# Foreword

# The American Model of Federal Administrative Law: Remembering the First One Hundred Years

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The conventional story of American administrative law dates its origin to a period 100 years after the Founding. In his classic history of American law, Lawrence Friedman tells us, "[i]n hindsight, the development of administrative law seems mostly a contribution of the 20th century . . . . The creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis."[1] According to this conventional account, the federal government woke from its laissez-faire slumbers in the face of a crisis in the railroad industry.[2] From that beginning, the modern administrative state was built in fits and starts over the next 100-plus years.[3]

Yet, even in 1887, the notion that the federal government was inert and that laissez faire was dominant was under attack. Albert Shaw, commenting on laissez-faire ideology in *The Contemporary Review*, said "[t]he average American has an unequalled capacity for the entertainment of legal fictions and kindred delusions. He lives in one

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1 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 439 (2d ed. 1985).

2 *See id.* at 329–30.

3 For a general overview, see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

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world of theory and in another world of practice . . . ."[4] Writing only ten years later in his book on comparative administrative law, Frank Goodnow tried to explain why the notion that America had no administrative law persisted. In Goodnow's opinion, "[t]he general failure in England and the United States to recognize an administrative law is really due, not to the non-existence . . . of this branch of the law but rather to the well-known failure of English law writers to classify the law."[5]

In this Essay, I want to explore the question of why early administrative law has been mostly invisible. In the course of that exploration I hope to do several things: First, I want to challenge the notion that federal administrative law was nonexistent during the first 100 years of the Republic.[6] Second, I want to suggest a general model of the reach and functions of administrative law and compare the way that we understand that model to operate today with the way it operated in the period 1787 to 1887—roughly, the nineteenth century.

Finally, I want to argue that recognizing the shape of nineteenth-century American administrative law can help us both to better understand the system or model of administrative law that we currently observe and to motivate inquiry into parts of that system that are currently neglected. In the end, I argue that much of our administrative law remains mostly invisible and that we would do well to bring it into the light. On this latter point, my historical and comparative account resonates with Elizabeth Magill's call in these pages last year for administrative lawyers to pay greater attention to what she called "agency self-regulation."[7]

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4 Albert Shaw, *The American State and the American Man*, 51 CONTEMP. REV. 695, 696 (1887).

5 1 FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 6–7 (New York, Putnam 1893).

6 This theme is developed in much greater detail in a series of recent articles. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006) [hereinafter Mashaw, *Recovering*]; Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007) [hereinafter Mashaw, *Reluctant Nationalists*]; Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008) [hereinafter Mashaw, *Administration and "The Democracy"*]; Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010) [hereinafter Mashaw, *Gilded Age*].

7 Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009).

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### *Our Contemporary Model of Administrative Law*

As Frank Goodnow recognized in his 1905 treatise on American administrative law,[8] administrative law concerns three distinct aspects of administration. The first is the relationship of administration to the political branches of government.[9] Here administrative law takes on a constitutional flavor and is concerned broadly with issues of separation of powers. Over two hundred years after the founding, we are still engaged in lively debates concerning the appropriateness of broad delegations of authority to administrators,[10] the respective positions of Congress and the President in appointments and removals,[11] and the degree to which presidents have independent powers of direction concerning administrative action.[12]

Second, administrative law concerns itself with the internal structures and procedures that are required for legitimate administrative action.[13] This part of administrative law has both constitutional due process dimensions, as well as statutory and regulatory ones. Constitutional due process provides a floor, but statutes and regulations provide for much more elaborate and complex processes and structures for administrative action. These procedural concerns so dominate our current conception of administrative law that we sometimes speak of the field as the field of "administrative process" rather than as the field of administrative law.

Finally, administrative lawyers are endlessly concerned with the availability and contours of judicial remedies to test the legality of

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8 FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905).

9 *See generally id.* at 1–160.

10 For example, in March 2009, George Will wrote a column arguing that the Emergency Economic Stabilization Act of 2008 is unconstitutional because it violates the nondelegation doctrine. *See* George Will, *Bailout Boundary Dispute*, http://townhall.com/columnists/georgewill/2009/03/29/bailout_boundary_dispute. The legal literature is, of course, enormous, notwithstanding attempts to bury the nondelegation doctrine, a doctrine long thought to be among the walking dead. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

11 Yet another appointments power case was before the Supreme Court in its October 2009 Term. *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part* No. 08-861 (U.S. June 28, 2010), challenged the provisions in the Sarbanes-Oxley Act that provide for the appointment of the Public Company Accounting Oversight Board by the Securities and Exchange Commission rather than by the President.

12 The unitary executive debate continues. For a recent series of papers that provides a flavor of the controversy and citations to much of the prior literature, see Symposium, *Presidential Power and Historical Perspective: Reflections on Calabresi and Yoo's* The Unitary Executive, 12 U. PA. J. CONST. L. 241 (2010).

13 *See generally* GOODNOW, *supra* note 8, at 222–356.

administrative action.[14] To look at the course books on administrative law today is to imagine that judicial review of administrative action occupies much of the field. Even when dealing with the subjects of political control of administration and required administrative procedures, students are invited to view those questions largely through the lens of judicial review and judicial interpretation. Our twenty-first century conception of American administrative law is constituted by the stories we tell ourselves about these three legal domains.

*Political Control.* The story of political control that dominates our discourse features, first, a radical fall from grace, and then a series of patchwork reforms to attempt to recapture the rule of law as we imagine it initially operated under the Constitution. In a nutshell, the fall-from-grace story has three parts. First, abandoning early congressional practice, Congress now delegates authority broadly to administrative agencies, thus effectively severing the legislative connection to administrative policymaking.[15] Second, the creation of independent agencies,[16] even independent prosecutors,[17] and various limitations on appointments and removals of federal officers inhibit the President from exercising the political control that might reconnect administration to electoral democracy.[18] And, finally, the sheer size and complexity of the contemporary administrative state makes political control of its multifarious operations difficult, if not impossible.

The impossibility of direct political control, of course, motivates a search for alternative means to steer administrative action. These attempts account for many of the transsubstantive statutes that make up

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14 *See generally id.* at 378–440.

15 For commentary lamenting the failure of Congress to adopt more specific legislation, see generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993), and THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980).

16 For the view that the Constitution prohibits anything that might be called an independent agency, see generally Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

17 The Independent Counsel Statute has lapsed. For a comprehensive legal history of the Independent Counsel Statute, including whether the Independent Counsel was a good, or even a constitutional, idea, see generally Symposium, *The Independent Counsel Statute: Reform or Repeal?*, 62 LAW & CONTEMP. PROBS. 1 (1999).

18 *See* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 269–75 (6th ed. 2009). Commentators applaud and decry presidential control or its limitations. *Compare* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (defending a system of presidential control over administration), *with* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997) (criticizing too much presidential control over administration).

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the corpus of much of statutory administrative law.[19] Congress has, for example, adopted a series of framework statutes, such as the National Environmental Policy Act[20] and the Regulatory Flexibility Act,[21] that attempts to get agencies to attend to broad congressional purposes or values outside of the agencies' central missions. To some degree, these analytic requirements substitute for continuous congressional oversight of administrative action. And Congress's own episodic oversight is supplemented by its investigative watchdog, the Government Accountability Office.[22] Similarly, American Presidents since the Carter Administration have, by Executive orders, sought to provide controls through the Executive Office of the President over perceived regulatory excesses or deficiencies. These controls, now generally located in the Office of Information and Regulatory Affairs at the Office of Management and Budget, pursue an analytic strategy that is similar to congressional framework statutes.[23]

This is not to say, of course, that presidential direction and congressional oversight are missing from the modern administrative process. But the framework statutes and Executive orders are, in some sense, an admission that these conventional tools of political control are inadequate in the face of the size and complexity of the contemporary administrative state. In short, the political branches attempt to do by audit what they cannot do by specific direction, recognizing that this is a rather pale substitute for the political judgments of elected officials that allegedly operated in earlier eras. We see the administrative state as a flawed instrument of democratic governance that to some degree abandons our historic ideals. This fall from grace helps motivate attention to procedural and judicial restraints on administrative action.[24]

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19 For a brief description of these pervasive instruments of legislative control, see MASHAW ET AL., *supra* note 18, at 150–76.

20 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

21 Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2006).

22 Budget and Accounting Act of 1921, ch. 18, §§ 301–318, 42 Stat. 20, 23–27 (establishing the Government Accountability Office).

23 For an empirical evaluation of the capacity of the Office of Management and Budget to oversee agency rulemaking and its effects, see generally Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

24 Indeed, one subbranch of political science, generally denominated "positive political theory," views administrative law primarily as a device for elected political officials' control of administration. *See* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 245 (1987); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989).

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*Structure and Process.* The story of contemporary agency structure and process has a somewhat similar narrative. By the end of the Second World War, America had created a large administrative state that was believed by some, particularly leaders of the bar association, to be lurching toward tyranny. Agency proceedings were opaque, processes diverged markedly from standard judicial adversary procedures, and agencies' combinations of legislative, executive, and judicial functions struck many as aggrandizing executive power and creating the potential for bias and prejudgment in administrative determinations.[25]

Major procedural and structural reform was forthcoming in the (now quasi-constitutional) federal Administrative Procedure Act ("APA").[26] That statute regularized administrative rulemaking in the now familiar notice-and-comment process.[27] The APA also provided a standardized set of formal adjudicatory procedures,[28] required the separation of prosecutorial and decisionmaking functions within agencies,[29] and provided that formal hearings could be before independent hearing officers.[30]

The gains of the APA were carried forward in other twentieth-century developments. The "due process revolution" of the 1970s brought adjudicatory decisionmaking in grant and benefit programs within the ambit of the Due Process Clause.[31] Judicial construction embroidered the facially modest requirements of notice-and-comment rulemaking substantially.[32] And the transparency of agency decisionmaking was heightened by statutes such as the Freedom of Information Act,[33] the Government in the Sunshine Act,[34] and the Federal Advisory Committee Act.[35] Administrative process went from being

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25 For a description of the developments leading up to the Administrative Procedure Act, see generally Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007).

26 *See, e.g.*, 5 U.S.C. §§ 551–558, 701–706, 1305, 3105, 7521 (2006).

27 *Id.* § 553.

28 *Id.* §§ 554–557.

29 *Id.* § 554(d).

30 *Id.* § 556(b)(3).

31 On the "revolution" of the mid-1970s, see generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975), and Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975).

32 For a description of these developments, see generally James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979), and William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

33 Freedom of Information Act, 5 U.S.C. § 552 (2006).

34 Government in the Sunshine Act, 5 U.S.C. § 552b (2006).

35 Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–16 (2006).

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the artifact of particular statutes and practices within individual agencies to one based importantly on transsubstantive legislation and judicial interpretations. The emerging model emphasized public participation, transparency of government action, and judicialized procedures for individual determinations.

*Judicial Remedies.* The APA also made clear that agency action was, in general, subject to judicial review. As subsequently interpreted by the Supreme Court, judicial review under the APA involved the presumptive reviewability of all agency actions,[36] preenforcement review of agency rules,[37] and broadened standing of affected parties to seek judicial oversight.[38] Judicial review was essentially on an appellate model, where the legality of agency action was judged on the basis of the records made in the administrative process. While this review was articulated as deferential concerning substantive policy, it was thorough with respect to the requirements of procedural regularity, the adequacy of agency records, and the persuasiveness of agency reasoning. Through the medium of this "proceduralized rationality" review,[39] courts could keep a careful watch over agency discretion while avoiding the charge that they were usurping agency substantive discretion.[40]

### *The Nineteenth-Century Model of Administrative Law*

The twenty-first century model that was described in the preceding paragraphs is a law whose sources are almost exclusively in general principles derived by judicial review from the Constitution or from transsubstantive statutes that apply to most, if not all, agencies. When looking at particular congressional statutes authorizing agency action and providing particular structures and processes, or when looking at agency practice in a particular substantive area, contemporary administrative lawyers tend not to speak of administrative law. We speak instead of environmental law, communications law, or food

36 *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

37 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99, 103 (1977).

38 *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153–54 (1970).

39 For a description of the "proceduralized rationality" review approach to judicial review and its basis in American legal culture, see JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 156–63 (1990).

40 For the classic statement of the twentieth-century reimagination of administrative law, see generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). For reflections on whether to update this classic analysis, see generally Symposium, *The Reformation of American Administrative Law*, ISSUES LEGAL SCHOLARSHIP (2005), http://www.bepress.com/ils/administrativelaw/.

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and drug law. To the extent that those statutes or administrative regulations and practices take on common forms, those commonalities tend to be ignored.

But in nineteenth-century America, that is where administrative law was found. Nineteenth-century administrative law had extremely limited judicial review and virtually no transsubstantive statutes. Therefore, it disappears from view. Our forms of law have shifted in ways that make prior practices appear to be not a different system of administrative law, but no system at all. Yet, a system was there.

*Political Control.* Notwithstanding the conventional story of a twentieth-century fall from separation-of-powers grace, political control of administration in the nineteenth century was not so different from political control today. The notion that early statutes delegated little discretionary authority to administrators is simply a myth. To be sure, many early statutes, and many today, have remarkably specific provisions. But broad delegations were also present. Consider a few very early examples:

The statutes establishing the Departments of War and State in the first Congress said little more than that the Secretaries of those departments were to do what the President told them to do.[41] Similarly, when Congress established, or indeed continued, a system of military pensions, it did so in a statute that made payments simply on the basis of "such regulations as the President . . . may direct."[42] Private claims to public lands, the nation's great storehouse of wealth, were to be adjudicated "according to justice and equity."[43] And during the Jeffersonian embargo of 1807–09, naval officers and customs collectors were instructed to seize ships and their cargo if, in their *opinions*, there was intent to evade the embargo.[44]

As in the pension statutes, these vague delegations were often supplemented by a provision that authorized the President to make such further regulations as he deemed necessary to carry out the in-

41 *See* Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29 (establishing an executive department to be denominated the Department of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (establishing an executive department to be denominated the Department of War).

42 Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95, 95 (providing for the payment of the invalid pensioners of the United States).

43 Act of Mar. 26, 1804, ch. 35, § 4, 2 Stat. 277, 278 (making provision for the disposal of the public lands in the Indiana Territory, and for other purposes).

44 Act of Apr. 25, 1808, ch. 66, § 11, 2 Stat 499, 501 (creating an Act in addition to the act entitled "An act laying an embargo on all ships and vessels in the ports and harbors of the United States" and several acts supplementary thereto, and for other purposes).

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tent of the statute.[45] Vague delegations were also sometimes implemented by parties not formally a part of the government. When levying customs duties where the goods were not covered by invoices, or the invoices were thought to be fraudulent, fair value of the goods was determined by two reputable merchants who were mutually appointed by the Collector of Revenue and the shipowner or owner of the goods in question.[46]

Indeed, while today we view the Federal Reserve Board's power to control monetary policy as involving a breathtaking delegation of authority to a highly independent entity, the positions of the First and Second Banks of the United States were even more removed from political control by Congress or the President. Those banks handled all fiscal matters for the United States Government and, through their requirements for redemption of bank notes in specie, regulated the money supply. Yet the banks were private corporations with only one-fifth of their boards of directors appointed by the President. In addition, the bank charters provided that they could be run by an executive committee of seven directors, none of whom needed to be one of the public directors appointed by the President. The belief that, rather than politics controlling the bank, the bank was controlling politics motivated Andrew Jackson's war on the Second Bank and his veto of its rechartering.[47]

Congressional oversight of administrative action was necessarily spotty. Congress organized itself into committees in an attempt to provide political control over various departments and activities, required annual and special reports from departments and bureaus, and conducted investigations.[48] But there was virtually no congressional staff, and congressmen spent a huge proportion of their time on casework and private bills. Moreover, when it came time to draft statutes, drafting was often done by the departments themselves.[49] We

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45 *See* Mashaw, *Gilded Age*, *supra* note 6.

46 Act of July 31, 1789, ch. 5, § 22, 1 Stat. 29, 42 (regulating the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandises imported into the United States).

47 For further detailed discussion of the Banks of the United States and Jackson's "Bank War," see Mashaw, *Administration and "The Democracy,"* *supra* note 6, at 1585–613.

48 For a discussion of congressional attempts to oversee administration during the nineteenth century, see LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801–1829, at 89–133 (1951); LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829–1861, at 143–62 (1954); and LEONARD D. WHITE, THE REPUBLICAN ERA: A STUDY IN ADMINISTRATIVE HISTORY 1869–1901, at 68–92 (1958) [hereinafter WHITE, THE REPUBLICAN ERA].

49 For example, the statute reorganizing the General Land Office was drafted by Land

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may believe that congressional control over administration is relatively weak today, but it has never been strong.

The President's authority was also limited. While some statutes authorized the President to act, assuming that he would delegate that authority to others, many statutes allocated discretion to specific officers. From the early days of the Republic, Attorneys General advised Presidents that they were not allowed to direct the activities of officers who had been given statutory authority in a direct line from Congress.[50] Then, as now, Congress sometimes specified qualifications for offices[51] and, in some cases, by designating particular officers as the holders of new positions, effectively appointed them as well.

Many agencies were set up in a quasi-independent fashion. The Post Office was nominally in the Treasury Department, but its basic statute permitted it to operate independently and raise its own revenue.[52] U.S. Attorneys were first in the State Department, then in the Interior Department, and not in the Justice Department until 1870.[53] Prior to that time, the Attorney General had no authority to direct U.S. Attorneys' activities, a situation lamented by Presidents from Washington forward.[54] The initial Treasury Department statute

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Office Commissioner Ethan A. Brown. S. DOC. NO. 24-216, at 1 (1836). Similarly, the bill reorganizing the Navy Department was written by Navy Secretary A. P. Upshur. H.R. DOC. NO. 27-167, at 1 (1842). And when Congress wanted to know how to reform the 1838 Steamboat Safety Act, it turned to one of its few scientific officers, the Commissioner of Patents. COMM'R OF PATENTS, REPORT ON THE SUBJECT OF STEAM BOILER EXPLOSIONS, S. EXEC. DOC. NO. 30-18, at 1 (1848).

50 *See, e.g.*, The President and Accounting Officers, 1 Op. Att'y Gen. 706, 706 (1825); The President and Accounting Officers, 1 Op. Att'y Gen. 705, 705 (1825); The President and Accounting Officers, 1 Op. Att'y Gen. 678, 678 (1824); The President and the Comptroller, 1 Op. Att'y Gen. 636, 636 (1824); The President and Accounting Officers, 1 Op. Att'y Gen. 624, 624 (1823). And, of course, in the early case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804), it was determined that a presidential instruction would not protect an officer from a damages action where the President's instruction, even as Commander-in-Chief, was contrary to the language of the statute. For an argument that Congress fully understood the difference between giving powers to the President and to subordinate officers from the beginning of the Republic, see generally Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

51 For example, the Attorney General was required to be "a meet person, learned in the law." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (establishing the judicial courts of the United States). Similarly, the statute providing for the appointment of steam vessel inspectors and boilers required that the inspectors be persons who were qualified by training and experience to make the inspections. Act of Aug. 30, 1852, ch. 106, § 8, 10 Stat. 61, 63–64.

52 *See* Act of Feb. 20, 1792, ch. 7, §§ 2–3, 1 Stat. 232, 233–34 (establishing the Post Office and post roads within the United States).

53 *See* HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 148, 224 (1937).

54 For a discussion of the development of the Justice Department, see generally *id.* For a more detailed look at the very early days of the Republic, see Susan Low Bloch, *The Early Role*

seemed to make the Treasury responsible to Congress rather than the President,[55] but there was some question of who was responsible to whom. Once the first Secretary of the Treasury was appointed, Congress abolished the Ways and Means Committee on the grounds that the Secretary of the Treasury would serve its functions.[56] The accounting offices in the Treasury were also meant to operate independently,[57] as were the land commissions that decided private claims to public lands.[58] Indeed, with respect to appointments and removals, virtually all commentators agree that, throughout the nineteenth century, Congress generally had the upper hand.[59] In short, the conventional story of specific statutes, limited administrative discretion, congressional control of policy, and a unitary executive hardly describes nineteenth-century federal administration or administrative law.

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*of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561.

55 *See* Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (establishing the Treasury Department). Unlike the Departments of War and Foreign Affairs, the Treasury Department was not denominated an executive department in its statute. Moreover, it was required to "make report, and give information to either branch of the legislature, in person or in writing . . . respecting all matters referred to [the Secretary] by the Senate or House of Representatives, or which shall appertain to his office . . . ." *Id.*

56 *See* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 241 (1989). The Ways and Means Committee was reestablished as a part of Albert Gallatin's program to bring the Treasury more firmly under congressional control. JOHN SPENCER BASSETT, THE FEDERALIST SYSTEM: 1789–1801, at 140–41 (1906).

57 The activities of these officers were in many ways quasi-judicial. Requests for payment from the Treasury were sent to the Auditor, who examined and certified the amount due, and then transmitted accounts to the Comptroller for a final decision. *See* Act of Sept. 2, 1789, ch. 12, § 5, 1 Stat. at 66. Dissatisfied parties could appeal the Auditor's findings to the Comptroller. *See id.* § 5, 1 Stat. at 67.

58 Statutes dealing with land claims in the territories varied, but virtually all used the commissioner system for deciding private claims. For the major variations on the private claims process, see generally Act of May 8, 1822, ch. 129, 3 Stat. 709 (ascertaining claims and titles to land within the Territory of Florida); Act of Apr. 25, 1812, ch. 129, 2 Stat. 713 (ascertaining the titles and claims to lands in that part of the Louisiana Territory that lies east of the Mississippi River and New Orleans); Act of Mar. 26, 1804, ch. 35, 2 Stat. 277 (making provision for the disposal of the public lands in the Indiana Territory, and for other purposes); and Act of Mar. 3, 1803, ch. 27, 2 Stat. 229 (regulating the grants of land, and providing for disposal of the lands of the United States, south of the State of Tennessee).

59 For some standard accounts, see generally WILFRED E. BINKLEY, PRESIDENT AND CONGRESS (1947), JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE (1953), and WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (Meridian 1973) (1885).

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Political control of administration in the nineteenth century was a ramshackle business, as it is today. The principle difference was that, in place of the framework statutes and analytic requirements that now attempt to guide administration in the direction of elected officials' preferences, political control was often exercised through the machinery of political parties. Moreover, while that machinery was often corrupt, the spoils system or rotation in office was instituted for democratic purposes and theorized as a major contribution to American democratic governance.

Andrew Jackson made clear in his famous first annual message to Congress that rotation was a critical aspect of his "democratic" program.[60] He was concerned that the holdover officers that had dominated the Federalist and Jeffersonian periods tended to treat their offices as a species of property.[61] Not only were these high-status individuals dominating federal officeholding, Jackson viewed long tenure as corrupting. He was prepared to put in new personnel on the ground that "[i]n a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another."[62]

Jackson's successor, Martin Van Buren, was perhaps the foremost theoretician of rotation in office in that period. Van Buren defended the spoils system as central to democratic politics.[63] In his view, the people could influence the ordinary operations of the government only through party organization—organization that must be continuously active in order to really shape the agenda of government.[64] That continuous effort could only be funded by someone other than the rich and well-born if politics paid.[65] The civil service, therefore, must provide the payroll for the party leadership.[66] Moreover, the spoils system did not necessarily destroy competence in the public service. Because the party was responsible for the performance of the officers

60 Andrew Jackson, First Annual Message (Dec. 8, 1829), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1005, 1012 (James D. Richardson ed., 1897).

61 *Id.*

62 *Id.*

63 *See* Mashaw, *Administration and "The Democracy," supra* note 6, at 1616.

64 *Id.*

65 *Id.* at 1616–17.

66 MARTIN VAN BUREN, INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES (Augustus M. Kelley 1967) (1867). Van Buren's views were hardly unique. Various public-spirited rationales for rotation in office can be traced back to Dutch, English, colonial, and state practices. *See* CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 80 (1905).

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that it selected, it tended to keep in office people who understood the public business.[67]

*Judicial Review.*[68] From our contemporary perspective, the model of judicial review in the nineteenth century was even less recognizable than the system of political control. The courts took what might be described as a "bipolar" approach to judicial review. Where review was by mandamus or injunction, courts were unwilling to review to the extent that the statute provided the administrative officer any discretion. Similarly, where the actions of administrative tribunals were collaterally attacked in judicial proceedings, those tribunals were treated as coordinate tribunals whose determinations were final, provided they had jurisdiction over the subject matter. Indeed, in both of these cases, the ordinary Article III courts exercised review that one might describe as jurisdictional.

On the other hand, to the extent that courts were presented with common law actions against federal officers, they exercised de novo review. With the exception of cabinet officers, administrative officials had no immunity from suit, either absolute or qualified. A revenue officer who seized a vessel or impounded goods was subject to a common law suit for damages. The only defense was that the officer had indeed acted correctly.

Our standard contemporary approach, review for reasonableness, was virtually missing from the nineteenth-century jurisprudence. Moreover, the Supreme Court expressed grave doubt about the constitutionality of statutory provisions for appellate review of administrative action on the contemporary APA model. While contemporary separation-of-powers jurisprudence emphasizes a concern that too much business might be transferred from Article III courts to administrative tribunals, nineteenth-century courts were concerned with the mirror-image problem—that appellate review of administrative action would illegitimately involve the judiciary in administrative policy.

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67 This practice is anecdotally described in Nathaniel Hawthorne's sendup of his Customs House colleague. *See* NATHANIEL HAWTHORNE, *The Custom-House: Introductory*, *in* THE SCARLET LETTER 23–24 (Washington Square Press 1955) (1850). But retention of experienced personnel was the rule elsewhere as well. *See* BERNARD S. SILBERMAN, CAGES OF REASON: THE RISE OF THE RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES, AND GREAT BRITAIN 244 (1993).

68 The brief summary provided in the next three paragraphs is based on the much more extensive descriptions and analyses of judicial review in Mashaw, *Recovering*, *supra* note 6, at 1319–37; Mashaw, *Reluctant Nationalists*, *supra* note 6, at 1674–85, 1725–27; Mashaw, *Administration and "The Democracy,"* *supra* note 6, at 1685–88; and Mashaw, *Gilded Age*, *supra* note 6.

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To be sure, judicial review could be an effective constraint, even a debilitating one. Officers subjected to unlimited liability for error in the execution of the law, with error and the extent of damages determined by local juries, might easily give up on enforcement.[69] Yet, where a damage suit was not available because no common law form of action applied to the administrative action complained of, jurisdictional review provided very little in the way of remediation. In some sense, this system of judicial review looked less like legal control than the provision of a decentralized check on federal officialdom. At least where a common law action would lie, local juries had the capacity to mitigate or effectively annul federal law.[70]

*Structure and Process.* While Congress sometimes specified the internal structure of departments and bureaus with some care, it more often left these questions to the agencies themselves. This was particularly true with respect to the processes for adopting regulations and deciding cases. Constitutional interpretation failed to plug the gap that the statutes had left. During the nineteenth century, courts treated due process claims as the effective equivalent of separation-of-powers claims under Article III.[71] The question the courts asked was whether the particular decision at issue required a decision by an Article III court. If not, then the administrative process, whatever that process might turn out to be, was due process. Yet, notwithstanding the paucity of external controls on administrative processes, agencies themselves adopted and used remarkably similar approaches.

There was significant administrative adjudicatory activity from the beginning of the Republic.[72] Tax collection provided perhaps the largest quantity of cases, but land office commissions decided thousands of cases concerning claims to public lands in the first half of

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69 For example, Albert Gallatin wrote to Thomas Jefferson during the embargo of 1807–09 that "we cannot expect that the collectors generally will risk all they are worth in doubtful cases . . . ." 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1789–1835, at 338 (1922) (internal quotation marks omitted).

70 *See, e.g.*, Douglas Lamar Jones, *"The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 310 (1980) (describing the reluctance, indeed refusal, of juries in Massachusetts to convict those who violated the embargo laws).

71 The seminal case is *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). *See also* Mashaw, *Administration and "The Democracy,"* *supra* note 6, at 1685–87 (discussing the holding of *Murray's Lessee*).

72 For a discussion regarding the information in this paragraph, and for more detailed descriptions of administrative adjudication in the postbellum period, see generally Mashaw, *Gilded Age*, *supra* note 6.

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the nineteenth century.[73] The postbellum period witnessed a further surge in administrative adjudicatory business. This period might easily be called an age of administrative adjudication. The Bureau of Pensions decided hundreds of thousands of claims for veterans' disability benefits. The Land Office, the Patent Office, the Court of Claims, the various offices in the Treasury, and the Post Office decided thousands more. These were important cases. While land was the greatest source of wealth, the industrialization of America made invention patents increasingly important. Hence, decisions by both the Land and Patent Offices had significant economic consequences. Decisions in pension cases involved much smaller amounts, but in postbellum America, a remarkable proportion of Northern families depended upon military pensions for a part of their income. And the Post Office exercised a regulatory authority to exclude matters from the mail that might abruptly end a firm's capacity to do business at all. The mails were, after all, the main means by which both deliveries and payments were made from a distance.

In the first treatise devoted to American administrative law, Bruce Wyman includes hundreds of pages of appendices that describe the processes of administrative adjudicators.[74] In virtually all cases, the bureaus involved issued rules, manuals, instructions, and guidelines that specified how to present claims or protests, what evidence could be submitted and in what form, who had initial authority to make decisions, where to direct appeals, time limits for filing claims and appeals, and other procedural details.[75] Intermediate appeals were often referred to special boards or commissions where the agency dealt with a high volume of cases. In some cases, the adjudicators' independence was protected by for-cause removal requirements and even by specification of the number of members of a multimember board who might be of the same political party.

These procedures varied with context, but in predictable ways. Ex parte determinations tended to be less formal, but where matters turned adversarial—as in patent interference claims, mutually exclusive claims to public lands, or fraud order enforcement—procedure became more formal. In these adversarial proceedings, greater atten-

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73 For a discussion on the Land Office business in the early Republic, see Mashaw, *Reluctant Nationalists*, *supra* note 6, at 1696–719, and authorities cited therein.

74 BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS (1903).

75 *See generally id.* app. at 373–556 (providing appendix sections devoted to reproducing the procedural regulations and manuals used in the major adjudicatory bureaus).

tion was paid to the independence of deciders, the sufficiency of notice, and the avoidance of ex parte presentation.[76]

Departments and bureaus also built up bodies of internal precedent and published their decisions for the information of interested parties. Decisions of the Treasury (under the customs laws), the Patent Office, the Solicitor of the Post Office, the First Comptroller of the Treasury (concerning claims and accounts), the Land Office, and the Pension Office all began to be published between 1868 and 1887.[77] Recognition that these adjudicatory functions created law gave rise to further legalization. At the Land Office, for example, it was recognized that those who decided land disputes needed to be "able men of legal education and mature judgment . . . ."[78] That same office, in 1881, created an appellate Board of Law Review, staffed by the Commissioner of the Land Office and two legal assistants.[79] These patterns were repeated elsewhere.

In short, there grew up in the adjudicatory agencies familiar practices of adjudication which created an "internal law" of both substance and procedure. In Elizabeth Magill's terms, the agencies "self-regulated," and in remarkably similar ways.[80] Without the development of constitutional requirements or transsubstantive procedural legislation, the agencies developed similar procedures and divisions of function that responded to familiar notions of fairness, while seeking to maintain administrative efficacy. And, as private interests became more significant, processes became more formal. Just beneath the surface of this internal law one can see the familiar *Mathews v. Eldridge*[81] balancing test at work.

Similar commonalities can be found in the managerial controls that upper-level officials used to ensure consistency and fairness, both in adjudications and in other administrative actions. Bureaus often had internal divisions of functions that separated prosecutors from adjudicators or that provided checks on administrative authority by requiring the consent of multiple officials. The democratization of the federal civil service by the Jacksonian rotation-in-office scheme, com-

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76 For more details regarding the information provided in the two preceding paragraphs, see Mashaw, *Gilded Age*, *supra* note 6.

77 See the description in WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 124–25 (1982).

78 WHITE, THE REPUBLICAN ERA, *supra* note 48, at 203.

79 MILTON CONOVER, INST. FOR GOV'T RESEARCH, THE GENERAL LAND OFFICE: ITS HISTORY, ACTIVITIES AND ORGANIZATIONS 29 (1923).

80 Magill, *supra* note 7, at 859.

81 Mathews v. Eldridge, 424 U.S. 319, 355 (1976).

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bined with the growth of administrative responsibilities, promoted the development of internal systems of audit and inspection across multiple agencies.[82] Then, as now, superiors sought to control the actions of lower-level personnel and to make their actions consistent by issuing multitudinous instructions. Congress occasionally provided explicit statutory authority for the adoption for regulations. But, whether they had statutory authority or not, upper-level personnel felt the necessity to manage personnel by making rules.

While this rulemaking activity does not seem to have been governed by anything like our familiar notice-and-comment rulemaking process, bureaus and agencies involved outsiders in the development of rules.[83] And, although there was no *Federal Register*, agencies also sought to inform the interested public of their rules and guidelines through specific notice, publication in the press, and the issuance of manuals. These administrative practices produced a rather rich internal law of administration. It may not have been enforceable in court, given the very limited judicial review of administrative action that I have described, but it was the operative law for both lower-level officials and the private parties who sought or opposed agency action. The study of this internal law across multiple agencies provided the factual underpinning for the Attorney General's Report on Administrative Procedure[84] and the drafting of the APA. Our contemporary transsubstantive administrative law is built on the foundation of administrative practices that long antedate the APA's codification.

## *Conclusion*

A look at nineteenth-century practice provides an interesting perspective on our contemporary understanding of administrative law. First, it suggests that we should rid ourselves of the nostalgic idea that the administrative state is a twentieth-century creation. There was simply never a time when law was self-executing and fully specified by Congress. Nor was there a time when administrative officials were directly under the control of the President and subject to his direction in all matters great or small. To the extent that we model our contemporary jurisprudence on the idea that the administrative state is sad

82 On the "bureaucratization" of administration in response to the Jacksonian system of rotation in office, see Mashaw, *Administration and "The Democracy,"* *supra* note 6, at 1617–24, and authorities cited therein.

83 For example, the supervising inspectors of steamboats engaged in extensive rulemaking and often involved knowledgeable outsiders in the process. *See id.* at 1654–58.

84 ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 1 (1941).

evidence of the decline of American democracy, we imagine a nonadministrative state that never was. To the extent that our current law or its normative aspirations are modeled on what we take to be original understandings of American governance, we would do well to get the original understanding right.

The nineteenth-century practice that generated a relatively common, internal administrative law also urges attention to the way in which that law develops today. In our world of multiple transsubstantive statutes and ubiquitous judicial review, we tend to think of administrative law as a set of external constraints on agencies. We then analyze relentlessly these external constraints as if they were the major determinants of both agency efficacy and procedural fairness. Yet, in many ways, it is the internal law of administration—the memos, guidelines, circulars, and customs within agencies—that mold most powerfully the behavior of federal officials. The study and reform of that law should not be left to those whose principle concern is with the substance of some particular administrative field. To the extent that we are interested in the reform of administrative law in the United States, we might do better to operate on the internal law of administration than by ceaselessly tweaking the external law. This sort of reform was, of course, the mandate of the late, lamented, and now-reauthorized but inoperative Administrative Conference of the United States.[85] One cannot but hope that it will become operational again. And, even if it does not, my hope is that administrative lawyers can be convinced to look beyond judicial doctrine and the transsubstantive requirements of the external administrative law to see how administrative law really functions at the agency level and how it might be improved.

85 5 U.S.C. §§ 591–596 (2006).

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