian state resulted in distinctive normative visions and institutional arrangements which altered, but preserved, the dyadic relationships Hegel had introduced. In the conclusion, I suggest that their Hegelian progressive vision provides a promising set of background norms for contemporary American constitutionalism and the reform of our administrative state.

II. Hegel and German Public-Law Scholarship: Dualisms of the Liberal Rechtsstaat

Hegel’s *Philosophy of Right* sets out three conceptual pairings which have become definitive for understanding the purpose, structure, and problems confronting the administrative state: (1) individual rights and social welfare, (2) civil society and state, and (3) legislation and execution. In this section, I examine Hegel’s conceptual frame and show how it was adopted and elaborated by three key German public-law scholars: Stein, Gneist, and Mohl. These scholars represent a politically liberal, constitutionalist reading of Hegel, motivated in part by their political background: they each participated in the failed revolution of 1848–49, and sought to preserve its spirit in a constitutional monarchy which would regulate society while remaining constrained by the rule of law and respect for individual rights.


7Michael Stolleis notes that Gneist and Stein “were active participants in the Revolution of 1849 and bore the negative career consequences of this participation for some years later. Both were liberals of a Hegelian stamp who sought, each in his own way, to conquer the basic problems of their time, that is, the character of the
They are worth exploring not only for their exposition of Hegelian views and their importance to the development of German public law, but because of their influence on progressives such as Woodrow Wilson and Frank Goodnow, whose ideas I analyze in section III.

1. Liberal Rights and Social Welfare as Dimensions of Individual Freedom

For Hegel, individual freedom is defined as an activity of “self-determination.”

Understood as such, freedom requires not only the absence of coercive restraint, but also the capacity to engage in rational, purposive activity.

The classical liberal rights of property and contract lay the foundation for such activity by giving legal subjects an “external sphere of freedom.”

Through these rights, which Hegel calls “abstract right,” the agent is able to “be a person and respect others as persons.”

Abstract right furnishes a condition of formal legal equality, in which each person must recognize the autonomy of others and interact with them on that basis. While Hegel regards liberal rights as a product of historical development, he confers upon them universal, though circumscribed, value as preconditions for individuals to experience their own autonomy in and through their contractual relationships with others.

Though he is therefore a critic of theories of natural law, he remains
deeply committed to individual rights as institutional preconditions for the development of the free will.\textsuperscript{13}

The legal equality afforded by liberal rights provides the normative background for the social sphere of civil society (\textit{bürgerliche Gesellschaft}), in which individuals are able to satisfy one another’s wants through the “system of needs” of the marketplace.\textsuperscript{14} Nevertheless, Hegel observes that liberal rights have a destructive influence on individual freedom if they are not complemented and constrained by social institutions that serve to align private liberty with the public good. He argues that classical liberal entitlements create vast inequalities and antagonisms and complex systems of economic organization within civil society which prevent individuals from exercising their rational agency: “When the activity of civil society is unrestricted… the specialization and limitation of work also increase, as do likewise the dependence and want of the class which is tied to such work; this in turn leads to the inability to feel and enjoy the wider freedoms, and particularly the spiritual advantages, of civil society.”\textsuperscript{15} The operation of the marketplace does not provide everyone with the material goods necessary for them to have meaningful ownership over their actions and life plans.\textsuperscript{16} Thus, alongside a legal system which protects rights to property and contract, individual freedom also requires a public authority, or “police” (\textit{Polizei}), which provides these essential goods and regulates the market to ensure that its tendency towards inequality is minimized.\textsuperscript{17}

Mohl applied this Hegelian understanding in his path-breaking work on administrative law, \textit{Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates} (Police-science according to the principles of the Rechtsstaat).\textsuperscript{18} The idea of the \textit{Rechtsstaat}—meaning a state under the rule of law—came to be and remains today a defining feature of German constitutional and administrative law, requiring legislative control over administrative action, rights are “abstract” and “negative” universals, which must be complemented by “more concrete,” positive institutions of family, society, and state in order for the concept of freedom to be fully realized (ibid., §§29–30).


\textsuperscript{14}Hegel, \textit{Philosophy of Right}, §§189–95.

\textsuperscript{15}Ibid., §243.

\textsuperscript{16}Ibid., §§236–43.

\textsuperscript{17}Ibid., §§231–45. \textit{Polizei} was a general term for the regulatory functions of the state in nineteenth-century Germany, and served as the foundation for the development of German administrative law (\textit{Verwaltungsrecht}). See Michael Stolleis, “Was bedeutet Normsetzung bei Polizeyordnung der frühen Neuzeit?,” in \textit{Ausgewählte Aufsätze und Beiträge}, ed. Stefan Ruppert and Miloš Vec (Frankfurt: Klostermann, 2011), 1:219–39.

the separation of powers, and judicial protection of fundamental rights. Mohl followed Hegel in arguing that “the freedom of the citizen is the foundation of the whole Rechtsstaat.” Like Hegel, he understood freedom as requiring both a sphere of independence and the provision of the social requisites of rational agency: “the state leads its members in two ways. First it has to ensure that they will not be forcefully disturbed in the pursuit of the rational and permitted development and use of their powers by the wrongful wills of others. Second, it must complement the insufficiency of individual powers to achieve rational life-goals through the use of the comprehensive authority entrusted to it.” As we shall see, this dualistic account of freedom would require liberal legislation that set out the judicially enforceable rights of citizens, and social legislation which delegated significant authority to executive officers to determine and provide the material requisites for citizens’ rational agency.

Gneist gave institutional shape to the conflict between individual rights and social welfare with his description of the proper role of the courts in relation to administrative action. Like Mohl and Hegel, he observed a basic distinction between the values of individual autonomy and social well-being. Gneist therefore sought to develop principles for administrative courts tasked with adjudicating between the public interest in welfare promotion and individual rights. But the protection such courts afforded would be different, and more qualified, than the protection afforded in civil courts: “All controls of the state administration are determined for the protection of the collective as well as the individual. When, in contested questions, this order grants subjects legal hearing... this happens (as in the criminal process) to secure a corresponding implementation of the law.” Rights were to be qualified and balanced against public interests by giving the individual the right to a hearing to contest and if possible refute the legal basis of an administrative action infringing upon his sphere of private autonomy.

2. Civil Society and State as Target and Agent of Administrative Action

Hegel describes civil society as an economic system that is essential for the exercise of individual freedom, but which also undermines it in significant...
ways. In civil society, individuals act as “private persons, who have their own interest as their end.” As we have seen, civil society is liable to render inoperative the freedoms it grants because of divergence between the price mechanism and the material requirements of rational agency. The state ensures that civil society does not take away with one hand what it gives with the other. It stands above civil society as “the actuality of concrete freedom.” In Hegel’s view the state is not merely, as it would be for Max Weber, a “monopoly on the legitimate means of violence,” but rather an ethical structure in which individuals’ status as free beings finds recognition and expression. Whereas individuals within the realm of the economic market are unfree to the extent of their inability to function as fully rational agents, and unequal to the extent of their disparate income and capital, in the state they recognize one another on equal terms as free members of the political community. The state’s constitutional structure cabins the mechanisms of civil society within an “organic” political order. The state is organic not in the sense that it is somehow natural or biological, but rather in the sense that it embodies a coherent institutional rationality through its simultaneous differentiation and integration of political functions.

Hegel therefore departs from classical liberal political theories in insisting that the state does not exist merely as a necessary means to provide security, the conditions for commodious exchange, and the satisfaction of private interests. The state also embodies and asserts the requirements of freedom and equal recognition above and beyond the reciprocal satisfaction of needs based on contracts. It enables individuals to lead a “universal life,” to engage in “self-determining action in accordance with laws and principles based on thought.” Whereas the interdependence of individuals is only implicit in workings of the market, which enables one individual to satisfy the needs of another, in the state it is explicitly known and commonly willed in laws, constitutional structure, and public consciousness.

The relationship between the state and civil society is a complex amalgam of reinforcement and transformation. The state secures civil society through the statutory codification of private law and the administration of justice in

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25 Ibid., §260.
27 Hegel, *Philosophy of Right*, §286.
28 Ibid., §258A.
Publicly known laws and adjudicatory procedures give reality and enforceability to the formal equality and freedom of individuals. At the same time that the state institutes the requirements of economic liberty and formal freedom, however, it regulates and intervenes in civil society in the interests of social welfare. These two functions are in potential conflict. To the extent that the state qualifies rights to property and contract by considerations of public welfare, or deprives individuals of their entitlements through taxation in order to fund public programs, it curtails and may even distort the functioning of economic civil society. There is thus a tension between the society-preserving and society-transforming aspects of the state.

Hegel mediates the fraught relationship between these two entities through various forms of collective social life. Between the state and civil society, Hegel describes a sphere of “corporations,” which are politically recognized trade and professional associations. Through these corporations and other associations and community organizations, individuals are able to think of their individual needs in relation to the needs of similarly situated individuals, and thus to develop a social identity and interest that can inform their political stance. But Hegel leaves underdetermined the degree to which the freedom and equality of political citizenship authorizes or even requires the state’s intervention into and transformation of civil society.

Hegel’s distinction between state and civil society would prove central to German administrative-law scholarship. Gneist asserted that “the ‘state’ is independently posited in the ethical nature of humanity, whereas society is grounded in the system of its needs.” Likewise, Lorenz von Stein saw civil society as an antagonistic totality and the state as an organic unity, whose administration would help to resolve social tensions. But Stein, more than Gneist, recognized a dialectical relationship between society and state, as social interests came to permeate the state, and the state took on a more active role in society: “Between these two great factors—the particularity of actual existence, which pervades the state, and the unity of the will of the state, which rules over such particularity—there takes place a continual, never ceasing struggle, in which the two elements reciprocally fulfill one another in the service of the highest idea of personal development, with or

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without consciousness.”

For both Stein and Gneist, the distinction between state and society served to orient the regulatory purposes of administration. Administrative authorities exercised the state’s claim to intervene in society in order to address and mitigate social conflict and inequality. Thus, it became possible to distinguish “public law” (öffentliches Recht), understood as the rules concerning the relationship between the state and its subjects, from “private law” (Privatrecht), understood as the rules of civil society, concerning the relationships between individuals.

3. Legislation, Execution, and the Need for Administrative Discretion

Hegel’s state is a constitutional monarchy, with a separation between an executive power, a legislative power, and a sovereign power. His organic concept of the constitutional state required that the separation of powers be preserved but qualified, so as to ensure both the intelligibility of state action and its coherence as a source of political order: “while the powers of the state must be clearly distinguished, each must form a whole within itself and contain the other moments within it. When we speak of the distinct activities of these powers, we must not fall into the monumental error of taking this to mean that each power should exist independently and in abstraction.” His point here is that while the powers can and must be institutionally distinguished from one another, so as to give political power a rational form, no absolute and categorical line can be drawn between them; an effort to do so will prevent the state from functioning as a unified political entity. Hegel therefore embraces the modern constitutional requirement that political functions must be differentiated, but remains attentive to the ways in which each power shades into and partakes of the others at the definitional limits between them.

37The state Hegel describes in the Philosophy of Right was not, as some commentators have assumed, simply a copy of the Prussian state of his time. Rather, it represents Hegel’s “constitutional plan” for Prussia in an era of political reform. See Gertrude Lübbe-Wolff, “Hegels Staatsrecht als Stellungsnahme im ersten preussischen Verfassungskampf,” Zeitschrift für philosophische Forschung 35 (1981): 476. That Hegel was not simply idealizing the Prussian state can be seen, for example, from the fact that he provided for a form of representative government which was absent in Prussia at the time.
38Hegel, Philosophy of Right, §272A (H).
39It is not accurate to claim, as Philip Hamburger does, that “Hegel dismissed the conventional separation of powers as incompatible with state unity” (Is Administrative Law Unlawful?, 449). It is more accurate to say that Hegel dismissed what M. J. C. Vile calls the “pure” as opposed to “partial” separation of powers, as did most thinkers who relied upon this constitutional mechanism. See M. J. C. Vile,
The legislative power is generically defined as “the power to determine and establish the universal”; the executive power is defined as “the subsumption of particular spheres and individual cases under the universal.”\footnote{Hegel, \textit{Philosophy of Right}, §273.} The legislature, which is composed of representatives of social estates, has the power to frame general statutes governing both civil law and public administrative law. The executive power includes the court system and administrative agencies, which Hegel calls the “police.”\footnote{Ibid., §287.} While Hegel formally gives ultimate executive authority to the monarch, to “say ‘yes’ and dot the ‘i,’” he invests substantive control in a council of administrative advisors who head functionally differentiated administrative departments.\footnote{Ibid., §§287–90.}

The reason the legislative and executive power cannot be absolutely separated from one another, despite their formal conceptual distinction, is that universal legislation must leave substantive regulatory determinations to the discretion of executive authorities in order to retain its generality:

It is possible to distinguish in general terms between what is the object of universal legislation and what should be left to the direction of administrative bodies or to any kind of government regulation, in that the former includes only what is universal in content—i.e. legal determinations—whereas the latter includes the particular ways and means by which the measures are \textit{implemented}. The distinction is not entirely determinate, however, if only because a law, in order to be a law, must be more than just commandment in general..., i.e. it must be determinate in itself; but the more determinate it is, the more nearly capable its content will be of being implemented as it stands. At the same time, however, so far reaching a determination as this would give laws an empirical aspect which would necessarily be subject to alteration when they were actually implemented, and this would detract from their character as general laws.\footnote{Ibid., §299A.}

The regulation of civil society thus requires leaving a significant degree of discretionary, quasi-lawmaking power to administrative agencies, in order to preserve the formal generality and stability of legislative enactments, while at the same time permitting the state to be responsive to changes in circumstance and divergent realms of application. As a consequence, Hegel insists that public administration must be more than a purely technical task. Public officials must be “educated in ethics and in thought,” such that they can use sound judgment to resolve issues left indeterminate by the legislature.\footnote{Ibid., §296.}
Mohl would adopt a similar view to Hegel, arguing that the executive must be constrained by statutes, but would have to fill out statutory mandates with administrative measures: “The configuration of general principles can and must arise from statutes; but if one wants to avoid the danger of placing restraints upon rather than providing advantages to the subjects, or of providing absolutely no determinations on important matters, then one must settle for statutes which set out the essential features, and leave the implementation of these in individual cases to [administrative] ordinances.”45 In order to remain sensitive to individual cases and emerging needs while preserving the general application of legislative norms, statutes must leave room for administrative judgment to interpret the meaning of legal commands at the stage of implementation. This meant a substantial delegation of the power to determine the will of the state from the legislative organ to executive agencies and their officers: “The need arises in the area of police action to bring into force independent changes of the state will, which do not rely upon statutes, without the use of the legislative organ.”46

Stein was more enamored than Mohl of executive independence because he saw the monarch as a neutral power who could mitigate the tensions between social classes through his executive officers.47 He therefore went further than Mohl in emphasizing administrative autonomy, maintaining that “for the executive power, the simple execution of existing law does not suffice, rather... at almost all points it goes beyond the law, and thus has a law-fulfilling and in part law-substituting function.”48 Even for Stein, however, clear legislative commands were obligatory and binding upon the executive. The executive could supplement the laws and infuse them with the unifying spirit of the crown, but it could not contradict them. For the executive power was merely the “deed” of the state, which was bound to adhere to the “will” of the state, as expressed in legislation.49 This understanding of administrative

45Mohl, *Die Polizeiwissenschaft*, 45.
46Ibid.
47As the German legal scholar Ernst Forsthoff observed shortly after the founding of the West German Federal Republic, “We encounter the first conception of a social constitutional state in the shape of constitutional monarchy in the work of Lorenz von Stein. Starting out from the dialectical contradiction between the state, based upon civic equality, and society, in which a condition of natural difference prevailed, he saw the social task of the state as the hindrance of the development of legal classes and thus the removal or impairment of civil equality. That is only possible, if in the state there exists a will, a decisive instance which considers all interests and is obliged to the whole. This instance was for Stein the monarch who was abstracted from every social class” (Ernst Forsthoff, “Begriff und Wesen des sozialen Rechtsstaates,” in *Veröffentlichungen der Vereinigung des Deutschen Staatsrechtslehrer*, vol. 12 [Berlin: de Gruyter, 1954], 13; my translation).
law would inform early twentieth-century German positivism, as theorists of the Rechtsstaat maintained a formal commitment to legislative supremacy over execution but made room for considerable administrative discretion.50

4. Normative Aspirations and Limitations of the Hegelian Framework

The three conceptual pairings of rights and welfare, society and state, and legislation and execution evince a certain symmetry: each one designates an apparently irresolvable tension between two concepts which are essentially valuable to modern political order, and yet are potentially antagonistic to one another. The German Hegelian theorists held these pairings in productive tension with one another, such that a space for individual agency could be forged amid the competing claims of negative liberty and public welfare, of legal generality and administrative sensitivity to social context, and of private and public authority. Their solicitude for individual rights and legal constraints on state action did not mean that they rejected all forms of state interventions into society, intrusions upon private rights in the public interest, or the necessity of a degree of discretionary administrative authority—far from it. Rather, in their effort to describe and justify the administrative functions of the modern state, they were always conscious of countervailing values and institutions.

The three conceptual pairings the German Hegelians diagnosed tend to track one another. To the extent that the state intervenes in the economic order of civil society in the interests of social welfare, more discretion falls to executive administration to fill out the details of statutory enactments. This is because the more the state attempts to achieve distributive justice rather than corrective justice, and the more it regulates private economic activity according to programmatic goals, the more complex and polycentric its regulatory tasks become.51 The crafting of general rules to reshape social relations according to programmatic goals usually does not permit detailed and contextually sensitive statutory specification of regulatory means. As state intervention increases, so too then does the sphere of administrative judgment.

50 As Richard Thoma put it, “the statute provides the frame in which administration unfolds its free purposive activity. This frame reaches so far as to distribute to the organs of the executive authority accordingly far reaching powers to issue ordinances, individual orders, dispensations, and legal changes” (Richard Thoma, “Rechtsstaatsidee und Verwaltungsrechtswissenschaft,” Jahrbuch des öffentliches Rechts 4 [1910]: 204; my translation).

Hegelian political philosophy, however, stresses the importance of preserving the tension within each pair. The total domination of civil society by the state would undermine freedom by depriving individuals of any sphere of independence from political commands; the complete absence of statutory control would deprive state action of the lawlike and predictable quality that makes purposive rational agency possible. From the Hegelian perspective, the central challenge for the activist regulatory state is to preserve a degree of legislative control over administration and to recognize and respect individual rights when the state intervenes to preserve social welfare.

The nineteenth-century German Hegelian framework, however, remains deeply antidemocratic. Though Hegel supports the separation of powers, the rule of law, and the defense of individual rights, he derided the concept of popular sovereignty: “popular sovereignty is one of those confused thoughts which are based on a garbled notion of the people. Without its monarch and that articulation of the whole which is necessarily and immediately associated with monarchy, the people is a formless mass.” Hegel argued that the monarch provided a necessary personification of the state as a singular will, and connected the political community to the immediate “naturalness” of a living personality and noble family. The idea that sovereignty must reside in a single person, rather than a community, is linked with a dubious argument of his mature political theory, namely: if the principle of individual free will underlies the state, then the state itself must be embodied in an individual will in order to adequately reflect its normative foundation.

Hegel offers no convincing defense for this proposition. Hegel likewise critiques public opinion as a kind of accidental knowledge, which “deserved to be respected as well as despised.” The role of political representation and legislative deliberation is therefore not to incorporate and give coercive backing to public opinion, but rather to “permit[] public opinion to arrive for the first time at true thoughts and insight.” Both in his doctrine of monarchical sovereignty and in his critique of public opinion, therefore, the people appear principally as passive subjects of authorities whose commands they are bound to respect as expression of their own will. Hegel’s commitment to the philosophy of the subject leads him to give

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52On the function of the rule of law for preserving rational agency, see Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1963), 9.
53Hegel, Philosophy of Right, §279A.
54Ibid., §280.
55Ibid., §279.
56Ibid., §§317–18.
57Ibid., §315. See also Jürgen Habermas, Structural Transformation of the Public Sphere, trans. Thomas Burger (Cambridge, MA: MIT Press, 1989), 117–23.
political authority to the opinions of one person, rather than to the intersubjec-
tively formed opinions of the people as a whole.\textsuperscript{58} These antis民主 aspects of Hegel's theory have been justly criticized.\textsuperscript{59} If, as Hegel insists, the underlying \textit{telos} of political order is individual self-
determination, this cannot be accomplished merely symbolically, by placing sovereignty in a singular will whose only claim to rule is hereditary, or habitually, by training individuals to identify with the laws of the state without meaningful opportunities for critique or transformation. Self-determination requires the active and reflective engagement of individuals in the construction, interpretation, and maintenance of the laws that bind them. For otherwise, the individual is determined by agents and forces external to herself, rather than by her own will. Without significant public participation in the deliberations of the state, the laws appear to citizens either as mere constraints or as customary norms which individuals are powerless to assess and to change. Hegel and the Hegelian public-law scholars may have shied away from such conclusions either for practical political reasons, out of a genuine aversion to popular control of the state, or out of a quasi-Platonic, metaphysical identification of the state with a singular subject. Whatever the reason, however, their liberal \textit{Rechtsstaat} was not a democratic one. It was in this respect that the American progressives would depart from German liberal Hegelianism most radically.

III. The Hegelian Progressives: Conceptual Continuities and Democratic Adaptations

From the publication of Woodrow Wilson's \textit{“The Study of Administration”} in 1887 to the publication of John Dewey's \textit{Individualism, Old and New} in 1930, American progressives adopted and adapted certain crucial aspects of Hegelian social, political, and legal theory in their effort to legitimate the expansion of the American administrative state. The basic facts of this influence are known. Wilson directly quoted Hegel and Stein in the \textit{“The Study of Administration.”}\textsuperscript{60} Dewey lectured on Hegel and acknowledged that Hegel

\textsuperscript{58}It is noteworthy that Hegel at one point compares the monarchical principle to public opinion: “We have considered subjectivity once already in connection with the monarch at the apex of the state. Its other aspect is its arbitrary appearance in public opinion as the most external manifestation” (\textit{Philosophy of Right}, §320A).


had left “a permanent deposit” in his thinking, even after he abandoned Hegelian metaphysics for pragmatism. Goodnow studied with Gneist in Berlin and shared with Hegel a sense of the necessary independence of administrative officials. Mary Parker Follett relied on Hegelian ideas to develop her theory of “The New State.” As both critics and sympathetic readers have recognized, these thinkers drew upon Hegel to emphasize the importance of state action to realize a positive conception of human freedom and to qualify the American constitutional emphasis on constrained government power and classical liberal rights. But existing scholarship on the Hegelian motifs in progressivism, emphasizing the continuity between the two and remaining at a mostly abstract level, is inadequately attuned to the important transformations and adaptations which occurred when these thinkers synthesized Hegelian ideas with their American commitment to democratic self-government.

The progressives’ injection of democratic values provided ways of mediating, without eradicating, Hegel’s constitutive tensions. Individual rights and social welfare would be mediated through democratically enacted legislation that provided for rights to challenge administrative action through administrative, rather than judicial, adjudication. The relationship between state and civil society would be mediated through a participatory administrative process that included affected social groups in policymaking. The relationship between legislation and execution would be mediated by a president who played an active but indirect role in both legislation and administration. Democracy in the progressive state thus was not identified solely with legislative or presidential control, but rather was understood as a process of bringing public opinion to bear on the state in multiple, complementary institutional settings.


1. Individual Rights and Social Welfare: Towards an Administrative Due Process

The American Hegelians, like their German cousins, understood the regulatory function of the modern state as guided by two distinct dimensions of the underlying norm of individual freedom: individual rights and social welfare. They understood “social welfare,” however, not as an objective value to be determined by the monarchical executive or his ministerial subordinates. Rather, the people was the self-conscious source of the definition of the public good. Thus, Wilson stated in *Constitutional Government in the United States* that “a constitutional government is one whose powers have been adapted to the interests of the people and to the maintenance of individual liberty.”\(^{64}\) Accepting an active role for the state in securing the general public interest, Wilson nevertheless rejected any thoroughgoing subordination of individual rights to the collective good. In *The State*, he therefore criticized socialism for involving too great a sacrifice of individual autonomy; rather, “A truer doctrine must be found, which gives wide freedom to the individual for his self-development and yet guards that freedom against the competition that kills, and reduces the antagonism between self-development and social development to a minimum.”\(^{65}\)

Dewey, more explicitly than Wilson, followed Hegel in understanding individual rights and social welfare as two dimensions of individual freedom. In *Ethics*, cowritten with James Tufts, he argued that “exemption from restraint and interference with overt action is only a condition, though an absolutely indispensable one, of effective freedom. The latter requires (1) positive control of the resources necessary to carry purpose into effect, possession of the means to satisfy desires; and (2) mental equipment with the trained powers of initiative and reflection requisite for free preference and for circumspect and far reaching desires.”\(^{66}\) Dewey therefore appropriated Hegel’s notion that freedom required not only “abstract right,” or what Dewey called “legal freedom,” but also certain material goods and intellectual capacities which often could be furnished to all only with the purposive intervention of government.


\(^{66}\)John Dewey and James H. Tufts, *Ethics* (New York: Henry Holt, 1908), 438. Dewey and Tufts cite Hegel’s *Philosophy of Right* as a source for part 3 of the book, “The World of Action.” I refer to Dewey as the author here because, as the preface states (vi), he was the principal author of the particular sections of the book in which administration, and political institutions more broadly, are discussed.
Whereas Hegel, however, had merely reconstructed the justification of the welfare state from a philosophical standpoint, Dewey democratized this analysis by arguing that the need for the administrative state had actually become perceptible to the democratic public, thus motivating activist intervention: “it is the possession by the more favored individuals in society of an effectual freedom to do and to enjoy things with respect to which the masses have only a formal and legal freedom that arouses a sense of inequity, and that stirs the social judgment and will to such reforms of law, of administration and economic conditions as will transform the empty freedom of less favored individuals into constructive social realities.”

Whereas Hegel had castigated public opinion for its contingency and ignorance, Dewey saw public opinion as the self-conscious source of the administrative state’s legitimate claims to activist intervention.

The question remained how the institutions of the state were to negotiate the trade-offs and interaction between individual rights and social welfare. Frank Goodnow, who among the American Hegelians was both the most singly focused on administration and had the most legal training, tackled this question. Like Wilson and Dewey, Goodnow emphasized the dual norms of individual rights and social welfare, but sought to untether individual rights from natural law, and to anchor social welfare in the self-understandings of the democratic public. He thus understood the aims of administrative law to be “governmental efficiency, individual liberty, and social well-being, as interpreted by the body representative of public opinion.” “Social well-being” was thus not an objective good to be discerned by public officials trained in Hegel’s political philosophy, but rather an intersubjective good to be determined by the public and articulated in legislation.

Goodnow observed that this question of social well-being, and the role of the government in its promotion, had increased profoundly in importance with rapid industrialization and urbanization. He thus sought to examine the legal feasibility of administrative efforts regarding commercial regulation and public-welfare provision. This survey of administrative law raised constitutional questions, for the Constitution set boundaries upon the capacity of the federal government and the states to hand adjudicatory power to

67Dewey and Tufts, Ethics, 439.

68While I emphasize the continuities between this set of progressive thinkers, an important difference is worth noting: Dewey and Follett tended to treat individual freedom and democratic governance as fully compatible ideals, whereas Wilson and Goodnow saw individual rights and democracy as distinct and potentially conflicting constitutional norms. In the conclusion, I argue that individual rights should be seen as a preconditions for democratic governance, which therefore delimit governmental power in extreme cases.

administrative bodies. Goodnow argued that the individual rights to life, liberty, and property enshrined in the Constitution must be and could be interpreted so as to minimize the conflict between them and the efficient implementation of democratically determined social goals. He complained that the immediate availability of judicial review of the determinations of administrative officers undermined the effective implementation of democratic will, because it introduced burdensome costs on public agencies. But he acknowledged that aggressive judicial review of administrative agencies was motivated by a legitimate concern to safeguard individual autonomy, and that the lack of deference to administrative determinations was due to the “informality of existing administrative procedure.”70 He therefore hoped that “when we develop an administrative procedure which is reasonably regardful of private rights, e.g. notice and a hearing to the person affected by the administrative determination, it may well be that the courts will change their attitude and come to the conclusion that the changed and complex conditions of modern life… should have an effect both on the constitutional rights of individuals and on the powers and procedure of administrative authorities.”71

In the same way that Gneist had sought to grant individuals access to administrative courts rather than regular civil courts, Goodnow argued for a formalization of administrative procedure which would better ensure individual-rights protection, without resorting to cumbersome litigation in the regular court system. Goodnow’s plea for formalizing administrative hearings bearing on constitutional rights was motivated principally by a desire to accommodate legitimate demands for rights protection with the most efficient possible implementation of democratic conceptions of social welfare. Whereas Gneist insisted upon independent administrative courts, therefore, Goodnow was willing to leave rights protection to internal administrative adjudications.

2. Civil Society and State: Softening the Binary

The progressives’ democratic adaptation of Hegel’s distinction between civil society and the state was more significant and fraught with difficulties than their interpretation of the conflict between individual rights and social welfare. Wilson, in “The Study of Administration,” observed that “where government once might follow the whims of a court, it must now follow the views of a nation. And those views are steadily widening to new conceptions of state duty. … The idea of the state and the consequent ideal of its duty are undergoing noteworthy change; and ‘the idea of the state is the conscience of administration.’ Seeing every day new things which the state ought to do,

70 Frank Goodnow, Social Reform and the Constitution (New York: Macmillan, 1911), 230.
71 Ibid., 231.
the next thing is to see clearly how it ought to do them.”72 The uncited quotation here was from Stein, who argued that public officials, separated from economic society and operating under the authority of the sovereign monarch, had a “free view into the future, whereas the confusion of the present makes us insecure about the truth and value of momentary doubts.”73 The German Hegelian tradition had relied upon the separate, public-regarding identity and universal ethos of the administrative class to regulate civil society in the interests of individual freedom. Wilson, however, applied this idea to a context in which the regulation of civil society was something explicitly demanded by the democratic public. In order to remain true to the democratic spirit of American government, administration would therefore have to remain more tightly bound to, rather than separated from, the civil society it regulated: “administration in the United States must remain sensitive at all points to public opinion. ... The ideal for us is a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with popular thought, by means of election and constant public counsel, as to find arbitrariness or class spirit out of the question.”74

Though Wilson therefore adopted a Hegelian conception of the state as an ethically charged political unity, he tethered it more closely to civil society. Thus, in The State, he says that “society is an organism, government its organ”; and “The state exists for the sake of society, not society for the sake of the state.”75 These propositions depart widely from Hegel’s view, in which civil society lacked organic character insofar as it was organized by the antagonistic principles of the marketplace. Indeed, Hegel had posited that the state, rather than society, was the seat of organic unity, as it provided a set of integrated political institutions through which the life of the nation could evolve. Wilson’s democratic emphasis, laying stress upon the people as the source of political legitimacy, in effect inverted the Hegelian view. Wilson sought to retain the Hegelian idea of an administrative state with the power to regulate society in the interests of freedom, but deprived the state and its personnel of its independence from, and superior normative legitimacy to, the society it regulated. He did not jettison the idea of

74Wilson, “The Study of Administration,” 217. Because Wilson’s article was occasioned in part by contemporaneous merit-based civil-service reform, I interpret him to refer to the election only of legislators and the president, rather than administrators themselves.
75Wilson, The State, 576, 735.
administrative independence entirely, but this ideal stood in tension with the need to keep the state accountable to its regulatory object.

A similar adaptation can be seen in Dewey’s political thought. In *Ethics*, Dewey explicitly adopted Hegel’s distinction between “civil society and the political state” as complementary institutional settings for the realization of human freedom:

> Freedom… implies a public order which guarantees, defines, and enforces rights and obligations. This public order has a twofold relation to rights and duties: (1) As the social counterpart of their exercise by individuals, it constitutes Civil Society. … (2) The public order also fixes the fundamental terms and conditions on which at any given time rights are exercised and remedies secured; it is organized for the purpose of defining the basic methods of exercising the activities of its constituent elements, individual and corporate. In this aspect it is the State.

Dewey thus saw civil society and state as different tiers of a unified social order—“the public.” This was a subtle but important departure from Hegel. Though Hegel similarly understood civil society and the state each as moments of a common “ethical life,” he nonetheless treated them as categorically distinct. Civil society was for him an economic order, grounded in the private interests of individuals and in their reciprocal satisfaction through the unconscious workings of market mechanisms. The Hegelian state, by contrast, was a political order, in which the universal interest of all members of the political community, above and beyond their economic advantage, was commonly known and explicitly willed into existence through the institutions of government. For Dewey, by contrast, state and civil society could be distinguished only by their level of generality, not by the forms of social interdependence they embodied. As a consequence, Dewey acknowledged that “no hard and fast line can be drawn between civil society and the State,” ultimately distinguishing the two by degree rather than kind.

This same paradigm can be seen in Dewey’s greatest work of political theory, *The Public and Its Problems*. Dewey again offered a Hegelian analysis of civil society, arguing that contractual relations between individuals create negative externalities for others, and that such consequences necessitate public agencies to address the failures of the economic market. But he objected to philosophies like Hegel’s which led to a “magnified idealization of

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76 Dewey and Tufts, *Ethics*, 451. Though “civil society” may have carried a broader meaning in early nineteenth-century America—connoting religious organizations and other forms of private order outside the state—Dewey uses the term in more or less the same sense as Hegel, to refer to the institutions of the market and various forms of civic associations that grow from it (ibid., 451–555).

77 Ibid., 451.

78 Ibid., 473.
the state,” instead describing the state as an institutional expression of an otherwise inchoate “public”: “The lasting, extensive consequences of associated activity bring into existence a public. In itself it is unorganized and formless. By means of officials and their special powers it becomes a state. A public articulated and operating through representative officers is the state.”\textsuperscript{79} In the same way that Wilson had reduced the state to an organ of the social organism, then, Dewey deflated Hegel’s state into a mere “articulation” of the public.

His reduction in the stature of the state was similarly motivated by an effort to democratize the Hegelian view. Dewey therefore adopted Hegel’s position that classical liberal rights were both a requirement for and a potential obstacle to individual freedom, but gave this critique a democratic gloss: “the same forces which have brought about the forms of democratic government, general suffrage, executives and legislators chosen by majority vote, have also brought about conditions which halt the social and humane ideals that demand the utilization of government as the genuine instrumentality of an inclusive and fraternally associated public. The new age of human relationships has no political agencies worthy of it. The democratic public is still largely inchoate and unorganized.”\textsuperscript{80} The challenge for Dewey was therefore not to envision an administrative state which would paternalistically regulate civil society in order to restructure it according to a universal class’s conception of the requirements of freedom. Rather, it was to conceive of an administrative state which would intervene into civil society in a democratically legitimate manner.

This project had concrete implications for Dewey’s vision of administration. Dewey emphasized that expert management alone could not solve public problems; that “in the absence of an articulate voice on the part of the masses... the wise cease to be wise,” for it is impossible for administrative experts “to secure a monopoly of such knowledge as must be used for the regulation of common affairs.”\textsuperscript{81} Thus, “No government by experts in which the masses do not have a chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in a way which forces the administrative specialist to take account of the needs.”\textsuperscript{82} Dewey envisioned an administrative process which brought the democratic public into dialogue with administrative agencies, in order to ensure that public officials were informed of social needs and values, and at the same time to educate the public about solutions to its common concerns. Mary Parker Follett pursued a similar line with her idea of introducing “experience meetings” into administrative decision-making:

\textsuperscript{80}Ibid., 109.
\textsuperscript{81}Ibid., 206.
\textsuperscript{82}Ibid., 208.
“The first step in these would be to present the subject under consideration in such a way as to show clearly its relation to our daily lives. ... The second step would be for each one of us to find in our own experience anything that would throw light on the question.”

This participatory project took on a corporate form. In *Individualism Old and New*, Dewey argued for a more social conception of individual freedom, urging Americans to “cease opposing the socially corporate to the individual.” He thus drew on the British pluralist attempt to emphasize trade unions and other forms of corporate membership as the building blocks of modern society. Follett likewise developed a concept of politics based upon what she called the “group principle” — the notion that “individuals are created by reciprocal interplay.” Hegel had anticipated this pluralistic theory with his idea that vocational associations could mediate between civil society and the state and provide a check on administrative power. But, unlike the British pluralists, he had maintained the authority of the state above and beyond these groups. Follett and Dewey sided with Hegel, and against the pluralists, in arguing that the state must remain in a normatively superior position in relation to other forms of social grouping, in order to bring these civil associations into harmony and to address power imbalances among them. As Follett put it, “The outcome of group particularism is the balance of power theory, perhaps the most pernicious part of the pluralists’ doctrine. The pluralist state is to be composed of sovereign groups. What is their life to be? They are to be left to fight, to compete, or, word most favored by this school, to balance.” Follett sought to avoid this slide from pluralist bargaining to interest-group domination by preserving the politically superior position of the state in relation to the groups it regulated.

While Wilson’s, Dewey’s, and Follett’s idea of a democratized administrative state was a brilliant stroke of institutional imagination, it was a fragile project. If, as they suggested, the state became deeply integrated with civil society through public participation in administration, the power imbalances within civil society would threaten to overtake the state. Once administrators were no longer thought of along the lines of Hegel’s removed “universal class,” relying upon their independent ethic and expertise to make sound

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88 Ibid., 308.
judgments, but rather were held accountable to the diverse views, interests, and specialized knowledge of groups within the civil society, the potential would exist for the state to merely perpetuate the inequalities and antagonism which already existed in the society it regulated. These progressive thinkers were certainly aware of the problem of corporate power and its potential to control public policy. But they did not explain how administration could be open to supervision and review by social groups, and yet remain autonomous from the disproportionate influence of those interests which were more powerful and less diffuse.89 Though they lacked convincing institutional solutions to this problem, they set out clear criteria for a democratic form of administration: it must draw its democratic legitimacy not merely from the legislature nor from the president, but also from the direct participation of members of the public in administrative proceedings on equal terms.

3. Legislation and Execution: The Problem of Administrative Discretion and Presidential Power

The progressives’ adaptation of Hegelian concepts to the democratic context also had significant consequences for their understanding of the relationship between legislation and execution. As we have seen, Hegel and his German followers placed great importance upon the priority of legislation and yet recognized that a significant sphere of discretion must be left to executive agencies to interpret and apply the laws. Wilson, too, would adopt this stance in understanding the proper role of administration. His notes for his 1892 lectures at Johns Hopkins state that “the scope of administration is... largely defined and limited... to the laws, to which it is of course subject; but serving the State, not the law-making body in the State, and possessing a life not resident in the statutes.”90 This meant that “administration cannot wait upon legislation, but must be given leave, or take it, to proceed without specific warrant in giving effect to the characteristic life of the State.”91 Wilson therefore envisioned a state in which the legislature would retain a kind of formal control over administration, but in practice administrative agencies would have discretion to interpret broad delegations of power in ways suitable to the relevant circumstances.

Goodnow, similarly, relied upon on Stein’s distinction between legislation and execution as the “will” and the “deed” of the state to argue for a mixture of legislative control and administrative independence. On the one hand, he argued that “popular government requires that it is the executing

91Ibid., 121.
authority which shall be subordinate to the expressing authority, since the latter in the nature of things can be made much more representative of the people than can the executive authority.92 This implied that the legislature, “the organ whose main duty it is to express the will of the state, has usually the power to control in one way or another the execution of the state will by that organ to which such execution is in the main entrusted.”93

Goodnow thus subtly transformed a logical proposition of Hegelian constitutionalism—that the legislative universal must govern over the executive particular—into a democratic constitutional norm—that legislation must govern execution because the legislature best represents the diverse views of the democratic public. At the same time, however, Goodnow insisted that administration needed to be separated from political control in order to efficiently implement the democratic will: “While… in the interest of securing the execution of state will, politics should have a control over administration, in the interest both of popular government and efficient administration, that control should not be permitted to extend beyond the limits necessary in order that the legitimate purpose of its existence be fulfilled.”94 The democratic state at once required and delimited political control of administration. Too loose a control would be despotic, undermining both individual liberty and democratic sovereignty; too great a control would prevent the efficient implementation of democratic will by turning its administrative implementation into a mere tool for partisan politics.95

In the American context, however, political control could not be equated with legislative control. For the American president was a democratically elected official whose claim to speak on behalf of the people competed with that of Congress. Whereas Hegel’s chief executive was a passive monarch who merely said yes and dotted the i, the American president was a publicly accountable official with a national electoral constituency. How was this political aspect of the executive branch to comport with the administrative implementation of legislation? Was the president merely charged with faithfully executing the “will” expressed in legislation by Congress, or did

93Ibid., 17.
94Ibid., 38.
95As Goodnow stated elsewhere, “There has been a continuous attempt on the part of the people to control the discretion of administration in the exercise of the sovereign powers of the state. This attempt has resulted in a formation of a new body of law which determines and delimits administrative action and discretion; and this body of law is made as a general thing by the legislature, the representative of the people and the supposed protector of individual rights. The administration is thus brought within the law, but it does not lose its position as the representative of the sovereign power” (Frank Goodnow, Comparative Administrative Law, vol. 1 [New York: Putnam’s Sons, 1986], 11).
he, too, play a part in expressing the will of the democratic state? Goodnow sought to distinguish between “execution” and “administration,” and thus to separate administrative agencies within the executive branch from the direct control of the president. But the distinction between functions of “an executive character” and administrative functions remained elusive.96

Wilson resolved the issue by suggesting that the president had a significant legislative role to play as a national representative of public opinion, but only a minor role as an administrative executive. Wilson argued that the president could be a leader both of his political party and of the nation by “being a spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statements of policy which will enable it to form judgments alike of party and of men.”97 The president, through the use of argument, persuasion, and rhetoric during and between elections, would inspire and enliven the deliberative democratic foundations of the state.98 He would be a policymaker more than an administrator, mitigating popular opinion in favor of his party’s legislative program. In this capacity, the president would only succeed as a leader to the extent that he “rightly interpret[s] the national thought.”99

As regards his administrative functions, however, Wilson argued that the president’s role was necessarily more limited. With the expansion of administrative tasks that attended the early growth of the administrative state, important decisions of policy implementation were to be delegated to cabinet members and their departments. The president would rely upon the secretaries’ “sagacity as representative citizens of more than usual observation and discretion.”100 The president’s appointees would then serve as the politically responsive but professionally competent intermediaries between him and the administrative civil service.

The combination of increased presidential stature as opinion leader and increased administrative demands within the executive therefore yields two distinct but interconnected aspects of the Wilsonian vision of the office of the president. On the one hand, the president brings to the office a particular distillation of public opinion, filtered through the lens of party platforms, public constituencies, and his own personal values. On the other hand, the presidency is an administrative institution which implements the laws from atop the executive hierarchy, coordinating the complex system of administrative agencies established by Congress. In Wilson’s vision, the president would focus on influencing legislative policy, but would largely relinquish personal

96Goodnow, Politics and Administration, 82; M. J. C. Vile, Constitutionalism and the Separation of Powers, 308.
97Wilson, Constitutional Government in the United States, 68.
99Wilson, Constitutional Government in the United States, 68.
100Ibid., 76.
control over the administrative apparatus, shifting this downward to his appointees. In essence, Wilson’s approach combines Hegel’s idea of a council of administrative heads who make major policy decisions with a chief executive who does more than “dot the ‘i.’” The president draws on his democratic authority to give content to the abstract popular sovereign, claiming to express its will through his rhetorical vision. But Wilson imagined that this communicative power would be most potent as a method to shape legislation, rather than to control administrative operations directly. Combined with his earlier proposals, in “The Study of Administration,” the Wilsonian theory sought to infuse the state with popular opinion at multiple levels: in the president’s articulation of public opinion in legislative programs, in the laws, in the elite distillations of public views represented by the cabinet, and in pervasive consultation of the broader public within administrative agencies themselves.

IV. Conclusion: Engaging with the Legacy of Hegelian Progressivism

It is now widely recognized that the New Deal was deeply influenced by progressivism. To the extent that we still live within the constitutional horizon of the New Deal, the progressive vision therefore remains with us. It is beyond the scope of this paper to establish any direct causal link between Hegelian progressivism and the institutional developments which occurred during and after the New Deal, though connections can certainly be drawn. Irrespective of the historical origins of the administrative state,

103 Roosevelt’s Commonwealth Club address was influenced by Dewey’s Individualism, Old and New. See Milkis, The President and the Parties, 39, and Robert Eden, “The Origins of the Regime of Pragmatic Liberalism,” Studies in American Political Development 7 (1993): 74–150. Charles Edward Merriam, who served on Roosevelt’s Committee on Administrative Management as well as the National Resources Committee, cited Mary Parker Follett’s pluralist theory of administration in his scholarship. See, e.g., Charles Edward Merriam, Public and Private Government (New Haven: Yale University Press, 1944), 46. He also argued that Hegel’s philosophy had contributed to the development of activist theories of the democratic state: “the development of the doctrine of democracy was aided on the ideological side by concurrent theories that were not primarily concerned with democracy, but that when brought together contributed to the strengthening of the mass position. Among these were the philosophies of Hegel, who lifted the state out of artificiality by declaring it to be the highest form of human association” (Charles Edward Merriam, The New Democracy and the New Despotism [New York: McGraw Hill, 1939], 54).
however, it is worth noting that certain aspects of the progressive theory are now enshrined in constitutional and administrative law. Recall Goodnow’s suggestion that judicial review of administrative action could be less intensive if administrative procedure became more formal and provided notice and hearing rights to persons aggrieved by administrative action. This proposal has come to pass in the form of a due-process jurisprudence which assesses whether internal administrative procedures adequately balance the weight of the individual rights at stake against the relevant public interest.\(^{104}\) In addition, the Administrative Procedure Act of 1946 sets out default trial-like hearings for administrative adjudication.\(^{105}\) The combination of formal legislative control and broad administrative discretion that Wilson and Goodnow proposed has become enshrined in statutory and judicial administrative law.\(^{106}\) Wilson’s, Follett’s, and Dewey’s plea for administrative decisionmaking that involves the democratic public has been implemented in the form of “notice and comment” rulemaking, which requires that members of the public have an opportunity to submit their views to agencies prior to the promulgation of binding rules.\(^{107}\) None of this is to say that the progressives’ vision has been fully realized in the contemporary American state. Participation in the administrative process is often skewed in favor of powerful, organized, and moneyed interests, as against the interests of diffuse and unorganized citizens.\(^{108}\) Presidential control of administration has become increasingly intensive and direct, diminishing the legal accountability of administrative agencies with a plebiscitary form of rule.\(^{109}\) In the face of this fragmentary institutional legacy, the question is whether the progressive vision remains worth pursuing, or whether it is time to abandon a set of ideas that have led us astray from our underlying constitutional values.

I want to close by suggesting that Hegelian progressivism continues to offer a coherent and laudable vision for the future of American democratic constitutionalism. Our Constitution houses conflicting political impulses. The Framers famously sought to constrain and rationalize the people’s political power by channeling it into competing institutions with distinct functions,

and by empowering the judiciary to hold the legislature accountable to constitutional limitations.110 At the same time, however, they aimed to imbue the national government with state-building capacities it had lacked under the Articles of Confederation.111 The proliferation of experiments in administrative governance in the very first years of the Republic attests to the compatibility of such institutions with the constitutional scheme the Founders envisioned.112 Thus today, even the most committed proponent of originalism, Justice Antonin Scalia, has upheld the constitutionality of broad delegations of rulemaking authority to administrative agencies.113 Conservatives’ categorical rejection of the administrative state therefore cannot easily rest its case on the text of the Constitution, the intent of the Framers, or the political history of the Founding.

Nor, however, do these resources provide much positive guidance about the basic norms and structure of our contemporary administrative state. They permit but do not justify expansive public power to intervene into society. Hegelian progressivism provides such justification. In line with liberal-democratic interpretations of the Constitution,114 it insists that individual rights are preconditions for republican self-government, in that they enable individuals to form independent judgments that ensure the free and equal formation of public opinion. But Hegelian progressivism rejects the liberal notion that such rights are categorically superior to considerations of social welfare.115 It holds instead that rights may be infringed when their social consequences unreasonably undermine the capacity of individuals to participate as autonomous members of the democratic community. It recognizes that individuals can be deprived of their freedom not only by governments, but also by unequal and antagonistic social systems which, in the absence of public-welfare provision, fail to provide everyone with the necessities of life; which, in the absence of market regulation, foist uncompensated costs upon parties without their contractual consent; and which, in the absence of government intervention against private discrimination, subject

individuals to the irrational prejudices and unfair treatment of other persons and corporate bodies.

This critique of the normative limitations of abstract right and the pathologies of civil society justifies a democratic administrative state. Public opinion must be institutionalized in binding law that cures the defects the people perceive in civil society. But legislative norms should be fairly general, so that administrative agencies can realize democratically determined goals in an ever-changing and complex social reality. The legislature cannot quit its constitutional responsibility to provide an “intelligible principle” to guide administrative discretion but it should refrain from an overly energetic specification of details. For the more determinate legal norms become, the more likely they are to frustrate the animating purposes of the law when they are implemented. However, the delegation of broad implementing authority to administrative agencies violates the democratic constitutional norm of collective self-government if the people are not actively engaged and consulted in the administrative process. When administrative agencies perform in quasi-legislative activities, the people must participate in administration, in order to retain their status as author of the laws. We, the people, must find ourselves at home in the state.