Episode 859: The Bureaucrat Kings: The Origins and Underpinnings of America's Bureaucratic State

Guest: Paul Moreno

WOODS: I'm very interested in the subject of the administrative state. I had a guy — now I'm trying to think of his name. It might have been Philip Hamburger from Columbia Law School who's done good work on this. It's very unusual to be able to say somebody at Columbia Law School has done anything good anything; that's why I remember it [laughing]. But I saw your book, *The Bureaucrat Kings*, and I thought, all right, this is a great opportunity to really get into the meat of where this all came from.

Now, let me start off by playing devil's advocate here. Let's say most Americans probably believe there needs to be some kind of federal regulatory apparatus, and so once you accept that premise, then you have to realize that of course Congress can't possible micromanage every environmental regulation you would need and every regulation involving commerce that you would need, so you're going to have to delegate this to some kind of agency somewhere. So why is Paul Moreno complaining?

MORENO: Well, actually, that's absolutely right to some degree. Bureaucracy is unavoidable in any large organization. But the key difference is the federal government used to be limited in its functions that were enumerated in the Constitution. That's what kept the administrative state from getting out of control. Something like the Army, the Armed Forces are the classic bureaucrat institution, and everybody thinks of them as showing all of the pathologies of bureaucracy, but the country has to have a national defense force. I think what we're seeing right now in immigration is another good example. In fact, early administrative law of the late 19th century was about how much discretionary power immigration authorities could have, and that's really where administrative law got its start. So those, you have to keep the government limited to its constitutional functions, and that can at least contain the pathology of bureaucracy.

WOODS: But again, just to play devil's advocate before we get into the history of it, if you think about something as difficult and intractable as the environment, it seems tricky not to have some kind of regulatory treatment of that subject. It seems hard to deal with that any other way, and so you're going to have to some agency that isn't overseen day to day by Congress and where every single move they make is not approved by Congress.

MORENO: Yeah, I mean, the environment is such a large thing. It's I guess what economists refer to as the problem of negative externalities where nobody really owns and is responsible for it. And there are alternatives to bureaucratic controls to have clean air and clean water. Other countries have tried these, so there are alternatives to large, bureaucratic organizations managing problems like that.

WOODS: So let's start with the history. Because I have you for a limited time, I don't want to start with the really early history of what went right; I really do — for this show, we focus on what goes wrong a lot of the times —

MORENO: [laughing]

WOODS: — so let's start there. When you try to find the origins of the current bureaucratic state and you're looking in the late 19th century, do you really feel like it's a continuum from there, or do you think there's not just a quantitative, but a qualitative difference between what happens in the late 19th century and, say, the New Deal? Are we dealing with the same phenomenon or two different phenomena?

MORENO: Very, very different phenomena. The story of the growth of the administrative state is very — it comes in quanta. There are usually developments that have come out of economic crises, and especially wars have been the principal things that have built the state. And that's true in other countries as well. So it's a very different situation in the late 19th century, where especially the first independent regulatory agency, the Interstate Commerce Commission, was kept on a pretty short leash and was under control. The progressive in the 1910s, something fundamentally different takes place then. The New Deal is perhaps the biggest leap forward of all of them. And then the Great Society, you're dealing with a completely different kind, a different set of problems — things like the environment, things like workplace safety, race relations. There's a whole new kind of regulation in the '60s.

WOODS: All right, so now let's get into some of the details. I'm primarily interested in the change that occurs around the time of the Progressive Era, and I find it interesting that you identified certain contributing factors there, that there was a change, for example, in the tenor and content of a lot of American Protestantism at the time, namely the Social Gospel Movement. You talked about the influence of education with people coming back from a kind of technocratic Germany, and they've got these advanced degrees and they're looking to model society along the lines of an efficient, modern state, where experts direct the progress of affairs and so on. So there are all these factors at work, but it's primarily politicians who are pushing this. So let's get into the Progressive Era. What would you say are the major signposts of the administrative state in the early 20th century?

MORENO: I'd say it's politicians, but it's also academics —

WOODS: Right, right.

MORENO: that is, the influence of German higher education. The modern research university is really at the bottom of all of this. And a lot of that has been eclipsed, because the admiration that American elites had for Germany, for Prussia in the late

19th century, after the World Wars that was kind of erased from history. But the German origins of a lot of this are very profound. The eugenics movement would be another example of this, where the application of this idea of a scientifically managed social engineering didn't turn out very well.

WOODS: But when we look at the Progressive Era, we're looking at things like — we've got the Pure Food and Drug Act and stuff like that, and people — which did not actually give rise to the FDA. That comes later. But people look at that and they say this is so benign, especially compared to the labyrinth of regulations we have today — this is so basic and fundamental. It wasn't even testing drugs. It wasn't even like what we have now. What could we possibly object to here? These are the most fundamental questions of human safety and well being, and we're going to lodge some kind of procedural objection to this? This seems petty to a lot of people.

MORENO: I think if you look at the origins of things like the Pure Food and Drug Act and the Meat Inspection Act, a lot of it was driven by big producers, big meatpackers who wanted to eliminate competition from their smaller rivals. So they were in favor of this. It was a cartel-promoting phenomenon. A lot of it was based on media sensationalism and muckraking journalism. So the origins of all of those — as you said, people today regard it as very benign policies. They're actually, the motives are rather mixed.

WOODS: All right, so talk to me then about the way the progressives viewed the Constitution, because there are different ways of looking at this. There are some people who would say that the regulatory state is in some way implicitly contained in the Constitution; we just need to find it there. But the progressives themselves didn't seem to take that view. They seemed to think we have to make a change in the way we look at the whole thing.

MORENO: Yeah, absolutely. That's one of the key differences between the first generation of progressives and then the later ones, especially the New Dealers. People like Woodrow Wilson and his generation of scholars were very explicit about the Founders' Constitution had been outgrown; it was obsolete; the urban and Industrial Revolutions mean that it's no longer relevant and we need to found American government on different premises. The later ones, the New Dealers didn't do that. If you look at FDR especially, he tries to use the language of the Founders while he's transforming what the Founders did. So he talks about an economic bill of rights, a second bill of rights. His 1936 Democratic Convention speech is all resounding phrases from the Declaration of Independence. So while he is surreptitiously transforming America, he's using the vocabulary of the Founders.

WOODS: You know, sometimes these days people get frustrated and they say there's no difference between the two political parties, but you know what? Compared to a hundred years ago, there's a big difference, because when I look at the things that Teddy Roosevelt did and the things Woodrow Wilson did, sure, they had totally different temperaments — I mean, Teddy Roosevelt is this brash fighter and Woodrow Wilson is the Princeton University president. But that's really where the dissimilarities end. I mean, yeah, they have a dispute about the tariff, but for heaven's sake, they both are architects of the modern administrative state. Do you view them as part of a continuity or do you see a radical difference between these two? Because in my

textbook in school, I was taught these were the two who were fighting against each other. And I thought, over what? Almost nothing.

MORENO: Yeah, well, Wilson's the much deeper figure. He'd been thinking and writing about this going back to the 1880s in his academic career. And in 1912 in that campaign, you're right; Wilson actually appears to be more conservative than Theodore Roosevelt did, but Roosevelt only came late to his progressivism in 1910, 1912. But once elected, Wilson does pretty much everything that Roosevelt had called for, and especially when Wilson was reelected in 1916, he really became sort of the full flowering of progressivism. That's the 1916 campaign is the really interesting one because Wilson repudiates a lot of the limits that he previously said the Constitution placed on what the federal government can do.

WOODS: Even though it came a little bit before T.R. and Wilson, they both either used or expanded on anti-trust law, so let's say something about that, because that's a classic case, starting in 1890, where you get this legislation that seems like it's almost designed to be left to the courts to figure out what in the heck it means, what it allows, and what it prohibits.

MORENO: Yes, it was, and that's exactly what the courts did. They essentially applied — they called it the rule of reason, which was that only combinations that harmed — it's actually harmed consumers. That was the standard that the court adopted in 1911. The act itself didn't specify whether the goal of anti-trust law was consumer welfare or to preserve small producers, and they were the ones who were really pushing for anti-trust laws as a way of preventing themselves by being driven out of business by more efficient, bigger competitors.

WOODS: So let's see. Once the Progressive Era has come and gone and we get the 1920s, which is to some degree a reaction against the Progressive Era, there are people who might think the 1920s was just a quiet time where there's no progress in the development of the administrative state. Is that true or false?

MORENO: That's false. There is very much a continuity in the 1920s, where certainly the Republicans did things like lower the income tax, but they still had an income tax. The Federal Reserve system was continued in the 1920s. In fact, the Republicans gave it even more power in 1927. Herbert Hoover's the guy who, as Secretary of Commerce especially before he was president, was pushing for expansion of the bureaucratic state. The Federal Radio Act of the 1920s is a really good indication of that, where you have this new industry and the federal government says you have to get a license from the federal government if you want to be able to operate a radio station. So you had a centralized, bureaucratic control of a very important new medium. And that's the model that becomes applied to lots of other areas of the economy in the New Deal.

WOODS: Well, suppose somehow Congress had the time and the wherewithal to take over control of these things. You're not saying that therefore you'd start supporting them. So what's the fundamental problem with basically the way American government's been run for the past over hundred years? What's fundamentally — because it can't just be it's these administrative agencies that aren't overseen by Congress, because even if they were, I still wouldn't like them, and I don't think you would either.

MORENO: Yeah, one thing is the question of whether Congress is exceeding what its powers are under the Constitution, and some people have looked at this and said, We're not going to concern ourselves with that issue; the real problem is the way that Congress — the procedures that Congress follows in all this. I think much more fundamental is getting Congress to recognize that its powers are limited to those granted mostly Article I, Section 8 of the Constitution. So all of these other procedural limitations — Could we have less arbitrary government? Could we have less delegation of power? That's another big issue that analysts look at. Those are really two separate questions. One's a procedural question, and the other more important one, I think, is the substantive one.

WOODS: So how did the Constitution come to be interpreted then as the federal government began to really take off?

MORENO: Yeah, the principal place that people have gone to to empower Congress to exceed constitutional limits is the commerce power, the power that Congress has to regulate commerce among the states. And if you simply define everything as interstate commerce, then there are essentially now limits. The other ones were the taxing power and what's sometimes called the spending power. A lot of what Congress does it does through the states by giving them money and attaching strings to that funding, and that way the states can do what Congress can't do itself. Medicaid is of course the biggest of all of these programs. They used to be called grants and aid. So I think a lot of people don't recognize the extent of the federal bureaucratic state because the federal government does a lot through the states, through government contractors — this is also the spending power. If you want to do business with the federal government, you have to follow these rules. So a lot of it is not visible.

WOODS: All right, there's a lot more to talk about here. Let's first pause to thank our sponsor.

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Let's fast forward ahead to the New Deal, and I kind of want to skip ahead to 1938, actually, but what do you think is fundamentally different about the New Deal? Is there something fundamentally different about what happens in the 1930s, or is it just building on what came before?

MORENO: I think FDR and the New Deal, as I said, their rhetorical approach to this was different. They tried to make it look like what they were doing was in continuity with the Founders' Constitution. They didn't repudiate the Founders, and that made it a lot more politically appealing because to this day the American people still revere the Founders and the Constitution.

And most of all, I think, what FDR did in two prominent speeches that he gave — one in 1932 during the campaign at the Commonwealth Club in San Francisco and then in 1944, his State of the Union address when the end of World War II was in sight — was to articulate this idea that government's job is not to protect our natural rights per the Declaration of Independence; rather, it's the provision of what we now call entitlements: housing, employment, health care, education, all those things. So there's a whole new sort of advance in really the theory about what government's

function is, what the nature of the American state is. And a lot of FDR's defenders, historians who like FDR, they give him credit for this. They praise him for sort of refounding the United States.

WOODS: Yeah, indeed, indeed, whereas a lot of us kind of feel like it was okay to start with [laughing]. It was actually okay.

MORENO: They'll use terms like leviathan and Machiavellian as terms of praise.

WOODS: Yeah, yeah.

MORENO: They've lost touch with [laughing] —

WOODS: We could talk about the court packing scheme and how that influenced some of the justices, but in the interest of time, you have 1938 as the high noon for the administrative state. What do you mean by that?

MORENO: Yeah, that was the year in which, in the midst of all of this — as you said, FDR's controversial plan to pack the Supreme Court — reaction in Congress was underway in 1938 and the question of whether Congress would impose any kind of meaningful restraints upon the administrative state. FDR, at the same time he called for expansion of the Supreme Court to get that under presidential control, he also called for a reorganization of this now sprawling bureaucracy. A committee put together by Brownlow and a couple of other prominent political scientists — it was called the Brownlow Committee — asked Congress essentially to put the president as the single head of the administrative state, the unitary executive theory, that's sometimes referred to. And Congress balked at that and it preserved the sort of hybrid nature, where we still have independent regulatory agencies like the National Labor Relations Board, for example. They're outside the control of the president.

So that was a fundamental reaction on the part of Congress. A lot of that was just Congress preserving its own hand in administration, because Congress, what it does up to the present day, it lets these regulators make the rules, make the laws, which Congress should be doing. And then Congress goes in and through oversight they sort of intervene, especially when their own constituents' interests are at stake. So Congress has a hand in administration as well.

WOODS: All right, now I want to take much of our remaining time to say something about the Great Society, because that's another major step forward in this. I mean, we can talk about deregulation because we do get some of that. But the Great Society. Now, a lot of people who don't really know how it turned out, they just like the names of the legislation — and you've got to hand it to them. The names of the legislation in the Great Society were just masterstrokes, because they all sound totally unobjectionable. Who could be against this? Secondary education — who wouldn't want to help all these things? Tell me about — I mean, I think they know that, let's say, welfare requirements were liberalized, but they may not know about the administrative state aspect of the Great Society, so tell us that.

MORENO: Well, one prominent example of that would be the Civil Rights Act of 1964, which everybody is in favor of now. The idea of ending segregation, doing away with legal discrimination, there's no controversy about that. But look what happens to it. Very quickly it's turned into a system of affirmative action and racial preferences, and this was all the work of bureaucrats in the Office of Civil Rights in the Department of Education, at the Equal Employment Opportunity Commission, all of which was affirmed by the courts. The courts were also an important partner in building the administrative state in the 1960s. So that's a program that got started — the law hasn't changed and the language of the Civil Rights Act wasn't amended; it was simply interpreted in radically different ways by bureaucrats and judges.

WOODS: Right, okay. So when I look back on the Great Society, what I see is a lot of legislation that had either no consequences or bad consequences. There was legislation that was supposed to improve educational outcomes and doesn't seem to have done that. I can think of all kinds of things where we were given these promises, and for a lot of people, the promises are sufficient. That's great. It has a nice name; there's a saccharine promise attached to it; that's good enough for me. But the results have not been good, as you know. The enormous amount of spending over the years, we have very little to nothing to show for it. We have a lot of social pathologies to show for it. Is the administrative state aspect of this, is that really front and center to the story of — what am I missing in the story of the Great Society if I don't include that ingredient?

MORENO: Well, there were some people in the Great Society who wanted not to have New Deal-style administrative agencies administering these new programs. The war on poverty was a good example of that, where they wanted to cut out the middlemen, especially the big city political machines that used welfare essentially as patronage and try to fund grassroots organizations, many of which turned out to be very radical organizations and that's why the anti-poverty program didn't last very long. So there was something of an anti-bureaucratic strain in some Great Society programs, but the ones that survive are the big, old-fashioned, command-and-control bureaucratic agencies like the EPA and Medicare and Medicaid.

And a lot of those — you mentioned this idea that for some people, good intentions are good enough. But that's — the 1960s programs show what happens when you don't consider real-world consequences. And this is what gave rise to the conservative movement in the 1970s. These are sort of the original neoconservatives. They had been liberals, people like Daniel Patrick Moynihan, some of them had been part of the creation of this new state who then recognized the perverse consequences of this and they provided a lot of the intellectual groundwork for the conservative movement of the 1980s and for deregulation in the 1970s and 1980s. The old slogan was the neoconservatives were liberals who were mugged by reality. The actual consequences, not just the intentions of these programs, were very sobering.

WOODS: Yeah, I'd like to get back to what you said, because you were talking about the *1970s* and 1980s. A lot of people associate deregulation with Ronald Reagan because he was the free-market guy, and they don't realize that it did get its start under Jimmy Carter, and I want to say a couple of things about that. First of all, I don't quite understand why that is, because he never really struck me as a particularly free-market guy, so I'm not sure what the genesis of it was. But to this day, I hear

some people on the left saying what a terrible thing this deregulation spree was and it had terrible results, but did it really have bad results to deregulate the airlines? I'm pretty sure it had good results in terms of fares and flight availability and so on. Do you know the story there in terms of what was deregulated and were the consequences really so bad?

MORENO: Yeah, one important thing was that almost all the deregulation was on old New Deal economic regulation, not the new social regulation of the Great Society. Didn't touch the EPA, didn't touch any of the new organizations. And the most impressive thing about it was academic economists had been analyzing the costs of regulation for a long, long time, and in the 1970s they finally began to have some impact among policymakers. In fact, it was Ted Kennedy of all people who sort of led the movement for deregulation in the trucking industry. Stephen Breyer, who's now a justice on the Supreme Court, was Ted Kennedy's sort of advisor about all this. So it was very clear by the '70s that the costs and the economic losses associated with regulating these industries — trucking, airlines, railroads have long been a sick industry — the argument that academic economists were able to make was so convincing that you actually did get some meaningful reform in these fields.

But again, it was very limited. It was mostly about control, as you said with the airline industry, about just allowing it to compete. But in lots of other ways, these industries remained highly regulated, and there wasn't any fundamental deregulation of the new big agencies that affect workplace safety, civil rights, the environment, all those Great Society programs.

WOODS: Well, I feel like we have to at least say a brief word about regulation over the past, let's say, ten years, particularly since the financial crisis, because the narrative that became accepted about the financial crisis — which as one person, I did my best to fight against — was of course inadequate regulation. What else would it be?

MORENO: Yeah, yeah.

WOODS: And of course it means that if we ever manage to repeal anything and we inevitably get another recession, it'll be blamed on the repeal. You can't have a rational discussion because everything is blamed on deregulation. Supposedly, deregulation caused the financial crisis, so therefore we need Dodd-Frank, or earlier, we needed Sarbanes-Oxley because of corporate malfeasance. What can you say about those two in particular?

MORENO: That is the same story over and over again. There's one consistent theme in the administrative state. It's that a problem that is identified as a market failure usually is not a market failure; it's a problem that's caused by earlier government intervention. And that claim leads to more government intervention. The start of all of this is railroad regulation. The federal government subsidized building railroads and overbuilt the transportation system in the Civil War, and then that caused the problem that the Interstate Commerce Commission was supposed to fix. And again, it only made the problem worse and then fundamentally was restructured in 1920.

The Fed was invented in 1913 to deal with what were largely bogus claims about a money trust that Wall Street was dominating the country's financial system and

discriminating against farmers and people in the South and the West, and the Fed just screws up over and over again, and every time it wrecks the monetary system, it gets more power. As I said in other places, in the federal government, nothing succeeds like failure. Government interventions cause problems that only lead to more government interventions over and over again.

And with the financial crisis, the roots of that in the housing bubble that was promoted by many federal agencies — you called it the narrative, and controlling the narrative, people's believe that the Great Depression was a market failure rather than a government failure, that this financial crisis was a market failure rather than a government failure, that's why the popular understanding of this is what leads to these further interventions that only make things worse. It's very frustrating.

WOODS: I read in your conclusion, you make the point that of course we have to focus not just on procedural questions — who's intervening in the economy — but the substantive question of: is it okay to intervene in the economy, period, no matter who's doing it? So that's a big piece of this puzzle. But when you're talking about what can be done about it, I think I sense in your conclusion the kind of — I don't want to say hopelessness because you don't write a book for the purpose of hopelessness — but hopelessness combined with exasperation, because you're saying ultimately it really is up to the public. When the public really, truly demands something, really and truly, it generally does happen.

But on the other hand, the problem, it seems to me, Paul, is that most people being educated by the same institution that runs these agencies, they're educated to believe that without these agencies their kids would be working in a coal mine of ten cents an hour and their heads would be blown off by an exploding toaster and the sandwich they eat with the bread they just toasted would probably kill them because it would be poison. How could they live without — It seems like without fixing that, how could we ever get people's opinions to change about the agencies themselves?

MORENO: No, that's absolutely true, and as Lincoln pointed out before the Civil War, in a democracy, public opinion is everything. With public opinion on your side, everything's possible, and without it, nothing's possible. So yes, this is fundamentally an educational project. It's one of the things that we try to do at Hillsdale College. It's one of the things I tried to do writing this book. There's a lot — we're up against a lot, because you said these institutions have been developing for over a century. They are, as you said, sort of part of the warp and woof of people's individual lives now. Just the task of trying to imagine what life would be like without regulation of this kind is a daunting task.

WOODS: You get extra points for using "warp and woof," one of my favorite phrases of all time.

MORENO: [laughing]

WOODS: You know what's funny? You and I have both written a lot of books, and when I look at our current situation and how dominated it is by social media and stuff, it's very humbling to realize that somebody who made really, really clever and effective

three-minute animated videos might have more influence than you and me put together in getting people to think differently [laughing].

MORENO: That's absolutely true, and that's I think one of the heartening things. I tell my students that if you look at the 1960s, especially the way in which the media was so centralized, whereas the ultimate sources of information now are so much greater, that's something that is giving me some hope.

WOODS: Right, yeah, that can't be a bad development for us.

MORENO: Absolutely.

WOODS: All right, so Paul, so I'm going to link to your book at TomWoods.com/859. It's *The Bureaucrat Kings: The Origins and Underpinnings of America's Bureaucratic State*. It's amazing how much you pack into a short-ish book. You're like me: I hate books filled with fluff that I learn three things from. I want it packed with information.

MORENO: [laughing] Well, the publishers were very strict about the word count, so that imposed some healthy discipline on me.

WOODS: Okay, that's good; that's good. All right, so that definitely served a good purpose. So I'm going to link there. Of course you can also get *The Bureaucrat Kings* also at Amazon — but you don't have an individual website? At least I'm not seeing one in the notes.

MORENO: No, no, I'm very, very low tech.

WOODS: Ah, okay, all right. Well, we'll link to you on the page and get people to check out the book. Thanks so much for your time today, Paul, and thanks for writing this.

MORENO: Thanks very much, Tom. Glad to be on the show.