

# OFFICEHOLDING AND POWERWIELDING: AN ANALYSIS OF THE RELATIONSHIP BETWEEN STRUCTURE AND STYLE IN AMERICAN ADMINISTRATIVE HISTORY\*

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To what extent has the exercise of administrative power been directed during the course of American history toward highly political ends, such as repaying political debts or furthering the particularistic interests of rich or powerful individuals and groups? Even a cursory review of the facts reveals that the administrative process has not always been highly politicized. When the United States became independent some two centuries ago, magistrates generally sought to use their power to further non-political religious and ethical ends in which nearly all their fellow subjects believed. More than a hundred years later, at the close of the nineteenth century, the ideology of administrative decision-making was similarly an apolitical one, in which administrators sought to resolve disputes and decide upon policies by reasoning deductively from abstract, general principles which nearly all of the nation accepted. The administrative process in the late nineteenth century differed from that of the mid-eighteenth not in the degree of politicization, but in the substantive standards from which administrators reasoned: In the mid-eighteenth century, as I have already suggested, the standards were ultimately religious and ethical, whereas by the end of the nineteenth century they had become basically scientific and utilitarian.

Obviously, this transformation in the substantive standards of administrative decision-making was part of the general secularization of Western culture between the seventeenth and nineteenth centuries. I do not doubt that this trend toward secularization had a substantial impact on the American administrative system, but I do not intend to analyze the course of that impact in the present essay. I wish, instead, to explore some

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\* The author is indebted to Bruce Ackerman, Stephen Botein, Owen Fiss, George Haskins, Morton Horwitz, Arthur Leff, Leon Lipson, Ellen Ryerson and Robert Stevens for their comments and criticisms. Gerald Greenberger rendered invaluable research and editorial assistance. This article was in large part written while the author was a member of the Society of Fellows of Harvard University.

uniquely American aspects of the change in substantive standards of administration, not with the aim of proving that they account fully for the change, since they do not, but with the hope of suggesting that they may have contributed to it in part.

In most European nations the switch from religious and traditional to rational and scientific norms guiding the administrative process was a direct one.<sup>1</sup> Not, however, in the United States. When the religious basis of the administrative process of colonial America broke down in the early nineteenth century, it was replaced by an explicitly political process, in which administrators justified decisions by reference not to abstract standards, but to the political obligations of party. This politicized process rested upon a premise that in many circumstances an "administrator . . . is in 'politics' and cannot help it"<sup>2</sup> and that administrative decisions and choices of policy can never be made by reasoning from abstract principles, but must inevitably reflect the mere will of the person having power to make them. In early nineteenth century America, where political and social power was increasingly devolving upon the majority of the people, this newly politicized administrative process inevitably became democratic as well, as those possessing decision-making power were constrained to exercise it consistently with the will of the majority. It was not until the closing decades of the century that this politicized and democratic style of administration was superseded by a rational bureaucratic style that was covertly anti-democratic insofar as its controlling standards bore no necessary relationship to the will of the majority.

Thus, the processes of administration in eighteenth and nineteenth century America reveal a pattern of transformation first, from an apolitical process based on religious principles; then, to a politicized process based on democratic principles; and finally, back to a rational process based on scientific principles. This transformation in the processes of administration was paralleled by a like transformation in the modes of acquiring administrative office. In eighteenth century America, the more prestigious offices tended to be held by aristocrats of sorts—by men of high social rank who were chosen for office because they were looked upon as the natural leaders of their communities and hence as the men best able to persuade their fellow subjects to abide by traditional ethical standards. This aristocratic pattern of office

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1. See J. B. Bury, *The Idea of Progress* (1938); Paul Hazard, *The European Mind, 1680-1715* (1963).
  2. David Truman, *The Governmental Process* 443 (2d ed. 1971).

holding was terminated in the Age of Jackson, when the democratization of politics led to the creation of national party organizations and the use of subordinate offices as rewards for the party faithful. The spoils system, in turn, was attacked by post-Civil War reformers who introduced a third pattern of office-holding into American politics—what they called a merit system, in which appointments were made on the basis of ability, as disclosed by scores on competitive examinations, to perform duties required of officeholders in an increasingly technocratic bureaucracy.

My objective in this essay is to analyze in a preliminary and tentative way the parallel transformations in the means of acquiring administrative office and the processes of making administrative decisions. In the course of the essay, I hope that the reasons for the two sets of changes and the relationships between them will become clearer. However, before I begin discussing the changes, two problems in the nature of the evidence must be noted.

The first is that I have not systematically examined primary source material relating to the manner in which administrative officers performed their duties in office. Such an examination, even if it were limited to only a single geographical area, would require a search through virtually every existing governmental record at the national, state and local level, together with a search through massive private archives. Much of this material, of course, has already been examined by historians inquiring into a wide range of particular topics such as the structure of authority in colonial towns, nineteenth-century state economic regulation, and the functioning of individual departments in the federal government. In the essay that follows, I have relied heavily on this body of work and have freely drawn what seem to me plausible inferences from it, though I do not doubt that further inquiry into the questions raised in this essay will uncover additional facts that might cause me to modify some of my conclusions, at least as to their details.

The second problem concerns some specific gaps in the evidence that can be extracted from available secondary literature. One gap is in our knowledge about administrative processes in most of the colonies in the eighteenth century; my evidence comes almost entirely from four—Massachusetts, New York, Virginia and, to a lesser extent, South Carolina. These four

colonies differed so greatly from one another in their political origins and basic economic and demographic characteristics that it seems fair to assume that any pattern prevalent in all four of them is likely to be common to the other nine colonies as well. Another gap is in our knowledge of administrative processes in the states in the nineteenth century; here we know almost nothing. This gap has caused me almost exclusively to rely upon evidence from the national level when I discuss nineteenth century administrative practices.

If the states and the federal government had had vastly different governmental functions in the nineteenth century, this sudden shift from an analysis of state to an analysis of federal practices would be a troublesome one. But, although they were different, the functions of the two levels of government were not entirely different. It is well-known, of course, that the federal government did not engage extensively during the nineteenth century in regulating private conduct—that is, it did not often formulate prescriptive rules for business and individuals and punish those who failed to obey them. As I shall suggest in Part 3 below,<sup>4</sup> the regulatory role of the states was also a limited one during most of the century. It was not until the closing years of the century that successful regulation of private conduct, especially economic conduct, became commonplace at the state level<sup>5</sup>—at about the same point in time that the federal government began to take an active interest in economic regulation.<sup>6</sup> The fact that neither the states nor the federal government played a major regulatory role does not mean, however, that either government was unimportant. Through their judiciaries both played important roles in allocating economically valuable resources among competing individuals.<sup>7</sup> Both likewise established vast programs, which I shall discuss below, of governmental grants and other forms of aid to promote economic growth.<sup>8</sup>

Of course, it would be better to analyze changing processes of administration in the eighteenth and nineteenth centuries on the basis of primary sources drawn from all levels of government. But that cannot be done. Given the present state of the literature, it accordingly seems soundest, at least in my view, to advance some general working hypotheses that are consistent

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4. See text at notes 89-104, *infra*.

5. See text at notes 92-93, 102-104, *infra*.

6. See Interstate Commerce Act, 24 U. S. Stats. 379 (1887); Sherman Antitrust Act, 26 U. S. Stats. 209 (1890).

7. See, e.g., *Charles River Bridge v. Warren Bridge*, 7 Pick. 344 (1829), *aff'd*, 11 Pet. 420 (1837); *Thurston v. Hancock*, 12 Mass. 220 (1815).

8. See text at notes 105-112, *infra*.

with the great bulk of the research already done and that will, I hope, be useful in structuring further thought, research and criticism.

## I. THE CIVIL MAGISTRATES OF EIGHTEENTH CENTURY AMERICA

The historian investigating how men acquired office in eighteenth-century America will quickly come across two facts that stand out sharply in contrast to modern norms. The first is the immense difficulty that eighteenth-century government faced in securing men to fill lower offices—offices like that of constable, which did not entitle a man to call himself esquire or gentleman or otherwise identify him as a leading citizen of his community.<sup>9</sup> In most places in the colonies, men had to be coerced to accept such positions. In eighteenth-century Massachusetts, for example, coercion took the form of criminal prosecutions for refusing to serve in minor offices; those prosecutions were quite commonplace.<sup>10</sup> The same pattern appeared throughout New England and New York,<sup>11</sup> and there is evidence that it was also prevalent in the remainder of the colonies.<sup>12</sup>

What conditions made office so undesirable for most men? One condition was the relative poverty of colonial government, at least in comparison with contemporary governments in economically advanced nations such as England and France and later governments in the United States. Whether it was a result of a poor tax base or of a general unwillingness to pay taxes, government in colonial America did not have vast quantities of

9. Holders of certain offices received the title of esquire or gentleman merely by virtue of their occupying the office. See *Bromfield v. Lovejoy*, Quincey 237 (Mass. 1767). But cf. Robert E. Brown, *Middle-Class Democracy and the Revolution in Massachusetts, 1691-1780*, at 18-19 (1955), suggesting that titles of rank were not always indicative of precise economic distinctions in colonial Massachusetts since "labourers" might earn more than "gentlemen."
10. See William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, at 17-18 (1975). Cf. n. 29. See Petition of Selectmen of Boxford, Essex Ct. Gen. Sess. (March, 1771).
11. See, e.g., An Act Relating to Constables § 6, in *Stats. of Conn.* 75 (rev. ed. 1824); An Act to Regulate the Fine Set on Persons Chosen to the Office of Constable, N. H. Laws of 1770-71, ch. 9, in 3 *Laws of N.H.* 547 (1915); Arthur E. Peterson, *New York As An Eighteenth-Century Municipality, Prior to 1731*, at 151-60 (1917); James F. Richardson, *The New York Police: Colonial Times to 1901*, at 7, 17 (1970).
12. See, e.g., J. Glen, "Description," in *Colonial South Carolina: Two Contemporary Descriptions* 40, 42 (Milling, ed. 1951), suggesting that the office of justice of the peace and a commission in the militia might also be disdained. See also Leonard D. White, *The Federalists: A Study in Administrative History* 317-20 (1961) [hereinafter White, *Federalists*].

offices carrying large salaries at its disposal.<sup>13</sup> Although there were many offices in the thirteen colonies, especially at the local level, nearly all of them gave their holders either a small compensation derived from fees or no compensation at all.<sup>14</sup> A more general colonial poverty also contributed to the undesirability of office: the difficulties of colonial farming and the scarcity of labor forced most men to spend nearly all their time cultivating their farms in order to earn their livelihood and, as a result, few had the wealth and hence the leisure to devote any significant time to public service.<sup>15</sup> Another factor was the existence of legal remedies for malfeasance in office that exposed officeholders to the risk of substantial monetary liability.<sup>16</sup> All these factors made officeholding at lower levels of colonial government clearly a burden rather than a reward.

The second fact that the historian finds so contrary to modern patterns is that higher offices, apart from those few like governorships that were disposed of by the crown in London, were filled by local aristocrats of sorts.<sup>17</sup> Of course, colonial America lacked a formal aristocracy comparable to the English peerage; the closest model for the American upper class was the English gentry.<sup>18</sup> What I shall refer to as the American aristocracy lacked the special legal privileges, the rigid class structure and the ancient landed origins of European nobility, although there were variations among the colonies in the precise nature of this American elite. In some the leadership group was

13. See Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* 158 (1971); John A. Schutz, *William Shirley: King's Governor of Massachusetts* 225-71 (1961). As Thomas Hutchinson, the governor of Massachusetts wrote, "There are very few places in this government except as are elective, worth anything." Letter to Hillsborough, 1771, quoted in Bernard Bailyn, *The Ordeal of Thomas Hutchinson* 180 (1974).

14. See, e.g., Bailyn, *supra* note 13, at 53, 110, 145-49.

15. Cf. Michael Zuckerman, *Peaceable Kingdoms: New England Towns in the Eighteenth Century* 27, 47 (1970).

16. See Nelson, *supra*, note 10, at 17-18. At least in Massachusetts, the only officials who were immune from common law suits for malfeasance in office were legislators and judges. See John Adams, *Legal Papers*, II, 23 (Wroth & Zobel, eds. 1965).

17. See Dixon R. Fox, *The Decline of the Aristocracy in the Politics of New York* 1-30 (1919); Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776*, at 31-47 (1963); Stanley N. Katz, *Newcastle's New York: Anglo-American Politics, 1732-1753*, at 45-48 (1968).

18. In certain cases upper class Americans modeled themselves quite consciously on the English gentry. See Bernard Bailyn, *New England Merchants in the Seventeenth-Century* 192-94 (1955); Bonomi, *supra*, note 13, at 69-70; Greene, *supra*, note 17, at 23-24; M. Eugene Sirmans, *Colonial South Carolina: A Political History, 1663-1763*, at 10-12 (1966). The colonists were quite aware, however, that their society lacked the formal aristocracy necessary to complete the British tripartite model of government. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 272-301 (1967).



largely a landed elite, while in others it was founded on mercantile and professional wealth as well. The willingness of aristocrats to admit able and ambitious newcomers to their ranks also varied from colony to colony. Nonetheless, in every colony some men who were set apart by imprecise and fluid criteria such as birth, education, wealth, talent, leisure time, and personal style constituted an upper class to which their fellow subjects were accustomed to look for leadership.<sup>19</sup>

Charles Sydnor's study of the office of justice of the peace in eighteenth-century Virginia—the most important and prestigious one in local government<sup>20</sup>—is, perhaps, most revealing. He writes:

The tax lists of eight sample countries show that the justices owned an average of about 900 acres of land, 25 slaves, and 8 horses. In these respects they were five or six times as wealthy as other heads of families, and they were ten times as likely to own a carriage, which was a symbol of social position as well as of wealth.

Most men who became justices were members of a relatively small number of well-established families. In the last twenty years before the Revolution one-fourth of the justices came from fifty-five families, using that word in the ample Virginia style. Each of these families supplied ten or more. Within this score of years, three-fourths of the justices were chosen from less than 400 families. Among the names that appear frequently in county-court lists are Washington, Harrison, Randolph, Carter, Ball, Lee, Cocke, Pendleton, Robinson, and Taylor.

The several hundred families that monopolized most of the justiceships on the eve of the Revolution had enjoyed this advantage in earlier generations. For example, Thomas Jefferson, who was himself a justice of the peace, was the son of a justice and the grandson of a justice on his father's side; and his mother was a member of the Randolph family that had held many local and provincial offices for several generations. Jefferson's case was not unusual. George Washington, James Madison, Patrick Henry, George Wythe, John Marshall, and

19. Social mobility was easier in colonies like Massachusetts which relied heavily upon trade than in those which stressed plantations. See Bailyn, *New England Merchants*, *supra*, note 18, at 194-97; Bernard Bailyn, "Politics and Social Structure in Virginia," in *Seventeenth-Century America: Essays in Colonial History* 90 (James Morton Smith ed. 1959); Greene, *supra*, note 17, at 22-31. For the social background of lawyers and judges, see Alan F. Day, "Lawyers in Colonial Maryland, 1660-1715," 17 *Am. J. L. Hist.* 145 (1973).
20. See Charles S. Sydnor, *Gentlemen Freeholders: Political Practices in Washington's Virginia* 64, 80-90 (1952). The J. P.'s were equally important in other colonies. See Bonomi, *supra*, note 13, at 35-36; Richard Brown, *The South Carolina Regulators* 13-14, 22, 24, 26, 49 (1963); Nelson, *supra*, note 10, at 15. In Massachusetts, for example, the Justices of the Peace had exclusive jurisdiction over civil suits where the amount in controversy was less than 40 shillings and title to land was not involved in addition to criminal jurisdiction over petty offenses. English county government, which served as a model for many of the colonies, placed great reliance upon the J.P.'s. See J. Plumb, *The Origins of Political Stability in England, 1675-1725*, at 20-22 (1967); Beatrice Webb and Sidney Webb, *English Local Government From the Revolution to the Municipal Corporation Act* [Vol. I: *The Parish and the County*] 319-608 (1906).

James Monroe were all either sons, nephews, or wards of justices. In brief, leaders of Revolutionary Virginia were members of families that had filled offices of at least local importance in previous generations. They inherited family prestige, and they counted influential men among their relatives and friends.<sup>21</sup>

My own study of holders of judicial office in pre-Revolutionary Massachusetts reaches similar conclusions.<sup>22</sup> Available data appears, again, to confirm that in most of the other colonies higher offices were generally held by gentlemen.<sup>23</sup>

Higher office was a natural extension of a gentleman's position. Since there was little conception of political institutions apart from the men who composed them, just government could only be viewed in personal terms.<sup>24</sup> No sharp distinction was drawn between the public and private aspects of an aristocrat's activities: both were inseparable parts of the total role filled by the upper class in eighteenth-century society. Office was merely an appurtenance to an aristocrat's other holdings. As Professor Sydnor suggests, office was often acquired along with an ancestor's property following his death, and, once acquired, it was generally held for life.<sup>25</sup> Nor did men treat their offices as different in kind from their other assets: as long as an officer performed his duties and paid over the sums required by law when due, he could use official funds as he wished.<sup>26</sup> Public service ethics in the eighteenth century were very different from those of today: when, for example, the Speaker of the House of Representatives called for \$33,000 in 1798 for compensation of members and

21. Charles S. Sydnor, *Political Leadership in Eighteenth-Century Virginia* 7-8 (1951).

22. See Nelson, *supra*, note 10, at 33-34.

23. See the sources cited in note 17 *supra*.

24. This tendency to view governmental actions in terms of individuals rather than institutions can be seen quite clearly in the Declaration of Independence. Although the writers knew that the king was not individually responsible for the many evils committed in his name, the document enumerates them as if he were personally responsible. There was also a tendency in Continental thought to view the monarch as personifying the government he led. See Herbert H. Rowen, "L'état c'est à moi [sic]: Louis XIV and the State," 2 *Fr. Hist. Stud.* 83 (1961).

25. See Sydnor, *supra*, note 20, at 67, 78-82. For a discussion of the social prerequisites of power in the Massachusetts legislature, see Robert M. Zernsky, *Merchants, Farmers, and River Gods: An Essay on Eighteenth-Century American Politics* 28-38 (1971). Most judges effectively held office for life since the Crown's dismissal power had often become merely nominal; in those instances when it was exercised during the mid-eighteenth century, its exercise could provoke great controversy. See Greene, *supra*, note 17, at 26, 31-47, 330-43; Leonard W. Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783*, at 373-419 (1958); Bonomi, *supra*, note 13, at 35-39.

26. See, e.g., Schutz, *supra*, note 13, at 87, 121-22, 135-36. This practice appears to have been a continuing one. See Matthew A. Crenson, *The Federal Machine: Beginnings of Bureaucracy in Jacksonian America* 83-84, 100-103 (1975).



retained \$18,000 of that sum personally for nearly two years before returning it to the treasury, no criminal prosecution was brought.<sup>27</sup> As late as the 1830's, it was quite common for federal land officers to speculate in public lands with money collected in their official capacities.<sup>28</sup> The basic concept was that men had "property"<sup>29</sup> or "an estate for life in office"<sup>30</sup> and that they could use their estate as they pleased, so long as they paid their debts. However, the notion of office as property cut both ways: if a man could profit personally from office, he also had to suffer its liabilities personally. When President Washington, for example, felt the need for a secretary to write his official correspondence, he had to pay one out of his own funds.<sup>31</sup> A more important source of personal liability were various legal remedies for malfeasance in office which exposed office holders to the risk of substantial monetary damages, for which they normally received no indemnity from government.<sup>32</sup>

It was not only the means of acquiring and holding office that differed so sharply from twentieth century American patterns; the law enforcement capabilities of colonial government were also vastly different. Colonial magistrates did not secure obedience through what might be called the carrot and stick method, for colonial government possessed few sticks or carrots. A striking fact is that magistrates could rarely call upon organized, professional police or military forces when subjects refused to obey.<sup>33</sup> Of course, sheriffs and similar law enforcement officials possessed legal authority to make arrests, but as studies of both Massachusetts and New York have shown, they had physical power to capture only those individual law breakers who had

27. See White, *Federalists*, *supra* note 12, at 346.

28. See M. Rombaugh, *The Land Office Business: the Settlement and Administration of American Public Lands, 1789-1837*, at 180-99, 271-294 (1971); Crenson, *supra*, note 26, at 84-91.

29. See Nelson, *supra*, note 10, at 125, where it is noted that Massachusetts courts upheld plaintiffs' claims that they had "Property" in military offices, see *Cushing v. Vose*, Suff. Ct. Com. Pl., Oct. 1785, and in merchant marine offices. See *Prescott v. Tucker*, Essex Sup. Jud. Ct., April 1821. The Court also spoke of an incumbent's "title to the office" of sheriff. See *Fowler v. Beebe*, 9 Mass. 231, 234 (1812). As late as 1821, an Alabama court wrote that "the right to exercise an office is as much a species of property as any other thing capable of possession." *Wammack v. Holloway*, 2 Ala. 31 (1821).

30. *Goss v. Inhabitants of Bolton*, Cushing 11, 13 (Mass. 1778). *Accord*, *Hill v. Powers*, Cushing 26 (Mass. 1780).

31. See White, *Federalists*, *supra*, note 12, at 495.

32. See note 16, *supra* and accompanying text. Even after independence, many officers remained liable for substantial penalties for neglect or refusal to perform their duties. See White, *Federalists*, *supra*, note 12, at 425-26.

33. See Nelson, *supra*, note 10, at 34-35.

no friends in their local communities ready to assist them.<sup>34</sup> The ability of colonial government to grant rewards was equally limited. Once a tract of land, a license, or a franchise had been awarded to an individual, eighteenth century concepts of property prevented government from taking it back and granting it to another.<sup>35</sup> As a result, local governments seldom had very many lucrative grants or contracts to bestow at any one time, while provincial governments found themselves similarly bereft of lucre except on a few occasions, chiefly in wartime.<sup>36</sup> Local magistrates also had little patronage to bestow since, except for the few high offices which they themselves occupied, office was a burden rather than a benefit. While provincial governments did have formal power to appoint men to prestigious local offices, that power had been grievously undercut in the eighteenth century by the almost hereditary monopoly that local aristocrats had obtained on those offices.<sup>37</sup>

If government did not govern with carrots and sticks, how, then, did it govern? In part, by relying upon the personal power and prestige of the aristocrats who held office and were the natural leaders of their communities. Through family connections, employment of labor and ownership of resources that others sought to use, most aristocrats wielded considerable economic power in their communities;<sup>38</sup> persons who were in their debt or who were seeking gain from them would be likely to follow where they led. Aristocrats also enjoyed prestige which would induce others to follow them; they were likely to be the only educated men in their communities other than the clergy,<sup>39</sup> and they benefited from the then prevalent "natural principle of respect for those in authority"—from the assumption that "some degree of respect . . . [was] always due from inferiors

34. See *id.* at 32-35. Douglas Greenberg, "The Effectiveness of Law Enforcement in Eighteenth Century New York," 19 *Am. J. Legal Hist.* 173 (1975). For further examples of the powerlessness of officials before a hostile public, see Edmund S. and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* 59, 65, 168-169 (rev. ed. 1963); Zuckerman, *supra*, note 15, at 86-88.

35. See Nelson, *supra*, note 10, at 46-51; Morton J. Horwitz, "The Transformation in the Conception of Property in American Law, 1780-1860," 40 *U. Chi. L. Rev.* 248-54, 261-72 (1973).

36. See Bernard Bailyn, *The Origins of American Politics* 72-80 (1970).

37. See text at notes 17-23, *supra*. The patronage base of royal governors was also being eroded by the home government, which sought to confer as many valuable colonial offices as possible on men sent out directly from England. See Bailyn, *supra*, note 36, at 72-75.

38. See Sydnor, *supra*, note 20, at 70-77; Greene, *supra*, note 17, at 23-47; Bonomi, *supra*, note 13, at 29-31. For a generalized description of the "important people," see White, *Federalists*, *supra*, note 10, at 5.

39. See Sydnor, *supra* note 20, at 37, 62-77.

to superiors.”<sup>40</sup> Thus it was not by accident that central authorities appointed aristocrats to most local offices on a semi-hereditary basis, for they alone had effective power to govern. A key point, however, which helps explain why colonials were willing to tolerate an aristocratic rule of sorts, is that office gave little real power to its holder. If by virtue of his wealth and standing in his community, a man already possessed substantial power, office merely gave formal recognition but added little else to it. If, on the other hand, a man had neither position nor power as a private subject, then office gave him nothing.

Of course, the mere fact that aristocrats manned most high offices insured that aristocratic values would unconsciously permeate society and that the existing social order, which was by no means perfectly egalitarian,<sup>41</sup> would be ratified and maintained. But this fact posed no problem for colonial Americans. The main object of colonial government was the maintenance of minimal physical order, and that object could be accomplished by establishing an administrative machine that utilized existing leadership. Colonials feared any governments sufficiently large and strong to redistribute wealth or power and could not even conceive of the possibility that the social order could be changed in any fundamental way,<sup>42</sup> and so were not disturbed by an administrative machine that could do none of those things. Moreover, even though aristocrats monopolized most higher offices and held many members of the community under their economic sway, their power must not be exaggerated. Not everyone was indebted to them, nor was everyone seeking to gain wealth from them. Some men were independent,<sup>43</sup> and over those men aristocrats had no power of coercion, but only the power of persuasion. Of course, they had only persuasive power over each other as well.

40. Thomas Bradbury Chandler, *The American Querist: or, Some Questions Proposed Relative to the Present Disputes Between Great Britain and Her American Colonies*, No. 13, at 6 (Boston, 1774).

41. See Bonomi, *supra*, note 13, at 179-228; Darrett B. Rutman, *Winthrop's Boston: Portrait of a Puritan Town, 1630-1649*, at 72-97 (1965). But see generally Brown, *supra*, note 9.

42. Many leading prerevolutionary thinkers were consciously opposed to massive social change and assumed the existence of a hierarchical society. See Bailyn, *supra*, note 18, at 301-319.

43. A traveler reported in the mid-eighteenth century: "The public or political character of the Virginians, corresponds with their private one: they are haughty and jealous of their liberties, impatient of restraint, and can scarcely bear the thought of being controuled by any superior power." Andrew Burnaby, *Travels Through the Middle Settlements in North-America, in the Years 1759 and 1760*, at 20 (1775). Bonomi emphasizes that the politics of New York in particular were dominated by an excessively "factious people." Bonomi, *supra*, note 13, at 280. See also Zuckerman, *supra*, note 15, at 16-45.

How did aristocrats persuade each other and the independent men in their community of the right course for government to take? In part, by not attempting to radically reorder society so as to enhance their own positions.<sup>44</sup> On the contrary, aristocrats functioned as spokesmen for the entire community who administered colonial government by appealing to widely shared community notions about the law of God and those human laws that reflected its precepts. They were able to make that appeal because the magistrates and aristocrats and other independent men in colonial communities were sufficiently few in number and had inherited a sufficient body of common religious and ethical ideas that they could reason together and arrive upon a consensus upon the meaning of ultimate moral norms. The small size and the ethical coherence of colonial communities was, in turn, a function of the localization of political power and the weakness of central political entities both on the imperial and on the provincial level.<sup>45</sup>

This understanding of politics and administration is consistent with what we otherwise know about the eighteenth-century American magistracy. It reinforces other evidence indicating that officials lacked significant coercive power and explains how colonial society could function without falling into chaos despite government's lack of such power: the ability of local, indigenous leaders to control their subordinates and persuade their peers was sufficient under most circumstances for the maintenance of minimal order. It also explains why even high office was often more of a burden than a benefit to its holder, for by assuming office he undertook a heavy task of persuading his fellow subjects of the rightness of his policies and gained neither added power to coerce them nor the power to pursue policies that would improve rather than merely maintain his own position or that of his class in the community at large. In addition, it explains why men did not often compete for office<sup>46</sup> and willingly let others hold it: the basic reason was that, by declining office, a man did not surrender whatever power he otherwise had to participate in the final working out of government policy.

But, ultimately, the understanding that colonial aristocrats governed by virtue of their personal authority and the loyalty

44. See Bailyn, *supra*, note 18, at 18-21; Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 148-49 (1969).

45. I am in the process of developing the themes in this paragraph in another portion of the larger study of which this essay is a part.

46. Indeed, individuals who appeared overly ambitious for political office or lusting for power courted social disapproval. See Bonomi, *supra*, note 13, at 103-104; Bailyn, *supra*, note 36, at 143.

of most of their fellow subjects to an inherited ethical consensus on which magistrates based their decisions begins to explain why new processes of administration necessarily developed when, in the half century following the American Revolution, aristocracy and consensus politics broke down, and an egalitarian, competitive political system emerged in their place.

## II. AN INTERLUDE OF CONFUSION

The Revolutionary War and the coming of independence did not bring about any radical change in the structure of America's magistracy. Acceptance of office still entailed the assumption of a duty to enforce widely shared ethical standards rather than an opportunity to formulate policy in order to advance the interests of some segments of the community to the detriment of others. Magistrates still were drawn from and retained close ties to local communities; the law of the newly independent states, that is, was enforced not by a corps of bureaucrats appointed out of the state capitals but by local men chosen either by local voters or by county judges who, although they were formally appointed by central authorities, were themselves men of local stature who effectively held office for life. Magistrates also continued to have little power to coerce their communities, and, while competition for office, especially at higher levels, was increasing, competition remained the exception rather than the rule.<sup>47</sup>

The establishment of the federal government during the 1790's, however, introduced new elements into the administrative system. Those elements can best be isolated by comparing the administrative practices of the new government with those of the pre-Revolutionary, British imperial administration, to which it was in some senses a successor.

The imperial administration had failed, of course, to enforce parliamentary policies, and the founding fathers, who were well aware of this failure, accordingly sought to construct the new national government upon a firmer administrative foundation. A crucial weakness of the imperial government in the thirteen colonies had been its lack of control over most local officials: only the few placemen sent from England to fill the highest colonial offices had always remained fully loyal to the crown,<sup>48</sup>

47. See generally Richard R. Beeman, *The Old Dominion and the New Nation, 1788-1801*, at 28-55 (1972); Paul Goodman, *The Democratic-Republicans of Massachusetts: Politics in a Young Republic* 1-46 (1964).

48. See generally Bailyn, *supra*, note 13. See also Bonomi, *supra*, note

but those placemen had lacked the local influence that was necessary to govern effectively.<sup>49</sup> The new government sought to improve its control by changing the mode of selecting subordinate officials. In the colonial and immediate post-Revolutionary period in the states, most officials had been effectively chosen by local electors or by local political bodies such as county courts. A few federal officials, notably court clerks, were, like their predecessors in the states, responsible to other officers, chiefly judges,<sup>50</sup> whose political base was a local one, and there were occasional suggestions that all local appointments should be made "according to the opinion of the Justices and Selectmen of the town."<sup>51</sup> In fact, though, the new federal service, unlike any previous substantial group of civil officers in America, was effectively appointed and subject to removal by executive officers in the national capital.<sup>52</sup>

Also important to building a centralized federal machine was the development of new administrative procedures by which officers in the national capital could superintend and direct the activities of officials in various localities. First, officers at the capital had power to issue instructions and rules, establish procedures and even specify forms to be used in the conduct of public business.<sup>53</sup> Second, procedures were developed at an early date for review by central authorities of decisions taken by agents in the field.<sup>54</sup> Third, some matters, either at the request of local agents, at the demand of central authorities, or upon the application of private parties involved in the matter, were decided by central authorities even before field agents had passed upon them.<sup>55</sup> In short, there developed at an early date within the administrative structure a body of rules supplemented by adjudicatory decisions, all backed up by the power of removal, to insure that subordinate officials knew what their superiors expected of them and performed according to expectations.<sup>56</sup>

This administrative centralization did, in fact, guarantee the

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13, at 8-9, 98-100, 151-56, 210-11, 265-66 (discussing the career of Cadwallader Colden); Wallace Brown, *The King's Friends: the Composition and Motives of the American Loyalist Claimants* (1965).

49. See Bailyn, *supra*, note 36, at 72-91. See also text at notes 33-37, *supra*.

50. See Judiciary Act of 1789, at §§ 7, 27, 28, 1 U.S. Stats. 73, 76, 87 (1789).

51. Letter from Noah Webster to Thomas Jefferson, February 20, 1809, in 14 *Good Government* 48 (1894).

52. See White, *Federalists*, *supra*, note 12, at 199-209, 284-290.

53. See *id.* at 205-7.

54. See *id.* at 207.

55. See *id.* at 207-8.

56. See *id.* at 20-25.



loyalty of federal bureaucrats to the national administration, even under the stresses of enforcing the embargo of 1807. Although some officials were more competent and energetic in enforcing that law than others, there were apparently only three officials in the entire country—one district attorney and two customs collectors—who were disloyal and failed to use their best efforts to have it enforced; there were also several collectors who resigned.<sup>57</sup> At no time in its early history did the federal government confront the kind of systematic evasion of its laws by its own officials which the imperial administration had faced in the 1760's and 1770's.

Apart from the changes already noted, however, the new federal government continued generally to follow inherited administrative practices. One important traditional practice to which new government adhered was the appointment of men of local standing rather than outsiders to most offices: President Washington, for example, emphasized the importance of the "fitness of characters to fill offices"<sup>58</sup> and refused to appoint his nephew, Bushrod Washington, as a federal attorney since his "standing at the bar would not justify" that nomination.<sup>59</sup> During the first four decades of the new government's existence, Washington's successors, including Jefferson, also followed the traditional practice of filling offices with "gentlem[e]n of respectable standing in society."<sup>60</sup> Jefferson, for one, thought it relevant of a man proposed for a position in New England that "his family ha[d] been among the most respectable on that shore for many generations";<sup>61</sup> roughly half of the men he appointed to higher office were descendents of families who had been in America since the seventeenth century, while sixty percent had had fathers in high-ranking occupations.<sup>62</sup>

With the exception of Jefferson, Washington and his early

57. See Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801-1829*, at 454-55 (1964) [hereinafter cited as White, *Jeffersonians*]. For details about these individual exceptions, see the letters between Gallatin and Jefferson in Albert Gallatin, *Writings*, I, 389, 397, 400, 404 (H. Adams ed. 1879).

58. Letter from George Washington to Samuel Vaughan, March 21, 1789, in George Washington, *Writings*, XXX, 238 (Fitzpatrick ed. 1939).

59. Letter from George Washington to Bushrod Washington, July 27, 1789, in *id.* at 366.

60. Letter from Thomas Jefferson to James Monroe, December 13, 1801, quoted in Edward Channing, *A History of the United States*, IV, 248 n.1 (1917).

61. Letter from Thomas Jefferson to Albert Gallatin, November 12, 1801, in Gallatin, *supra*, note 57, at 60.

62. See Sidney H. Aronson, *Status and Kinship in the Higher Civil Service: Standards of Selection in the Administrations of John Adams, Thomas Jefferson and Andrew Jackson* 60, 111 (1964).

successors also continued the inherited tradition of removing few incumbents from office, especially for political reasons. Washington, for instance, during the eight years of his administration, removed only seventeen civil officers other than minor ones from their jobs,<sup>63</sup> while John Adams removed merely twenty-one.<sup>64</sup> Surely an important reason why incumbents were not removed more frequently was that the electoral process produced only one change of party in the national administration between 1789 and 1828. That change occurred when the Jeffersonian Republicans replaced the Adams Federalists in 1801 and was accompanied by a considerable turnover among the occupants of subordinate offices.<sup>65</sup> However, the continuity of single party rule in the national capital does not fully explain the failure to remove incumbents; there was also a conscious adherence to the received tradition and a frequent retention of political opponents in office. For example, for eight years after he shifted his political allegiance from Hamilton to Jefferson in 1791, Tench Coxe remained a prominent official in government, serving the last seven as Commissioner of the Revenue in the administrations of both George Washington and John Adams.<sup>66</sup> The President most committed, perhaps, to keeping the federal bureaucracy from becoming subservient to a single political interest was John Quincy Adams who, on learning that many subordinates were working for Jackson's rather than his own cause in the 1828 election, nonetheless rejected the advice of supporters like Henry Clay to remove them from office.<sup>67</sup> As one Republican, James Sullivan of Massachusetts, wrote:

To remove men from office, for their having their own opinions, is a species of tyranny of which we have loudly complained. To withhold offices from men who are satisfied with their country's constitution, because they do not love the present administration when they are *better* qualified than others, would be no less than a militation with the principles of a free government.<sup>68</sup>

Removals occurred, in general, not because subordinate officers were not in sympathy with or failed to carry out policies of their superiors, but because of reasons such as illness which rendered them incapable of performing their duty, for incompetence or failure to perform their duties punctually or without negligence,

63. See Carl R. Fish, "Removal of Officials by the Presidents of the United States," 1 *Am. Hist. Rev.* 65, 69 (1899).

64. See *id.* at 70.

65. See *ibid.*

66. See White, *Federalists*, *supra*, note 12, at 288-90; Carl R. Fish, *The Civil Service and the Patronage* 19 (1905).

67. See J. Q. Adams, *Memoirs*, VI, 546-47 (May 13, 1825) (C. F. Adams ed. 1874).

68. Quoted in T. C. Amory, *The Life of James Sullivan*, II, 94 (1859).

or for conduct such as receiving gifts or illegal fees for performing official functions—conduct, that is, which constituted or bordered on dishonesty.<sup>69</sup>

Thus, during the first four decades of the federal government's existence, new and old administrative practices coexisted despite a continuing tension. On the one hand, there was an attempt to create a highly centralized federal administrative structure; on the other hand, there was an adherence to traditional administrative methods like the appointment and retention in office for life of men of local stature. Adherence to old forms, however, was often inconsistent with centralization. For example, local aristocrats whose standing in their own communities was often predicated in part upon their continuing identification with local interests could rarely give complete loyalty to the national administration; their appointment inevitably reduced the control that central authorities might otherwise have had over local administration. Their effective retention in office for life further reduced control by weakening the ultimate sanction for disobedience, the sanction of removal. Often, as in the administration of President Washington, who inaugurated most of the policies of centralization and yet failed to remove Tench Coxe from office for his political disloyalty, the tension did not surface. But at other times the tension was obvious. Although he was a friend neither of centralization nor of political prescriptions, believing that it was not "just" to remove from office "those in possession who have behaved well, merely to put others in,"<sup>70</sup> Jefferson, when he became president, faced strong pressure from his party workers to remove Federalists and replace them with Republicans who wanted their jobs<sup>71</sup> and actually removed more men from civilian office than all the other presidents prior to 1829 combined.<sup>72</sup> His discomfort is obvious from his statement that wholesale removals were carried out not in order to make the federal bureaucracy subservient to the interests of his own victorious party but to give that party its "proportionate share"<sup>73</sup> of office—to insure, that is, that the bureaucracy represented a

69. See White, *Federalists*, *supra*, note 12, at 285-88. It was even argued that "displacing a worthy and able man" might be justifiable grounds for impeachment. 1 *Annals of Cong.* 504 (1789). See generally Note, "The Scope of the Power to Impeach," 84 *Yale L. J.* 1316, 1334 (1975).

70. Jefferson, *Works*, VI, 45 (Federal ed. 1904).

71. See Fish, *supra*, note 66, at 29-31; White, *Jeffersonians*, *supra*, note 57, at 347-54.

72. See Fish, *supra*, note 65, at 73.

73. Letter from Thomas Jefferson to Elias Shipman *et al.*, July 12, 1801, in Jefferson, *Works*, IX, 272 (Federal ed. 1904).

diversity of political views and not merely a single one and was in that sense decentralized. Yet no action could have served as effectively to centralize power and produce a politically monolithic bureaucracy as did Jefferson's political removals.

The tension between new and old administrative practices was magnified by a growing awareness of the political character of subordinate office. The founding fathers, of course, had centralized authority within the federal administrative structure in order to guarantee more effective enforcement of federal law; they did not think in terms of using the administrative structure for political ends.<sup>74</sup> While the federal bureaucracy from the time of its establishment inevitably had had policy-making as well as law enforcement functions, the distinction between the two was not seen until the development of political parties during the 1790's. The distinction emerged clearly only in the Adams administration, when the Jeffersonian opposition came to differentiate law from policy in the controversies over the existence of a federal common law of crime and over the constitutionality of the Sedition Act.<sup>75</sup> These controversies, which were a product of the uncertainties that necessarily arose as a new structure of constitutional power was being built, made it impossible to conceive of law as fixed, static and immutable, as colonial Americans traditionally had. Just as these controversies for the first time made a few prescient legal thinkers recognize that judges had substantial discretion in the identification and application of law and so marked a first step toward the early nineteenth century's instrumental style of judicial reasoning,<sup>76</sup> so too the same controversies inevitably led political observers to see that subordinate officials, such as federal prosecutors, had discretion in deciding whether to prosecute sedition and common law crimes and that this discretion gave those officials a freedom to formulate policy concerning the use of their law enforcement capacities.

Jefferson for one, glimpsed the policy-making capacity of subordinate office. He was concerned with the power which

74. An exception to this is Alexander Hamilton. See Lynton K. Caldwell, *The Administrative Theories of Hamilton and Jefferson: Their Contributions to Thought on Public Administration* 80-81 (1944).

75. For a detailed discussion of the enactment and enforcement of Alien and Sedition laws, see generally James Morton Smith, *Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties* (1963). For an analysis of the developing perception of the law as an instrument of policy, see generally Morton J. Horwitz, "The Emergence of an Instrumental Conception of American Law, 1780-1820," 5 *Perspectives in Am. Hist.* 287-326 (Fleming & Bailyn eds. 1971).

76. See *id.* at 299.

office gave to his Federalist opponents and accordingly sought to remove "such officers as shall afterwards continue to bid us defiance."<sup>77</sup> In particular, he recognized the power of subordinate court officials to affect the outcome of justice, even accusing one marshal in Pennsylvania of packing a jury in a capital case;<sup>78</sup> he accordingly determined to appoint only Republicans as attorneys and marshals on the ground that they were "indispensably necessary as a shield to the republican part of our fellow citizens" since the courts were "so decidedly Federal and irremovable."<sup>79</sup> Nor was Jefferson's perception of the political power of subordinate officers a unique one: as Thomas McKean, the Republican governor of Pennsylvania wrote of Federalist officers in 1801, "To overcome them they must be shaven, for in their offices (like Sampson's hair-locks) their great strength lieth; their disposition for mischief may remain, but their power of doing it will be gone."<sup>80</sup> McKean acted on his beliefs, replacing virtually all Federalists with Republicans and establishing the spoils system in Pennsylvania.<sup>81</sup>

Of course, as elected leaders acted on the assumption that members of the opposition party who held subordinate office were political beings who should be replaced by their own supporters, they only verified that assumption and politicized subordinate office even further by appointing men who would pursue the interests of their party and its friends rather than a broader public interest. This increasing centralization of administrative power in the hands of leaders elected to office through political parties worked inevitably to undermine the old non-partisan, aristocratic structure of authority. Yet, as late as the administration of John Quincy Adams, the old aristocratic ideal still survived with vigor: to repeat, it was Adams who refused to remove subordinates who were working to secure the election of Andrew Jackson as president. It was only Jackson's victory, following on the heels of gradual yet fundamental political and

77. Letter from Thomas Jefferson to Elbridge Gerry, August 28, 1802, in Jefferson, *Works*, IX, 393 (Federal ed. 1904).

78. Letter from Thomas Jefferson to Dr. Benjamin Rush, March 24, 1801, in *id.* at 231. See also Letter from Jefferson to Archibold Stuart, April 8, 1801, in *id.* at 247-48.

79. Letter from Jefferson to William B. Giles, March 23, 1801, in *id.* at 223.

80. Letter from Thomas McKean to Jefferson, July 1801, quoted in William C. Armor, *Lives of the Governors of Pennsylvania* 303 (1872). Jefferson, however, wrote to McKean that, "Some states require a different regimen from others." Jefferson, *Works*, VIII, 178 (Federal ed. 1904).

81. See Fish, *supra*, note 66, at 86-95.

social changes, that would put the nonpartisan, aristocratic ideal permanently to rest.

### III. PARTY, DEMOCRACY AND OFFICE IN JACKSONIAN AMERICA

Several important political and social changes that occurred in the United States in the first third of the nineteenth century made the end of the nonpartisan, aristocratic ideal of officeholding inevitable. The first change was linked to a general decline in the prestige and power of the upper class. A rapidly growing population,<sup>82</sup> expanded economic opportunities productive of new wealth,<sup>83</sup> and an implicit redefinition of the concept of aristocrat which accorded high status to anyone who earned enough money, whatever his social background,<sup>84</sup> increased the size of the aristocracy and, more important, gave new men entry into it. This change in the size and composition of the upper class tended to dilute the power and influence of individual aristocrats in any given locality. At the same time that the personal power of aristocrats was declining, however, they were being asked to put that power to use in more difficult contexts. Aristocrats in federal service, for example, had a far more difficult role to fill than their colonial predecessors, in that they had to exercise power over a larger number of people spread over a wider geographic area; as a result, an aristocrat who possessed personal power over a fixed number of people would have to persuade more people of the wisdom of his policies by means other than his power if he were a federal officer than if he had been a colonial magistrate. Similarly, the states were growing larger in population and sometimes in area of settlement; consequently, state officeholders, like their federal counterparts, often found themselves having to bring their personal power to bear upon growing numbers of people. The end result was that all levels of government in early nineteenth century America were finding themselves increasingly less able to call effectively upon private aristocratic power to maintain order and enforce the law.

82. See generally J. Potter, "The Growth of Population in America, 1700-1860," in *Population in History: Essays in Historical Demography* 631 (Glass & Eversley eds. 1965); Yasukichi Yasuba, *Birth Rates of the White Population of the United States, 1800-1860: an Economic Study* (1962).

83. See generally Paul W. Gates, *The Farmer's Age: Agriculture, 1815-1860* (1960); Curtis P. Nettels, *The Emergence of a National Economy, 1775-1815* (1962); George Rogers Taylor, *The Transportation Revolution: Industry, 1815-1860* (1951).

84. See, e.g., James Fenimore Cooper, *The American Democrat* [1838] 70-87 (1969 ed.). In Cooper's words, "Social station, in the main . . . [was] a consequence of property." *Id.* at 71.



The ability of government to function by appealing to shared values was likewise being undermined. In the colonial period, as we have seen, magistrates often had been able to persuade other independent men to accept a particular policy by making such an appeal. The four decades from 1789 to 1829 saw the disintegration of whatever consensus had existed in colonial politics. By the 1820's men were aligned in several clearly delineated camps.<sup>85</sup> The daily partisan political conflict that flowed from these alignments, by emphasizing ideological differences rather than shared premises, made it more difficult to arrive at common policies by reasoning together, as the members of the 1787 convention, for instance, had done.

The decline in the personal power of aristocrats and the disintegration of consenses were evidenced by a contraction in the enforcement efforts of government. As the enforcement capacity of government declined, the sorts of matters over which government attempted regulation and ultimately coercion became more limited. In the colonial period, local magistrates had regulated the details of their subjects' economic and moral lives.<sup>86</sup> In contrast, the federal government never assumed an extensive regulatory role prior to the Civil War. Its most difficult enforcement tasks were the collection of its rather small revenue and the execution of the judgments of federal courts.<sup>87</sup>

85. See generally Richard Hofstadter, *The Idea of a Party System: the Rise of Legitimate Opposition in the United States* 212-52 (1972).

86. See Nelson, *supra*, note 10, at 36-63.

87. Of course we must not underestimate the difficulty even of these tasks, particularly in the vast wilderness that constituted early nineteenth-century America. That revenue collection was not always simple is demonstrated by such events as the Whiskey Rebellion of 1794 and South Carolina's attempt at tariff nullification in 1833; on both occasions, the government's normal enforcement mechanism required strengthening. See White, *Federalists*, *supra*, note 12, at 419-20; Leonard D. White, *The Jacksonians: a Study in Administrative History, 1829-1861*, at 512-16 (1954) [hereinafter cited as White, *Jacksonians*]. The potential difficulties in collecting taxes were even more apparent in the prerevolutionary failures of the British imperial government, whose customs duties were never fully collected and some of whose taxes met with outright resistance. See *supra*, note 34. Nor was the enforcement of judgments of the federal courts always an easy task. It must be remembered that the diversity jurisdiction was created for the purpose of removing from the state courts difficult cases that might result in unpopular judgments that would be more difficult than usual to enforce. See Henry F. Friendly, "The Historical Basis of the Diversity Jurisdiction," 41 *Harv. L. Rev.* 483 (1928). Throughout the first seventy years of the federal government's existence, there were, in fact, a series of cases in which state officials sought to interpose their power to prevent the execution of federal judgments, and federal officials were required to take special steps to have the judgments enforced. See Edward S. Corwin, "National Power and State Interposition," in 3 *Ass'n Am. Law Schools* 1176 (1937); Charles Warren, "Federal & State Court Interference," in *id.* at 1096; Warren, "Legislative and Judicial Attacks on the Supreme Court," 47 *Am. L. Rev.* 1 (1913).

Whatever the precise burden of those tasks may have been, it was far less substantial than the burden that had been faced by colonial magistrates attempting to enforce a coherent moral code affecting the details of individuals' lives. Similarly, federal bureaucrats administering the regulatory state in the twentieth century would have a far heavier enforcement burden than their nineteenth century federal counterparts. It was only rare legislation like the embargo of 1807 that stretched the enforcement capacity of nineteenth century federal bureaucrats, and even that legislation never fully tested the ultimate scope of federal power since the embargo was repealed just as the Jefferson administration was beginning to take its most draconian steps to enforce it.<sup>88</sup>

Meanwhile, changes in enforcement patterns at the state level were transforming the states' role into one not vastly different from that of the federal government. As was true of the federal government, the chief tasks of state government were the collection of revenue and the enforcement of judicial judgments.<sup>89</sup> By the early nineteenth century, the old regulatory role of the states was withering away. Local magistrates no longer took an active part in regulating morality, as they had in the colonial period,<sup>90</sup> and, although the states continued to attempt regulation of the economy, they found themselves confronted by new economic phenomena that were much more difficult to control. As a result, many of their attempts at economic regulation were unsuccessful. Massachusetts was one of the more successful in its attempts at regulating banks, insurance companies and railroads,<sup>91</sup> but its success was far from complete. Until the second half of the century, enforcement was attempted with little success through ad hoc legislative investigations occurring after the fact.<sup>92</sup> It was only in the 1850's that permanent boards were established to oversee banks and insurance companies<sup>93</sup> and 1869 that a railroad commission was estab-

88. See generally Walter W. Jennings, *The American Embargo, 1807-1809* (1921); Louis M. Sears, *Jefferson and the Embargo* (1927).

89. That these tasks were not always easy ones, see David M. Ellis, *Landlords and Farmers in the Hudson-Mohawk Region, 1790-1850*, at 34-35, 154-55, 232 (1946); Oscar Handlin & Mary F. Handlin, *Commonwealth: a Study of the Role of Government in the American Economy, Massachusetts 1774-1861*, at 32-33, 43-47 (rev. ed. 1969).

90. See Nelson, *supra*, note 10, at 110-11.

91. See Handlin & Handlin, *supra* note 89, at 128-29, 215-224.

92. See *id.* at 222. On the inefficacy of regulation, see Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, at 453, 559-60 (1964).

93. See Handlin & Handlin, *supra*, note 89, at 222.

lished—a commission which, in the view of modern commentators, had little effective power other than to investigate and publicize wrongdoing.<sup>94</sup> Other states had even less success. When Wisconsin, for example, sought in 1874 to establish a railroad commission with wide enforcement powers, the railroads openly directed their agents to disregard its orders and secured repeal of the enabling legislation in 1875.<sup>95</sup> Similarly, in Pennsylvania, various nineteenth century commentators observed that the banking laws were “practically disregarded,”<sup>96</sup> “shamefully evaded,”<sup>97</sup> “contemptuously trampled on,”<sup>98</sup> and “daily violated with impunity;”<sup>99</sup> like Massachusetts, Pennsylvania often sought to enforce banking and other regulatory laws solely through post-hoc legislative investigations,<sup>100</sup> with the result that regulatory programs were “in all too many instances . . . confined to the theoretical sphere.”<sup>101</sup> Even in New York in the post-Civil War era, a reform legislature met with only mixed success in the enforcement of its programs. The nation’s first tenement house law was a dead letter within three years of its enactment,<sup>102</sup> while an attempt to create a professional fire department succeeded only after initial rioting by old volunteer fire groups had been suppressed.<sup>103</sup> On the other hand, a newly established Metropolitan Board of Health, armed with extensive power to inspect and disinfect houses and to quarantine individuals, achieved striking success in improving New York City’s sanitation and in saving lives during a cholera epidemic with which the city was infected in 1866. During an eight month period of that year, the board issued over 31,000 separate orders, most of them requiring the cleaning and disinfecting of privies, cellars, yards and the like—a quite remarkable feat of enforcement for the nineteenth century.<sup>104</sup> Perhaps the board was so successful, however, only because its orders were backed by an implicit sanction of death.

94. See Edward C. Kirkland, *Men, Cities and Transportation: a Study in New England History, 1820-1900*, II, at 230-67 (1948).

95. See generally Robert S. Hunt, *Law and Locomotives: the Impact of the Railroads on Wisconsin Law in the Nineteenth Century* 98-131, 140-43 (1958).

96. 7 Pa. Archives (4th Ser.) 392 (Report by Gov. Johnston, 1850).

97. 6 *id.* at 130 (Statement by Gov. Wolf, 1836).

98. 6 *id.* at 620 (Statement by Gov. Porter, 1842).

99. Pa. H.R. Jour., 33d Assembly 622 (1822).

100. See Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860*, at 265-66 (1948).

101. *Id.* at 262.

102. See James C. Mohr, *The Radical Republicans and Reform in New York During Reconstruction* 149-52 (1973).

103. See *id.* at 25-53.

104. See *id.* at 86-114.

The narrowing of government's regulatory effort was part of a broader change in the nature of government's total social role. The other element in that broad change was a vast increase in governmental grants and other forms of aid to promote economic growth. The federal government, for example, sold and gave away huge segments of the public domain.<sup>105</sup> Much of the land went to individuals who settled it for purposes of farming,<sup>106</sup> but large tracts were also awarded to entrepreneurs seeking to exploit timber and mineral wealth<sup>107</sup> and to railroads as an inducement to the construction of transcontinental lines.<sup>108</sup> States were even more active than the federal government in promoting growth. The most noteworthy state investment was New York's Erie Canal, which several other states, notably Ohio and Pennsylvania, sought to emulate.<sup>109</sup> In the first three decades of the nineteenth century, virtually every state and locality in the nation sought to aid the economy by building roads and encouraging the construction of privately owned turnpikes,<sup>110</sup> while in the decades that followed similar state and municipal efforts took the form of buying stock and making loans to railroads.<sup>111</sup> Nor were state efforts limited to the construction of transportation facilities; Pennsylvania, for example, sought to aid the economy by investing in banks,<sup>112</sup> while Massachusetts sought to promote industry by granting monopolistic privileges to mills.<sup>113</sup> Although grants were sometimes accompanied by regulations to insure that the objects of the grants were attained, grants differed from more general forms of regulation in at least one highly significant way—namely, that regulation could be applied uniformly to all citizens whereas grants, especially those that necessarily conferred monopolistic benefits in order to accomplish their developmental objectives, could only be given to one from among several applicants. As a result, the increase in grants, occurring in conjunc-

105. See Paul W. Gates, *History of Public Land Law Development* 121-218 (1968); Rohrbaugh, *supra*, note 28, at 89-249.

106. See Gates, *supra*, note 105, at 219-47, 387-434.

107. See *id.* at 531-62, 699-714; Hurst, *supra*, note 92, 62-142.

108. See *id.* at 341-86.

109. See generally Carter Goodrich, *Government Promotion of American Canals and Railroads, 1800-1890*, at 51-168 (1960); Hartz, *supra*, note 100, at 130-49; Harry N. Scheiber, *Ohio Canal Era: a Case Study of Government and the Economy, 1820-1861* (1969).

110. See Nelson, *supra*, note 10, at 146-47; Kirkland, I, *supra*, note 94, at 32-59.

111. See Hartz, *supra*, note 100, at 37-180; Kirkland, II, *supra*, note 94, at 237-40, 248, 250.

112. See Hartz, *supra*, note 100, at 55, 96-100.

113. See Handlin and Handlin, *supra*, note 89, at 71-73, 76-77, 87, 103-5.

tion with the narrowing scope of regulation, transformed government from an institution that had existed primarily to insure the maintenance of uniform moral standards throughout the community into an institution whose chief task was the allocation of valuable resources among contending economic interests. Of course, this change in the role of government produced a corresponding change in the role of magistrates: magistrates who had once been charged with the maintenance of inherited ethical values were transformed into distributors of government lucre among the various interests struggling to receive it.

The growing ability of officials to dispense government largess tended to make office more attractive to its holders. Other simultaneous changes were also increasing the desirability of office at both the state and the federal level. The most important was the increasing remuneration being given to officeholders. By the early nineteenth century, most federal officers, who were paid either salaries, fees or a combination of the two, were earning in the area of from \$1000 to \$2000, although some were earning substantially more.<sup>114</sup> It also seems likely that many state offices were also becoming increasingly remunerative, although data is somewhat difficult to obtain. Finally, a growing recognition that the public had an interest in "lightening the burdens of office"<sup>115</sup> that common citizens might be called upon to fill and that all citizens had an interest in seeing filled by honest and competent men led to a reduction in legal liabilities for malfeasance in office.<sup>116</sup> The end result was that, whereas office in the colonial era often had had to seek its man, men in the early nineteenth century were seeking office quite avidly and finding that the offices they obtained were clearly beneficial rather than burdensome.

Taken together, these changes transformed the magistracy from a system in which aristocrats had effectively devoted their personal authority to the enforcement of shared community values with little immediate personal gain to themselves, into a system in which officials, who still tended to be of upper class

114. The act of 1818 provided for a scale of five pay rates for clerks, from \$800 to \$1,400 a year and up to \$1,700 for chief clerks. See Compensation of Clerks Act of 1818, § 7, 3 *U.S. Stats.* 447. The legislation of 1836 raised the pay scale to \$1,000, \$1,200 and \$1,400 for clerks, \$1,600 for principal clerks and \$2,000 for chief clerks. See Post Office Reorganization Act of 1836, §§ 43-44, 5 *U.S. Stats.* 89. Lucky officials, however, could get extra allowances and fee officers might earn substantially more, particularly in the major cities. See White, *Jacksonians*, *supra*, note 87, at 384-91.

115. *Ingraham v. Doggett*, 22 Mass. (5 Pick) 451-52 (1827).

116. See Nelson, *supra*, note 10, at 92-93.

extraction,<sup>117</sup> used their power not to promote politically neutral ends, which no one could any longer identify, but to obtain personal benefit or to further the political goals of some segment of the community with which they were allied. Thus, when Andrew Jackson in his 1829 message to Congress observed that "office . . . [was] considered as a species of property, and government rather as a means of promoting individual interests than as an instrument created solely for the service of the people,"<sup>118</sup> he was merely commenting perceptively on the transformation in the nature of office that had occurred in his own lifetime.

The transformation confronted Jackson and his party with two interrelated problems. Although they did not often see the problems as distinct ones, it is convenient to analyze them separately before turning to their interrelationship.

The first problem was to put an end to the special privileges of the few and create a new structure of power which would give control of government to the people. There can be no doubt of Jackson's own feelings on this issue. He argued that "[o]ffices were not established to give support to particular men at public expense" and that "[i]n a country where offices . . . [w]ere created solely for the benefit of the people no one man ha[d] any more intrinsic right to official station than another."<sup>119</sup> Office, in short, should be shared equally by all. When he came to power, Jackson was being pressed vigorously by men who wanted their share of power; at the beginning of his administration, thousands ascended upon Washington seeking office in no uncertain terms. As one New York politician informed Martin Van Buren, the incoming Secretary of State:

. . . . I take it for granted that all who do not support the present administration you will not consider your friends, and of course will lose your confidence. I have said from the commencement of the contest that I would not support any administration who would support men in power that had contributed to overthrow the democratic party in this State. I have preached this doctrine too long, and it has taken too [strong] a footing here, to be easily got rid of. This is not only the doctrine in theory, but we require it to be reduced to practice by the servants of the people to whom we have temporarily delegated the trust. I speak now the universal sentiments of the democracy of this city, and you may rely upon it no man can be sustained who aids or abets in the disappointment of the just expectations

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117. See generally Aronson, *supra*, note 62.

118. Andrew Jackson, "First Annual Message" (December 8, 1829), in James David Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, II, 448-49 (1897).

119. *Id.* at 449.



of the people on this subject—and all personal considerations and private friendships must yield to *political justice* . . . .<sup>120</sup>

It clearly seemed “right and politic to encourage and reward friends,”<sup>121</sup> and Jackson accordingly had little choice but to remove old officeholders from their jobs when “the public sentiment” in their locality “demand[ed] a change in the office.”<sup>122</sup> But that he also acted out of belief in the principle that all citizens should have equal access to office is demonstrated by his many appointments to office of former Federalists, who had been effectively frozen out of the federal bureaucracy during the administrations of his Republican predecessors.<sup>123</sup>

The other problem which Jackson and his associates faced was the deterioration of traditional structures of order and authority. Jackson and his men had watched centers of social power such as organized religion, professional associations and informal business groupings collapse and thereby lose effective power to impose moral standards on their members.<sup>124</sup> They commented upon such matters as the “debased . . . standard of commercial honesty,” “love of wealth,” “corruption,” and the need to return to the old republican “virtue.”<sup>125</sup> They thus glimpsed the fact that the traditional shared moral code of the eighteenth century had disintegrated and that social order could no longer rest on it. They may well have sensed as they tried to discharge the duties of office that they could no longer take advantage of old links with old centers of social power to insure uncoerced obedience to their commands, for those centers had become as weak as they themselves were.

But they were not without power of a different sort. Their capacity to bestow offices, contracts and favors conferred real power on them if they required the recipients in return to give loyalty and render services on a continuing basis. The Jacksonians saw that they could bind “the mass of the parties”

120. Letter from Jesse Hoyt to Martin Van Buren, March 21, 1829, quoted in William L. Mackenzie, *The Lives and Opinions of Ben'n Franklin Butler . . . and Jesse Hoyt*, . . . 51-52 (1845). Hoyt eventually became collector of the port of New York.

121. Letter from William T. Barry to Susan Taylor, June 11, 1829, in 16 *Am. Hist. Rev.* 333 (1911).

122. Letter from William T. Barry to Nathaniel Mitchell, October 30, 1834, announcing his removal, in 47 *Niles Register* 186 (November 22, 1834).

123. See Shaw Livermore, *The Twilight of Federalism: the Disintegration of the Federalist Party, 1815-1830*, at 242-50 (1962).

124. See Crenson, *supra*, note 26, at 143-45.

125. William M. Gouge, *A Short History of Paper Money and Banking in the United States* 30-33 (2d ed. 1835). For an analysis of this theme of a need for restoration, see Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* 16-33 (rev. ed. 1968).

together "with the hope of office, and its honors and emoluments."<sup>126</sup> More was at stake, however, than simply the winning of elections; indeed, Jackson's appointees frequently denied "exercising . . . [their] influence 'for political' or 'electioneering purposes.'"<sup>127</sup> Dispensers of patronage could demand in return loyalty to and support of government programs as well as assistance in winning elections. Appointees were informed that they had "received the appt. . . . under the full impression that you were ready and willing to take upon yourself the entire responsibility of cooperating with the administration in its measures"<sup>128</sup> and that those who "acted partially in their stations, ought not to expect to remain in office."<sup>129</sup> In sum, the Jacksonians commenced a reconstruction of social order upon the urge of men to obtain wealth and power—that is, upon the desire of individuals to advance their own well-being rather than upon shared moral sentiments inherited from an earlier era.

The Jacksonian attempt to weld party and office together into a new structure of authority can be observed throughout the federal bureaucracy and in many of the states, notably New York and Pennsylvania. However, two branches of the federal establishment—the post office and the customs service—will provide sufficient illustration when they are examined in detail.

In the Jacksonian era the post office was the largest branch of the federal establishment, with a total of some eleven thousand local offices.<sup>130</sup> Its size alone made it important, for by wisely distributing postal jobs an administration could gain power over a large number of men and their families.<sup>131</sup> But postal jobs themselves explain only a small part of the post office's significance, for the department had special importance in two other ways. First, it did not ship mail by itself; instead mail was shipped by private contractors. Those contractors made a good deal of money: for example, the contract for the thirty-one mile route between Hagerstown, Maryland, and McConnellstown,

126. Letter from Edward Everett to John McLean, August 1, 1828, in 1 *Proc. Mass. Hist. Soc'y* (3d ser.) 361 (1907).

127. Letter from William T. Barry to Andrew Jackson, April 1, 1835, quoted in Dorothy G. Fowler, *The Cabinet Politician: the Postmasters General, 1829-1909*, at 17 (1943).

128. Letter from William T. Barry to S. L. Gouverneur, July 14, 1829, quoted in Fowler, *supra*, note 127, at 16.

129. Letter from William T. Barry to Susan Taylor, May 16, 1829, in 16 *Am. Hist. Rev.* 332 (1911).

130. See H. R. Rep. No. 103, 23d Cong., 2d Sess. 212 (1935). There were 10,693 postmasters in 1834, and they received \$896,063 in compensation, while \$1,922,431 were paid to contractors.

Pennsylvania was worth \$1,400 per year, while the combined contracts from Baltimore to Washington and Baltimore to Wheeling, Virginia, were worth \$57,000.<sup>132</sup> The number of contracts, moreover, was quite large: by 1835, the number of contractors and their immediate dependents was over 20,000, and they received almost \$2,000,000 from the post office.<sup>133</sup> Prior to the appointment of Amos Kendall as Postmaster General in 1835, the department had let most contracts to its "old and faithful contractors" who had delivered the mail for long periods of time, through changes of administration, without regard to their politics.<sup>134</sup> Kendall ceased favoring contractors who had carried the mail in the past and instead favored those whose politics were more acceptable to the administration.<sup>135</sup> Together with post office employees, these contractors and their employees constituted a sizeable army whose economic interests insured their loyalty to federal law and administration policy.

The post office gained added importance from the fact that its employees were "agents for disseminating information throughout the country."<sup>136</sup> Jackson himself had noted of the post office that

in a political point of view this Department is chiefly important as affording the means of diffusing knowledge. It is to the body politic what veins and arteries are to the natural—conveying rapidly and regularly to the remotest part of the system correct information of the operations of the Government, and bringing back to it the wishes and feelings of the people. Through its agency we have secured to ourselves the full enjoyment of the blessings of a free press.<sup>137</sup>

While control of the post office would by no means guarantee total control of the dissemination of news and political opinion, the post office could surely help to manipulate political opinion and maintain social order, as it did when it refused to deliver abolitionist tracts in the South.<sup>138</sup> The franking privilege which

131. See *id.* at 28-29. See also S. Rep. No. 422, 23d Cong., 1st Sess. 11-13 (1834).

132. See letter from Amos Kendall to B. F. Butler, June 30, 1835, quoted in Crenson, *supra*, note 26, at 95.

133. See White, *Jeffersonians*, *supra*, note 57, at 329.

134. Amos Kendall, *Autobiography* 343-44 (Stickney ed. 1872). See also Francis P. Weisenburger, *The Life of John McLean: a Politician of the United States Supreme Court* 44 (1937).

135. See Crenson, *supra*, note 26, at 104-115.

136. Speech of James Buchanan before U. S. Senate, February 14, 1839, quoted in George T. Curtis, *The Life of James Buchanan*, I, 381 (1883).

137. Andrew Jackson, "First Annual Message," (December 8, 1829), in J.D. Richardson, II, *supra*, note 118, at 460-61.

138. See Gilbert H. Barnes, *The Anti-Slavery Impulse, 1830-1844*, at 100-101, 247 nn. 1-2 (1933); Russell B. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830-1860*, at 54-69 (1949);

local postmasters possessed until it was taken from them by statute in 1845<sup>139</sup> also aided in manipulating news and opinion: by distributing local postmasterships together with the right to send all one's personal mail free of charge to local editors, the Jacksonians cemented their relationships with those editors and gained a substantial measure of control over the news and opinion which they printed for the public. Each postmaster became "an electioneering outpost."<sup>140</sup> By also requiring their opponents to pay postage for mailing opposition publications, they insured that the opposition would function at a competitive disadvantage. In short, the postmasters, "[w]hen organized into a political corps . . . [could] give facilities to the circulation of newspapers, extras, etc., favorable to their views, and throw obstacles in the way of the circulation of those of an opposite character."<sup>141</sup> They could make the circulation of opposition views expensive and thereby play upon the economic acquisitiveness of their contemporaries to encourage them to support rather than oppose the administration.

The customs office similarly relied on economic incentives as a basis for rebuilding social order. Again, the potential for power in the service rested in part on the number of available places: by the 1850's the service in New York alone employed close to one thousand men.<sup>142</sup> Those one thousand men, however, were only the tip of the iceberg. The real power of the collector and his staff was that they controlled the speed with which imported goods cleared the port and the appraisal and classification of goods and hence the tax imposed on them.<sup>143</sup> In short, they controlled the profit of the merchants. As to the speed of clearance, there is evidence that by the 1850's some merchants were required to pay fictitious charges or wait indefinitely for port services.<sup>144</sup> As to classification and appraisal of goods,

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Clement Eaton, *Censorship of the Southern Mails*, 48 *Am. Hist. Rev.* 266 (1942).

139. Post Office Frauds Act, 5 *U.S. Stats.* 732 (1845).

140. *National Intelligencer* 3 (April 18, 1839).

141. H. R. Doc. No. 103, 23rd Cong., 2d Sess. 212 (1835).

142. H.R. Exec. Doc. No. 3, 35th Cong., 2d Sess. 247-49 (1858). See also H.R. Exec. Doc. No. 10, 34th Cong., 1st Sess. 10 (1853). Over three-fourths of the federal government's total revenue came from customs receipts in the port of New York.

143. See, e.g., Sec'y of Treasury, Report on Collection of Duties, H.R. Exec. Doc. No. 2, Pt. 2, 49th Cong., 1st Sess. xxv (1885); S. Rep. No. 1990, 49th Cong., 2d Sess. 73 (1887).

144. See, e.g., 91 *No. Am. Rev.* 449-50 (1860), reporting a public protest by 22 sea captains against the delays and bribery required. See also W. Hartman, "Politics and Patronage: The New York Customs House, 1852-1902" at 204-205 (unpublished Ph. D. dissertation, Columbia University, 1952).

customs agents obviously had significant discretion, particularly if goods were of an unusual sort, if they were purchased with foreign currencies of fluctuating value, or if they had been partially damaged.<sup>145</sup> Of course, if an agent refused to clear goods or imposed an excessive tax on them, a merchant possessed judicial<sup>146</sup> and after 1842 administrative remedies<sup>147</sup>—remedies, however, that were costly in terms of both time and delay. Thus, the customs service could impose significant obstacles in the path of a merchant who was in its disfavor. More important, however, were the benefits it could grant to its friends. It could clear their goods with special dispatch and classify and assess them so that low taxes would be imposed.<sup>148</sup> Within the existing state of customs administration there were no procedures for controlling such special favoritism; in particular, undervaluations of individual shipments of goods by customs officers could not be challenged by measuring them against an objective standard of value.<sup>149</sup> The service accordingly had the power to give its merchant friends a special competitive advantage which their competitors lacked standing to challenge in either a judicial or an administrative proceeding. As one Secretary of the Treasury observed in the latter part of the century, even slight favoritism might “enable a successful evader of duties to outstrip and out-sell all rivals in the same line of merchandise.”<sup>150</sup> By so organizing the customs service for political ends, an administration could thus place substantial pressure on merchants engaged in importing foreign goods, as did every administration from that of Jackson on.<sup>151</sup> Merchants could also be pressured into helping the administration obtain the support of businessmen and

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145. See H.R. Rep. No. 740, 24th Cong., 1st Sess. 1 (1836).

146. See Nelson, *supra*, note 10, at 17-18, 31, 92-93.

147. Tariff of 1842, § 17, 5 *U.S. Stats.* 564-65, granted review of original appraisals by two discreet and experienced merchants. If the two agreed, their decision was final; otherwise the collector decided.

148. See Sec’y of Treasury, Report on Collection of Duties, H.R. Exec. Doc. No. 2, Pt. 2, 49th Cong., 1st Sess. xxiv-xxv (1885).

149. See notes 192-95 *infra* and accompanying text. The Customs Administration Act of 1890, 26 *U.S. Stats.* 131, provided for the creation of a body of precedents against which future evaluations could be compared. The previous system of two merchants, see note 147 *supra*, in effect under the 1842 law could not provide a similar body of precedent because judgments of different pairs of merchants were too disparate and were inadequately published. For a discussion of an analogous set of problems, see Nelson, *supra*, note 10, at 165-70.

150. Sec’y of Treasury, Report on the Collection of Duties, H.R. Exec. Doc. No. 2, Pt. 2, 49th Cong., 1st Sess. xxv (1885).

151. A merchant belonging to the party out of power could increase his leverage, however, by hiring a customs broker, who was a member of the party in power. But, of course, this imposed an additional cost which his competitors avoided. See Hartman, *supra*, note 144, at 205.

other individuals who dealt with them once the importation process had been completed. It was commonplace for those who had voted "wrong" to be appealed to by one of the faithful with similar interests; on one occasion, for example, it was suggested to the Democratic leader of Hartford that he get one of his "mariners" to convince a fellow seaman to join the party.<sup>152</sup>

The post office and the customs service were not the only branches of government that either employed large numbers of citizens or provided opportunities for profit for independent contractors dealing with government. At the federal level, there was also money to be made in war department contracts, in the navy yards and in government offices engaged in the sale of public land.<sup>153</sup> What Jackson and his associates recognized was that this opportunity for profit could be used to weld party and office together both at the federal level and in the states and thereby help solve the problem which their age confronted of declining authority structures.

As I have already suggested, however, this problem often was not clearly seen as separate from the problem of ending the special privileges of aristocrats, and the two problems were not, in fact, unrelated. First, they were related in the rather obvious way that office could not be given to faithful party men until it had been taken away from its traditional aristocratic holders. When Jackson replaced the traditional office holders with new men faithful to the party, that is, he solved both problems simultaneously. Second, the idea of rotation—"a leading principle in the republican creed"<sup>154</sup> which sought to insure access to office on the basis of equality rather than privilege—increased the strength which party brought to office by increasing the number of men who could hope some day to hold it. The point is that men who expected to gain office within the space of months or even a few years, whether by calling upon their own party to rotate its own men or by an electoral victory of the opposition party, would join with current officeholders to support and even enhance official power; it would be better to support the exactions and impositions of the current holder so that one could himself exact and impose in the future than to challenge the current holder's power and find himself assuming an office with-

152. Quoted in Fowler, *supra*, note 127, at 14-15.

153. See generally White, *Jacksonians*, *supra*, note 87, at 187-205, 219-88; Crenson, *supra*, note 26, at 84-87; Alexander H. Meneely, *The War Department, 1861: A Study in Mobilization and Administration* 100-139, 252-79 (1928).

154. Andrew Jackson, "First Annual Message" (December 8, 1829), in Richardson, II, *supra*, note 118, at 449.



out prerogatives. "With a reasonable rotation," it was observed, "every citizen of political aspiration and experience who reach[ed] middle life and conduct[ed] himself well . . . [could] hope to crown his family with the reflected honor which office confer[red]. This prospect . . . [was] a motive to good work."<sup>155</sup>

Finally, the goal of eliminating aristocratic privilege and the necessity of creating new power structures were related at a deeper level. They both arose out of changes in men's conception of politics. In eighteenth century America, most of what we would view as political issues were seen instead as moral issues—as conflicts between right and wrong. While some of those issues in fact involved clashes between different class groups and interest groups, they were not so understood: in particular, there was no understanding that, when two groups were in conflict, both might be acting legitimately in advancing inconsistent demands and that the question of which demand to prefer was one of power rather than right. It followed from such a conception of politics that controversies should be resolved by officials who had the capacity, education and leisure to enforce moral right—a role that aristocrats could best fill.

By the 1830's, however, all this had changed. Political conflicts were no longer viewed as disputes about the content of autonomous moral standards; instead they were seen as disputes between class and interest groups which were each trying to use government for their own maximum benefit. It was further seen that society was capable of being shaped in an infinite number of ways, no one of which was more right or wrong than any other, and hence that there was no one right way to resolve disputes; on the contrary, their resolution was merely a question of power. In a society that was to be democratic, power, of course, had to be held by the "common man." This meant first that aristocrats had to be deprived of their special claim on office. It also meant that their replacements in office had to be given effective power to govern. Ultimately, it meant that all official power, including the power of subordinate officials, had to be placed directly under the control of the people, preferably, as Frederick Grimke urged, by having all officials popularly elected or, where that proved impossible, by having them rotated in and out of office by those who were so elected.<sup>156</sup> As one Congress-

155. Dickson, "The New Political Machine," 134 *No. Am. Rev.* 40, 50 (1882).

156. See White, *Jacksonians*, *supra*, note 87, at 558-60.

man told the House after the spoils system had been well established:

" . . . It is by having their agents constantly before them that their acts may be denounced or confirmed that the people maintain their supremacy and enforce their will. This, sir, is the theory and practice of our Government. Immediate responsibility we all incur, and speedy settlements we all must render. The appointment of subordinates or the nominations for appointments are just as much a part of our responsibility as any other which we have, and a share in those appointments and the right to become for a time a portion of the administrative force of the Government is one of the recognized rights of the people. . . ." <sup>157</sup>

In short, the perception of office as political—as capable of determining the course of social change for the benefit of particular groups and interests—required in a democratic state that office be transformed into an instrument of the will of the people or at least of the majority of the people. This required the replacement in office of aristocrats with what would later become known as spoilsmen and the linkage of office with party in a way that insured that the will of the majority would be brought to bear upon the holders of office, who in turn, would be given renewed strength to bring that will to bear upon a recalcitrant minority.

#### IV. POLITICAL MORALITY AND THE PROFESSIONALIZATION OF THE CIVIL SERVICE

Following the 1881 assassination of President Garfield by a disappointed office seeker, shortly after he had taken office, public opinion turned sharply in favor of reform of the spoils system,<sup>158</sup> and in 1883 reform legislation was enacted.<sup>159</sup> That legislation created a Civil Service Commission and established fundamental rules for its operation, dividing the civil service into unclassified and classified segments and providing for the appointment of members of the classified service on the basis of merit, as determined by competitive examinations that were open to all wishing to take them. Gradually, over the course of the next several decades, increasing numbers of lower federal officials were added to the classified service, and civil service

157. Cong. Globe, 40th Cong., 3d Sess. 263 (1869) (remarks of Rep. John A. Logan).

158. See Ari A. Hoogenboom, *Outlawing the Spoils: a History of the Civil Service Reform Movement, 1865-1883*, at 212-14 (1961); Leonard D. White, *The Republican Era: a Study in Administrative History, 1869-1901*, at 300-301 (1958) [hereinafter cited as White, *Republicans*].

159. Civil Service Act, 22 U.S. Stats. 403 (1883).

reform was extended to state and municipal governments.<sup>160</sup> Thus, the battle for reform, which had been commenced in the mid and late 1860's by political moralists who were turning their attention away from antislavery and Southern Reconstruction,<sup>161</sup> was ultimately triumphant.

In part, the reform movement was merely an attempt to eliminate corruption and improve performance within the lower bureaucracy. From the time of Jackson's administration, commentators had argued that rotation in office led to deterioration of performance levels in government service; as one had observed, "frequent change of the incumbents of office . . . [was] a willful sacrifice of all the tact, skill, and knowledge which . . . [could] be gained from experience."<sup>162</sup> The reformers had also observed a marked increase in official corruption. One place where corruption was rife was the customs service in New York: Samuel Swartwout, Jackson's collector for the port, embezzled \$1,225,705.69 in customhouse funds,<sup>163</sup> while Jesse Hoyt, whom Van Buren appointed as his successor, stole somewhere between \$150,000 and \$200,000.<sup>164</sup> Two decades later, Isaac Fowler, Buchanan's collector, fled to Mexico owing over \$150,000.<sup>165</sup> Similarly, an 1839 report showed that 75 receivers of public money in land offices were in arrears in their payments to the government.<sup>166</sup> While in many of these cases the amounts in arrears were small and in some of them reflected bona fide accounting differences, in others real delinquencies had occurred.<sup>167</sup> As the years progressed, graft and corruption reached the highest levels of the federal government in the Grant administration and municipal government under Boss Tweed in New York.<sup>168</sup>

160. See generally Hoogenboom, *supra*, note 158, at 239-48; Paul P. Van Riper, *History of the United States Civil Service* 96-532 (1958); Leonard D. White, *Trends in Public Administration* 239-58 (1933).

161. Several of the most prominent civil service reformers such as Charles Sumner, G. W. Curtis and Horace Greeley had been active in the abolitionist movement. See David H. Donald, *Charles Sumner and the Coming of the Civil War* (1960); David H. Donald, *Charles Sumner and the Rights of Man* (1970); William H. Hale, *Horace Greeley* (1950); Gordon Milne, *George William Curtis and the Gentee Tradition* (1956); Glyndon G. Van Deusen, *Horace Greeley: Nineteenth-Century Crusader* (1953).

162. F. Bowen, "Book Review," 76 No. *Am. Rev.* 496 (1853).

163. See H.R. Exec. Doc. No. 13, 25th Cong., 3d Sess. 25 (1838).

164. See H.R. Exec. Doc. No. 212, 27th Cong., 2d Sess. 294-98 (1842).

165. See H.R. Exec. Doc. No. 91, 36th Cong., 1st Sess. 3 (1860).

166. See H.R. Rep. No. 313, 25th Cong., 3d Sess. 142-46 (1839).

167. See White, *Jacksonians*, *supra*, note 87, at 421-22.

168. See generally Alexander B. Callow, Jr., *The Tweed Ring* (1966); Seymour Mandelbaum, *Boss Tweed's New York* (1965); Allan Nevins, *Hamilton Fish: The Inner History of the Grant Administration* 638-66, 717-39, 762-837 (1937).

Incompetence and corruption were obvious targets for the reformers. As Congressman Thomas Jenckes, the leader of the civil service reform movement in its earliest stages, remarked in one speech, "... [the] true interests of the Government . . . [could] be best served, its expenses lessened, the character of its officers improved, and its business more effectually done, by an entire reformation in the mode of making appointments in civil service. . . ."<sup>169</sup> Civil service reform would bring "competency" and "efficiency" along with "integrity" to the public service.<sup>170</sup> The National Manufacturers' Association, at its first annual meeting in 1868, agreed that it was "indispensable that public affairs be conducted on business principles, and that the dangerous custom of giving public posts to political paupers and partisan servants, regardless of their fitness, should be discontinued, as such custom absorbs a large share of the public revenue . . . ."<sup>171</sup> Administrators of some of the few federal agencies which were reformed at an early date also agreed that reform improved agency efficiency. The head of the lifesaving service, Sumner I. Kimball, for one, observed that in that "expert service" it was "absolutely indispensable" in obtaining the "very best obtainable men" "to adopt such means as would exclude politics" from their appointments.<sup>172</sup> Carl Schurz, the Secretary of the Interior under President Hayes, likewise concluded that the appointment of clerks only after a competitive examination, the keeping of efficiency records and the promotion of the most efficient "proved to be a powerful stimulus" to "almost everyone . . . do[ing] his utmost."<sup>173</sup>

Inefficiency and corruption, however, were often perceived merely as symptoms of a deeper malaise in American political life in the mid-nineteenth century. When the American people looked at their leaders during and after the 1850's, it seemed that most of those leaders had failed them. Compared with George Washington, John Adams and Thomas Jefferson, Millard Fillmore, Franklin Pierce and James Buchanan seemed quite ineffectual. As one commentator observed, the country had become "lamentably destitute . . . of men in public station of whom we

169. Cong. Globe, 39th Cong., 2d Sess. 837 (January 29, 1867).

170. *Id.* at 837-39.

171. Resolution of May 27, 1868, quoted in White, *Republicans*, *supra*, note 158, at 297. Accord, *N.Y. Times*, July 27, 1868, at 4, col. 4.

172. See S. Rep. No. 576, 47th Cong., 1st Sess. 212 (1882).

173. Letter from Carl Schurz to E. L. Godkin, December 7, 1879, in Schurz, *Speeches, Correspondence and Political Papers*, III, 490-91 (Bancroft ed. 1913).

may speak with any pride . . . .”<sup>174</sup> The main problem was that politics had been transformed from the practice of moral philosophy into a technique for allocating power and wealth, with the result that politicians had ceased to be moral leaders and become instead merchants of office and privilege.

The civil service reformers, nearly all of whom had built their early political careers on the basis of their essentially moralistic opposition to slavery,<sup>175</sup> endeavored to reconstruct the moral foundations of American politics. They believed “that the abolition of the spoils system . . . [was] second only in importance to the abolition of slavery . . . .”<sup>176</sup> They saw the link between the evil nature of politics and the wicked character of the men who became politicians and sought to reform the former by changing the latter. Thus, as Carl Schurz, an antislavery man who became an early leader of the reform movement, told the Senate:

. . . [T]he question whether the Departments at Washington are managed well or badly, is, in proportion to the whole problem, an insignificant question after all. Neither does the question whether our civil service is as efficient as it ought to be, cover the whole ground. The most important point to my mind is, how we can remove that element of demoralization which the now prevailing mode of distributing office has introduced into the body-politic.<sup>177</sup>

One aspect of that demoralization was the diversion of political parties from their proper function. That function was to “divide upon questions of national policy . . . by appeal[ing] by public speech and in the public press to the judgment of the people” and to “strive . . . to elect to the various legislatures representatives who will put its policy into law . . . .”<sup>178</sup> “Civil service reform” sought “not merely the observance of certain rules of examination” but “the restoration of political parties to their true function, which is the maintenance and enforcement of national policies . . . .”<sup>179</sup> Reformers did “not, of course, contemplate the dissolution of parties,” but proposed merely to “promote the legitimate power of party by making it a representative of

174. Letter from John P. Kennedy to his uncle, quoted in H. Tuckerman, *Life of John Pendleton Kennedy* 187 (1871).

175. See note 161, *supra* and accompanying text.

176. 31 *The Nation* 153 (1880). Accord, 31 *id.* at 134, 170-71, 184. See also 22 *id.* at 313 (1876). See generally Arthur M. Schlesinger, Sr., *Political and Social History of the United States* 315 (1925).

177. Speech before the United States Senate, January 27, 1871, in Schurz, *supra*, note 173, at 123.

178. George W. Curtis, “The Relation between Morals and Politics” (1878), in *Curtis, Orations and Addresses*, II, 135 (1894).

179. Curtis, “The Last Assault upon Reform,” 31 *Harper’s Weekly* 358 (1887).

opinion to a degree which, under the spoils system, is impossible."<sup>180</sup>

In the end, the reformers carried their analysis of the evils of the spoils system to an even more abstract level. The thrust of the reform movement was perhaps best summed up by its moral and intellectual leader, George William Curtis:

What we affirm is that the theory which regards places in the public services as prizes to be distributed after an election, like plunder after a battle, the theory which perverts public trusts into party spoils, making public employment dependent upon personal favor and not on proved merit, necessarily ruins the self-respect of public employees, destroys the function of party in a republic, prostitutes elections into a desperate strife for personal profit, and degrades the national character by lowering the moral tone and standard of the country.<sup>181</sup>

Essentially, as Curtis' analysis indicates, the reformers were seeking to transform the processes of governmental decision-making. As they looked at mid-nineteenth century government, they saw decision-making as a process in which officeholders by mere acts of will allocated the spoils of office among the party faithful. The reformers sought to replace this process by one that compelled administrators to act in accordance with autonomous, abstract standards. This concern with compelling officeholders to act objectively necessarily led to the reform of abuses in addition to those in the means of obtaining office, as examination of legislation relating to the postal service and the customs administration will show.

As we have seen, the post office's political importance in the mid-nineteenth century had rested in part on the contracts that it awarded for carriage of the mails.<sup>182</sup> With regard to those contracts, a complex series of reforms was put into effect in the last third of the century. Postal contracts in theory had always been awarded to the lowest qualified bidder, but, in practice, a number of techniques had been developed to circumvent the ideal; among the techniques were inadequate advertising of the contracts to be let, the awarding of additional compensation to favored low bidders, and the nominal acceptance of straw bids followed by the awarding of the actual contracts to a favored high bidder.<sup>183</sup> Congress outlawed these and some similar practices by a major piece of reform legislation in 1872,<sup>184</sup> which

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180. Curtis, "Party and Patronage" (1892), in Curtis, II, *supra*, note 178, at 505.

181. *Id.* at 502.

182. See notes 131-41, *supra* and accompanying text.

183. See White, *Jacksonians*, *supra*, note 87, at 254-58.

184. Post Office Reform Act, 17 U.S. Stats. 283 (1872).



required the post office to comply with detailed requirements for advertising before receiving bids for contracts, prohibited the award of additional compensation except in narrowly specified circumstances, compelled bidders to give security for the performance of their contracts before their bids could be opened, and even made failure to perform a bid which the government had accepted a misdemeanor.<sup>185</sup> The new requirements explicitly did not apply to contracts made with railroads,<sup>186</sup> which had become the principal carriers of domestic mail by the 1870's;<sup>187</sup> although the legislation set the rates of compensation that railroads could receive, it gave the Postmaster General discretion to make contracts with whichever roads he chose.<sup>188</sup> But, for several reasons this discretion did not result in contracts being awarded on political grounds. Until the 1860's, the post office almost never had to choose among railroads when it was seeking to transport mail; the rail network was so undeveloped that one route was all that was generally available between any two points.<sup>189</sup> Just at the time that the network developed sufficiently to permit interline competition, a small group of men with reform ideas and an extraordinary concern for postal efficiency created the railway mail service and established procedures for allocating the mail and hence payments for its carriage among potential competitors on nonpolitical grounds. The procedures revolved around a set of detailed schedules of interconnecting mail trains; clerks both at central post offices and in railway mail cars were directed to ship mail so that it would arrive at its destination most efficiently—that is, on the earliest possible train.<sup>190</sup> The apolitical nature of this process was reinforced in 1889 when the railway mail clerks were included within the classified civil service.<sup>191</sup>

Efforts were similarly made to depoliticize the administration of customs in the late nineteenth century. As we have seen, the political power of the customs service had rested largely on the ability of agents to classify and appraise the goods of friendly

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185. *Id.* at §§ 243-262.

186. *Id.* at § 265, repealed in part by Post Office Appropriations Act of 1873, § 1, 17 *U.S. Stats.* 556, 558 (1873).

187. See, e.g., Anon., *A History of the Railway Mail Service* 7-8, 95-98 (1903).

188. See Post Office Reform Act § 265, 17 *U.S. Stats.* 283 (1872).

189. See generally George Rogers Taylor and Irene D. Neu, *The American Railroad Network, 1861-1890*, at 4-48 (1956).

190. See generally Anon., *Railway Mail Service*, *supra*, note 187, at 81-104, 107-123.

191. See Executive Order, in Richardson, VIII, *supra*, note 118, at 845-51 (Grover Cleveland, January 4, 1889).

merchants more favorably than those of unfriendly importers.<sup>192</sup> In the last two decades of the nineteenth century, new efforts were made "to levy and collect duties [that were] uniform . . . for all persons throughout the United States."<sup>193</sup> Those efforts culminated in the Customs Administration Act of 1890,<sup>194</sup> which established a Board of General Appraisers, consisting of nine men who were appointed by the President with Senate confirmation for unspecified terms but were removable from office only for cause. This board, one of the earliest of the federal administrative agencies, rapidly built up a body of expertise and precedent that gave agents standards to follow in individual cases; while the new standards did not eliminate all possibilities of favoritism, they did provide a gauge against which particular decisions could be measured if favoritism was suspected.<sup>195</sup>

Meanwhile, standards were gradually being introduced elsewhere in the federal administrative system, and those standards were undermining "the vulgar conceit that a Yankee . . . [could] turn his hand to anything" merely because he had the will to do so.<sup>196</sup> Many jobs were beginning to require special abilities, skills and expertise. In the Department of Agriculture, for example, some newly developing jobs required scientific expertise and others, statistical skills that could only be measured objectively.<sup>197</sup> Throughout the bureaucracy, the introduction of office machinery, like typewriters and telephones, created job opportunities for people with the technical skills needed to operate and repair them.<sup>198</sup>

In short, by the end of the nineteenth century the administrative process was coming to be understood less and less as one that could be manipulated by any man wanting to manipulate it and more and more as one that required trained experts who made decisions and otherwise performed their tasks in accordance with autonomous, abstract standards. By 1900, this trans-

192. See notes 143-51, *supra* and accompanying text.

193. Secretary of Treasury, Report on the Collection of Duties, H.R. Exec. Doc. No. 2, Pt. 2, 49th Cong., 1st Sess. xxv (1885).

194. 26 U. S. Stats. 131, 136-39 (1890). Uniformity at the judicial level was obtained through the establishment of the United States Court of Customs Appeals in 1909. See Payne - Aldrich Tariff Act of 1909, § 29, 36 U.S. Stats. 11 (1909). See also, White, *Republicans*, *supra*, note 158, at 128-29.

195. See note 149, *supra* and accompanying text.

196. C. W. Eliot, *A Turning Point in Higher Education: the Inaugural Address of Charles William Eliot as President of Harvard College, October 19, 1869*, at 9 (1969).

197. See White, *Republicans*, *supra*, note 158, at 243-46, 255-56.

198. See *id.* at 390.

formation in the administrative process was not, of course, complete, especially at the state and local level. But the direction of change had become clear.

In some senses, the transformation of the administrative process looked backward to what appeared as a purer eighteenth-century model. When the reformers compared the political leadership of their own age with that of the Revolutionary era, they were consciously looking backward. Similarly, their objective of having administrative decisions made in accordance with abstract and autonomous standards rather than the will of the people looked back to a pre-democratic era in the American colonial past. But for two reasons the clock could not be turned back. One was that the religious and ethical bases of the colonial administrative process had been irretrievably destroyed. Thus, when the reformers in their effort to depoliticize the administrative process searched for standards to replace the majority's will as the basis for decision-making, they had to look elsewhere than in the nation's past. Ultimately the place to which they looked was Europe, especially Great Britain,<sup>199</sup> where they observed a functioning administrative process much to their liking. In arguing for the adoption of a like process in the United States, the reformers were well aware that one of the new standards from which administrators would reason was efficiency; as we have already seen, they spoke often of the need for greater efficiency in the national civil service.<sup>200</sup> At least in the early days of the reform movement, they do not appear to have spoken of science as a second new substantive standard; only after the emergence of the social sciences as professional disciplines in the 1880's<sup>201</sup> was it frequently noted that the administrative process was based upon "certain fundamental principles of general application analogous to those characterizing any science. . . ."<sup>202</sup> With this adoption of science and efficiency as the basic substantive standards for administrative reasoning, however, the late nineteenth century administrative system became quite different from its colonial antecedent.

The other reason why the clock could not be turned backward was that the aristocratic foundations on which the colonial

199. See White, *Republicans*, *supra*, note 158, at 280; Van Riper, *supra*, note 160, at 63-66.

200. See text at notes 162-73, *supra*.

201. See Robert G. McCloskey, *American Conservatism in the Age of Enterprise, 1865-1910: a Study of William Graham Sumner*, Stephen J. Field and Andrew Carnegie 38-39 (1964); Fritz Stern, *The Varieties of History From Voltaire to the Present* 19-21 (1956).

202. William F. Willoughby, *Principles of Public Administration* ix (1927).

polity had rested had also been destroyed. As a result, the Jacksonian idea of joining office and party together to provide a basis for enforcing law and maintaining order continued to endure. Particularly at the level of local government, the Jacksonian idea was essential to maintaining order, especially among immigrants in large cities, and for integrating groups such as immigrants into the mainstream of American life.<sup>203</sup> Not even the reformers could conceive of an alternative to the Jacksonian basis of order. For example, many Congressional Republicans argued during Reconstruction in favor of granting the right to vote to blacks on the grounds that all men should have that right and that blacks would thereafter constitute the core of a Republican party in the South.<sup>204</sup> In part, of course, the effort to add a Southern wing to the party was aimed at insuring the return of Southern Republicans to Congress and the choice of additional Republican electors in presidential contests.<sup>205</sup> It was also seen, however, as a technique for creating new structures of authority in the South—for amalgamating black voters and white power seekers into a cohesive organization that would place men in office and support them in the maintenance of law and the enforcement of egalitarian social policies.<sup>206</sup> Ultimately, of course, this effort to weld office and party together into effective government would be overwhelmed by forces such as Southern pride and racial fear and prejudice that were more powerful than the materialistic forces on which the Jacksonian system rested. The effort is noteworthy, however, for it demonstrates that many of the same political leaders who sought to end the demoralizing influence of the spoils system on American politics could conceive of no ready alternatives and actively participated in creating such a system when they found it necessary to build new authority structures in the South.

Yet, despite the fact that the civil service reformers could not conceive of replacing the politicized processes by which officials exercised power, they necessarily began to do so when they changed the way in which officials obtained office, for the goals of reform and the Jacksonian system for enforcing law and maintaining order through a majoritarian political organization were necessarily inconsistent: it was not always possible to formulate

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203. See Oscar Handlin, *The Uprooted* 180-202 (2d ed. 1973).

204. See Horace E. Flack, *The Adoption of the Fourteenth Amendment* 55-126 (1908).

205. See Joseph B. James, *The Framing of the Fourteenth Amendment* 3-33 (1956).

206. See *id.* at 184-85.

policies or distribute favors in a way that was consistent both with the will of the people and with autonomous scientific standards of administration. The result in the nineteenth century was a good deal of tension and ambiguity. On the one hand, the progress of reform was often slow, especially in local politics, where the Jacksonian system had greatest importance; in the absence of direct evidence, one can only speculate that the Jacksonian system at times endured because there was nothing to replace it. On the other hand, new means of law enforcement began to emerge, such as the increased use of coercive military force. During Reconstruction, the South was a victim of such coercion. Later, industrial strikers became the most common victims of federal troops.<sup>207</sup> But, while the nineteenth century was unique in American history in the extent to which the military was used to coerce civilians, nonetheless the fact remains that military coercion accounted to only a small degree for the maintenance of civil order.

Another new development was a growing interdependency between big business and government. The transformation of administrative process did not put an end to governmental grants, preferences and favors. The concept of political neutrality did not require government to cease favoring some groups and individuals in its distribution of jobs and other benefits. It required merely that government not use political party as the criterion for preferment. Instead, government ought to favor those who would bring "competency" and "efficiency" to their jobs—those, that is, who could render the services needed by government at the lowest possible cost. What made the preference of competency and efficiency neutral was not that those standards gave all citizens equal access to government patronage or that they ranked above all possible alternative standards on a truly autonomous scale of value, but rather that, in the business climate which dominated so much of American thought in the late nineteenth century, competency and efficiency were values that few men of the era questioned.<sup>208</sup> In short, the concept of neutrality did not eliminate government preferences; it merely replaced shifting preferences based on political allegiance with more long-term preferences in favor of those groups and individuals that possessed certain skills over those that lacked them.

At the same time that government distribution of patronage

207. See Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895*, at 131-58 (1960).

208. See McCloskey, *supra*, note 201, at 12; Robert H. Wiebe, *The Search for Order, 1877-1920*, at 135-59 (1967).

was becoming more stable, changes in the size and structure of many businesses were rendering that stability increasingly valuable to the business community. In the 1830's, most American businesses had been quite small, and few had investments in plant and equipment that could be used in only one particular line of business. For example, the holder of a government mail contract needed to invest capital in little other than horses and, perhaps, stagecoaches, which if the contract were lost in a redistribution of the patronage, could be readily used on the contractor's other routes or sold at a fair price to someone else in the stage business. By the 1880's, on the other hand, many of the businesses that either dealt with government or required favors from its officials had grown in size and begun to make large-scale, specialized investments in equipment that could not be readily used or sold to another if existing relations with the government were terminated.<sup>209</sup> Those businesses accordingly needed some assurance that patronage and other favors would continue to come their way without regard to the results of the next election. As early as 1864, Charles Sumner had realized "that the scale of business now and the immense interests involved will require some . . . system" of meritocratic reform and that it would soon be impossible to "transact our great concerns without serious loss unless we have trained men."<sup>210</sup> And, once civil service reform became a prominent issue in the late 1860's, some businessmen, perhaps sensing a need for greater stability in the allocation of governmental favors, became some of the strongest supporters of reform.<sup>211</sup>

Although business support of reform undoubtedly aided in its enactment, I do not mean to assert that it was the sole or even principal cause of reform. Unless one is prepared to believe that the rhetoric about eliminating corruption and restoring morality to government was understood both by those who spoke it and those who were influenced by it as a mere cover for business aggression, the impact of fifteen years of that rhetoric prior to Garfield's assassination cannot be discounted. However, even if civil service reform was largely a result of a moralistic conception of politics that was ultimately translated into legislation, the fact remains that the new system contributed to a new relationship between business and government, introducing new

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209. Allan Nevins, *John D. Rockefeller* 38 (1959).

210. Letter from Charles Sumner to Francis Lieber, May 15, 1864, in Sumner, *Memoir and Letters*, IV, 192 (Pierce ed. 1877).

211. See text at notes 170-71, *supra*.



and complex forms of interdependence that were beneficial to business. The new relationship of business and government, however, was not entirely one-sided because, while business received benefits, it became dependent on government for them and thus became committed to the maintenance of the status quo in a way that most entrepreneurs in the eighteenth and early nineteenth centuries had not been.

By the end of the nineteenth century, the outlines of the new system of interdependence were beginning to emerge. The railway mail service will illustrate. By the end of the century, that service had become quite profitable for most railroads; revenues from carrying the mail often accounted for as much as ten percent of their gross receipts,<sup>212</sup> while the marginal cost of carrying mail on regular trains was quite low.<sup>213</sup> More important, the stability of the mail allocation process brought an element of security to an otherwise competitive and unstable industry:<sup>214</sup> railroads could rely on a relatively fixed volume of mail business and revenue over long periods of time.<sup>215</sup> Likewise, the government and the users of the mail found the railway mail service to be the fastest and most efficient means of distributing mail, while the thousands of mail clerks who worked in the service owed their livelihoods to it. The advantages that these groups gained from the service gave them an incentive for remaining loyal to the status quo.

At the end of the nineteenth century, of course, incentives of this sort were of little importance in the overall structure of order and authority in the United States. The workings of political organizations like Tammany Hall in New York, the use of federal troops to suppress labor agitation, and the emerging system of racial repression in the South were far more important for keeping order and maintaining law. But for the future, ties between government and business would be increasingly significant.

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212. See, e.g., *Fifth Annual Report . . . of the Milwaukee & St. Paul Railway Co.* 24 (1869); *Twenty-Second Annual Report . . . of the Pennsylvania Co.* 50 (1893). Of course it was not usually that high. See, e.g., *26th Annual Report of the Richmond & Danville R.R. Co.* 129 (1873).

213. The typical way of carrying the mail was to add a mail car to an existing train. See G. Tunell, *Railway Mail Service: a Comparative Study of Railway Rates and Service* 14-21 (1901).

214. See Gabriel Kolko, *Railroads and Regulation, 1877-1916*, at 7-20 (1965).

215. See, e.g., *Fifteenth Annual Report . . . of the Pennsylvania Co.* 10, 14, 17 (1887); *Twenty-Ninth Annual Report of the Richmond and Danville R.R. Co.* 31 (1876).

## V. POSTSCRIPT

In short, the success of late nineteenth century reformers in reconstructing the administrative process on the basis of abstract and seemingly autonomous standards of efficient, scientific management ultimately led in the twentieth century to the emergence of new structures for enforcing law and maintaining authority. The same sorts of beneficial interrelationships that developed in the railway mail service between government, business, labor and consumers were duplicated elsewhere on the national, state and local levels. With the growth of the military establishment, the increased provision of services by federal, state and local governments, and the spread of economic regulation, a vast network of relationships developed among government bureaucrats, those who provided products and services, and those who consumed them—beneficial relationships that made people dependent on government and the maintenance of the status quo and made it increasingly difficult for them to conceive of openly disobeying government's commands, as their forefathers had done. These complex forms of interdependency bred social and economic rigidity, but also increased social stability and added to the capacity of government and its dependents to maintain social order.

The past two centuries in America have thus witnessed a shift from an administrative system which gave government, as distinguished from the aristocrats who served it, almost no power to command obedience to a system which gives government immense power over the masses who depend upon it for services and favors. That shift occurred, however, in three stages. In the first stage in the eighteenth century, the American colonies possessed an administrative system that gave local aristocrats vast power to govern their fellow subjects consistently with shared community religious and ethical beliefs, but left central political authorities with little power over local leaders. In the second stage in the mid-nineteenth century, central authorities gained considerable power over administrative officials, but those officials in turn could control their fellow citizens only through a tenuous political process of dispensing favors to fellow partisans, while the opposition was kept loyal only by an even more tenuous hope of obtaining office in the future. In the third stage in the twentieth century, central authorities have retained their power over subordinate officials and by dispensing governmental favors and services more widely have added to their capacity to control the bulk of the people.

Changes in the mode of acquiring office, the processes of exercising power and the capacity of government to rule the people have, in short, been interrelated. These changes, in turn, have been related to even deeper changes in Americans' conception of the ideal polity—changes which have taken the form of the destruction of the organic and aristocratic ideal of the founding fathers, the emergence of the democratic and egalitarian ideal of the Jacksonians and finally, the appearance of the competing meritocratic ideal associated with the rise of apolitical and scientific notions of law and government at the end of the nineteenth century. Detailed analysis of these deeper changes, however, cannot be made in the present article, but must be left to another occasion.