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## A PRAGMATIC REPUBLIC, IF YOU CAN KEEP IT

William R. Sherman\*

CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW. By *Jerry L. Mashaw*. New Haven and London: Yale University Press. 2012. Pp. x, 316. Cloth, \$75; paper, \$45.

### INTRODUCTION

These things we know to be true: Our modern administrative state is a leviathan unimaginable by the Founders. It stands on thin constitutional ice, on cracks between the executive, legislative, and judicial branches. It burdens and entangles state and local governments in schemes that threaten federalism. And it presents an irresolvable dilemma regarding democratic accountability and political independence.

We know these things to be true because these precepts animate some of the most significant cases and public law scholarship of our time. Underlying our examination of administrative agencies is an assumption that the problems they present would have been bizarre to the Founders, leaving these agencies with a deficit of constitutional legitimacy. This notion can be found in the Supreme Court's conclusion that the Affordable Care Act's Medicaid provision impermissibly commandeers state resources,<sup>1</sup> in the adherence to congressional delegation in *Chevron* and its progeny,<sup>2</sup> and in the academic debate over the role of political policy preferences in agency rulemaking.<sup>3</sup>

Supporters and adversaries of agency action alike perceive this lack of historical legitimacy as a weakness either to be shored up or attacked.<sup>4</sup> Previous accounts of the development of the administrative state have posited that its key features—congressional delegation, internal and external rules,

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1. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602–03 (2012) (plurality opinion).

2. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

3. See, e.g., Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

4. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1337–41 (2012); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987); Emily S. Bremer, *The Unwritten Administrative Constitution*, 65 FLA. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2143161>.

adjudication of individual rights, judicial review of agency action, specialized bureaucratic knowledge—arose as a result of legislation in the New Deal and World War II eras,<sup>5</sup> through the Progressive movement,<sup>6</sup> at the adoption of civil service reform and the Interstate Commerce Act in the 1880s,<sup>7</sup> or as far back as the Civil War.<sup>8</sup> Thus, modern critiques sketch a long fall from a state of constitutional grace, during which the nation's legal system has drifted far from the simple, self-executing laws of the early United States.<sup>9</sup>

Wait. Not so fast. Jerry L. Mashaw's<sup>10</sup> new "exercise in historical institutionalism" (p. 17), *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law*, painstakingly and conclusively shows that the conventional account of the provenance of and the problems posed by administrative law is just plain wrong. Mashaw demonstrates that administrative governance on a broad and complex scale has existed from the earliest days of the Republic (p. 5) and that the settled patterns of behavior surrounding it sketch the outlines of an unwritten "administrative constitution" (p. 16).

Instead of looking at the 1860s, 1880s, 1910s, or 1930s, Mashaw starts at the beginning—on the first pages of the U.S. Statutes at Large (p. viii). What he finds is the record of a nation neither hidebound by tripartite constitutional theory nor obsessed with the differences between rulemaking and rule implementing. Rather, the record shows an intensely pragmatic Congress and executive attempting to solve problems using whatever tools were available and inventing new tools as they went. Where the modern assumption has been that founding era Congresses specifically delegated only very discrete powers to administrative agencies, in fact the first Congress established the Departments of War and State, specifying little more than that these agencies should act as the president instructed, and authorized agencies to adopt whatever regulations the president chose with respect to military pensions and certain aspects of trade embargoes (pp. 290–91).

Thus, the history of the American administrative state is much more complex, and more interesting, than the fall-from-grace myth that underlies

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5. *E.g.*, Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012) (enacted 1946).

6. *E.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012) (enacted 1890).

7. *E.g.*, Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379. The perception that federal bureaucracy started with the creation of the Interstate Commerce Commission ("ICC") made the ICC a target for political attack by ideological opponents of bureaucracy. *See, e.g.*, ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (eliminating the ICC); David E. Sanger, *Republicans Want to Renew Vision of Reagan (Then Redo His Math)*, N.Y. TIMES, Jan. 15, 1995, at 18, available at <http://www.nytimes.com/1995/01/15/us/washington-memo-republicans-want-to-renew-vision-of-reagan-then-redo-his-math.html>.

8. *See* WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 3–5 (1982) (arguing that the countermajoritarian nature of the Civil War and its aftermath led to the development of a more extensive bureaucracy).

9. Pp. 4 & 317 n.6 (citing THEODORE J. LOWI, THE END OF LIBERALISM 128–29 (1969)).

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so many of our current debates. In setting the record straight, Mashaw has written an indispensable book for anyone seeking to understand the roots of, legitimacy of, and problems facing the American administrative state. This work is bound to be excerpted at length in textbooks and cited frequently in briefs, and it should spark renewed examination of “the lost one hundred years of American administrative law.”<sup>11</sup>

It should surprise no one that Mashaw has produced such a valuable volume. He has been an incisive scholar in public law and administrative governance for decades, covering subjects as diverse as auto safety,<sup>12</sup> public choice theory,<sup>13</sup> and administrative due process<sup>14</sup> (not to mention a sailing memoir).<sup>15</sup> His excavation of early administrative law is born of the same intellectual curiosity.

### I. APPROACHING AN INSTITUTIONAL HISTORY

*Creating the Administrative Constitution* is not a conventional history; rather, it is a legal and institutional history that chooses as its focus the policies, procedures, and practices of Congress, agencies, and, to a lesser degree, the courts. To do so, the book explores a mix of larger historical themes and specific examples of administrative law at work. The larger themes include hierarchical authority, judicial review of official action, and political accountability (or democratic legitimacy). The in-depth examples include the 1808 trade embargo, the General Land Office, and steamboat regulation. In this way, the book not only traces the origins and evolution of broad concepts and canons but also takes a deep-dive look at the creation and application of individual regulatory regimes. The result is a history that is both granular and broadly thematic.

At the outset, Mashaw explains that his subject requires a different type of primary source (p. 6). The standard account of eighteenth- and nineteenth-century national government recalls a regime of self-executing laws implemented by “courts and parties”<sup>16</sup> and supplemented by programs of patronage and subsidy. Even today, we are accustomed to finding the rules

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11. Mashaw is not the first to dig deeper into the past for the roots of administration or administrative law. See, e.g., NELSON, *supra* note 8. But Mashaw’s examination of the early administrative state, together with his study of internally given rules, is a major contribution to the field.

12. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

13. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997).

14. JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

15. JERRY L. MASHAW & ANNE U. MACCLINTOCK, *SEASONED BY SALT: A VOYAGE IN SEARCH OF THE CARIBBEAN* (2003).

16. Pp. 3 & 317 n.1 (citing STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* (1982)).

of administrative governance in the pages of appellate opinions—need anyone be reminded that *Chevron* is the most cited Supreme Court case in public law?<sup>17</sup> But Mashaw does not seek evidence of the early administrative state in judicial opinions. Instead, he looks first to “the techniques of administrative empowerment and control that Congress devised” and second to the “executive and administrative practices” that developed to implement Congress’s will (p. 7). These constraints on governmental action, he explains, were primarily internal, rather than external, and provide a wealth of data about what the early government was doing and how (pp. 6–7). In looking beyond court decisions for the sources of administrative law, Mashaw finds what has been hiding in plain sight: an abundance of information about how the administrative state developed from 1787 to the 1880s.

## II. IN THE BEGINNING

The book starts, appropriately, in the Federalist period, from 1787 to 1801 (pp. 17, 29). As Mashaw puts it, the first Congresses were “in a sense an extension of the Constitutional Convention” (p. 17). This is true in more than one sense. First, to the extent that we can glean the Founders’ vision for the nation from something other than the Constitution, the actions of the first Congresses provide a source comparable to the proceedings of the Convention and the ratification debates. In Congress, many of the same people who crafted the Constitution were struggling to create a nation that was republican, effective, and protective of individual rights, and the ways they pursued these goals are instructive. Second, the structure and content of the statutes adopted by the first Congresses reflected tensions similar to those animating the Constitutional Convention: the need to legitimize the national government, to cure the maladies afflicting the Articles of Confederation period, and to respond to outside threats.

In this period, Congress responded to emerging problems, and a modern reader gets the sense of a frantic effort to create a national state on the fly. Where the wartime and Articles of Confederation Congresses took administration into their own hands through a seemingly endless number of ad hoc and standing committees exercising a sort of executive authority, the record indicates that by 1787, members of Congress began to recognize the need to delegate. Congress pursued this delegation by using whatever national network of governing entities already existed and creating new commissions, offices, and boards. The first Congress established the Departments of War, Foreign Affairs, and Treasury; the Navy and the Post Office soon followed (p. 34). There was nothing demure about the scope of power delegated by Congress in this period; for example, laws on navigation and shipping administration included delegations regarding everything from

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17. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006).

registering vessels to building lighthouses to authorizing seamen's hospitals.<sup>18</sup>

Pervasive in this account is what can be interpreted as an intensely pragmatic approach to governing. If officials with certain expertise were needed, Congress might create an office to employ those people.<sup>19</sup> If there was no money to fund governmental employees, Congress might establish a bounty or commission system to motivate its officers to enforce the law.<sup>20</sup> If professional governmental administrators were necessary in a location or subject area where the national government did not have a presence, Congress might order state court judges to implement a program.<sup>21</sup> If a national standard was necessary for port clearance, it might stipulate that compliance with state inspection and quarantine laws was sufficient—thus effectively delegating enforcement of the national regulation to state officials.<sup>22</sup>

In other words, Congress demonstrated an extraordinary willingness to experiment with administrative techniques and to adjust those techniques to the problems, resources, individuals, and governmental structures at hand. The systems “deployed multiple federal officials, state officials, local courts, and private parties” (p. 38). This pragmatism through experimentation (whether arising out of principle or desperate speed) laid groundwork for over two centuries of creative administrative structure. Thus, cooperative federalism was born long before the Clean Air Act, and Congress issued unfunded mandates centuries before enacting the Individuals with Disabilities in Education Act (p. 35). And the question for the early Congresses was not whether administration fit within a narrow theory of separation of powers or federalism but rather, “Does it work, and more specifically, does it work within a republican system protective of individual rights?”

The answer to that question was “sometimes.” As one would expect, with experimentation comes error, and the data supports a wide-ranging assessment of the efficacy of various programs. Bounty-, fee-, and commission-based schemes created incentives for entrepreneurial enforcers but lacked checks that would encourage restraint or careful discretion.<sup>23</sup> Offices

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18. See pp. 34, 44–48.

19. See p. 41 (describing the Salary Act).

20. For example, customs officers were paid via commissions, piece rates, and daily fees. Pp. 36, 61.

21. See p. 38 (“[Congress] deployed . . . state courts . . . to construct a scheme that, it hoped, would prove both administratively effective and politically acceptable.”). This system is in severe conflict with the formalist interpretation pursued by Chief Justice Roberts and the current Court majority. See, e.g., Ronald Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 *DUKE L.J.* 1599 (2012) (arguing that, if taken at face value, recent Roberts opinions would find cooperative federalism unconstitutional because the president has insufficient direct control over the states that administer the programs).

22. See p. 35.

23. See pp. 36–37, 61–62.

and bureaus established without clear presidential oversight resisted supervisory control. And the need to allow for correction of mistakes or rogue action by these officials led to a wide range of administrative hearing and judicial review procedures (Chapter Three).

Despite the evidence that the Founders were not reluctant to create executive agencies, the wide variety of systems, officials, and duties arising in the Federalist period reveals something in the cracks: the lack of any coherent unified theory of administration. As Mashaw puts it, “Congress emphatically did not imagine that all federal administrative activities should be performed by officials lodged in departments and accountable directly and exclusively to the President” (pp. 50–51). This is not to say that there was no sense to or reason for this system; it just means that early Congresses had a complicated vision of how the government might accomplish its goals through administration. The variety can be seen as quite pragmatic in two ways: first, particular systems were sometimes tailored to the job at hand, and second, some systems were adopted with an eye toward the still-nascent legitimacy of the national government. With this latter concept in mind, early Congresses might have perceived a citizenry more apt to accept a governmental decree if issued by a local official, rather than by an appointee in a far-away national office (pp. 51–52).

Accordingly, early Congresses assigned power in a variety of ways. This included directly delegating authority to state and local officials (particularly judges and port officials), as well as creating offices for presidential and congressional appointment.<sup>24</sup> But supervising the administrative state required more than just appointment and removal power—although the recognition that holding office meant implementing the president’s policy was significant.<sup>25</sup> As the government grew to about 3,000 officers by 1801, various department heads and office chiefs worked furiously to issue circulars, memoranda, and other correspondence establishing policies, giving instructions, and requesting reports (p. 55). This work was particularly challenging because approximately 2,850 of these officers were not in the capital but were located in sometimes far-flung locations to which communications were unreliable or travel hazardous (p. 55). And among those revenue officers, postal agents, and other officials, there was significant disagreement about whether one’s oath of office required one to implement the law as he saw fit or as interpreted by supervisory officers (p. 57). As one might expect, Treasury Secretary Hamilton had strong feelings about the matter.<sup>26</sup>

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24. See p. 43 (describing the creation of the attorney general position).

25. Mashaw provides the example of Thomas Jefferson: “While Jefferson politicked shamelessly against Washington’s policies through proxies, he (mostly) carried them out as Secretary of State. When he found himself no longer able to do so, he resigned.” P. 55.

26. Hamilton wrote, in a letter to Department of Treasury officials, “[I]f the officer of the customs executes his duty according to law, when, in the cases mentioned, he conforms his conduct to the construction which is given to the law by that officer, who, by law, is constituted the general Superintendent of the collection of the revenue.” P. 57 (quoting 3 *THE WORKS OF ALEXANDER HAMILTON* 557–59 (John C. Hamilton ed., 1850)).



President Washington saw supervisory authority and national loyalty as intertwined; he made clear that he would rely on “character” as the top criterion for officers. To Washington, character meant not only moral fiber but also generalized respect in the community (p. 58). In other words, he sought to imbue an office with the personal standing of the individual holding it, and he trusted that an individual’s care with his own reputation would carry over to his care in faithfully executing the laws (p. 58).

The reliance on character, reputation, and respect may have been significant to the perceived legitimacy of the new officers of the young national government, but it planted the seeds of a conflict over a developing “officeholding class” that flowered in the Jacksonian era.<sup>27</sup> And it did not eliminate the need for a structure that could review and reverse errors or abuses of power. That structure existed only in the form of limited judicial review.

As noted above, the dearth of now-routine judicial review of agency action led some scholars to conclude that review was either unavailable or unimportant.<sup>28</sup> But judicial review in this period can only be properly understood in context. Review took the form of either private tort actions against an individual governmental official or common law equitable writs such as mandamus or quo warranto.<sup>29</sup> Limited though these forms might have been, they provided both direct and collateral means of challenging governmental action. Those areas of administration that most deeply affected people’s lives, such as taxes, veterans’ disability pensions, and the post office, were challenged by lawsuit with regularity.<sup>30</sup>

The judicial review available worked like this: If a citizen wished to challenge a seizure, detention, or impoundment of property, he brought suit against the individual governmental officer responsible for trover, assumpsit, *deniue*, or the like.<sup>31</sup> The governmental official did not have any sort of official immunity, qualified or otherwise (p. 66). The official, if the facts were not disputed, could only argue that he was carrying out a statutory responsibility; thus, the defense subjected the legality of the conduct to judicial review (p. 66). The equitable writs such as mandamus, on the other hand, were limited to challenging official action (or inaction) that was purely ministerial; they were not available to challenge those actions that involved an exercise of judgment or discretion.<sup>32</sup>

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27. See *infra* text accompanying notes 33–34.

28. See generally, e.g., LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 *Geo. L.J.* 287 (1948).

29. Mashaw refers to the two possible avenues of relief as a “bipolar” system of judicial review. P. 302.

30. See pp. 66–67.

31. See p. 66.

32. P. 65; see also S.S. MERRILL, *LAW OF MANDAMUS* 30 (Chicago, T.H. Flood & Co. 1892).



Clearly, this system was problematic—particularly in that it might encourage an official to be especially wary of adverse action against an individual with the means to pursue a drawn-out civil action. But Mashaw points out that the peculiarities of this structure matched the times (p. 76). The governmental officials who might be defendants in these matters were not likely to be full-time, salaried governmental employees but rather private citizens paid to exercise governmental authority on commission or by fees, sometimes with little in the way of conflict-of-interest guidelines (p. 76). Thus, a remedy that aimed to attach liability for harm done by official malfeasance to the individual responsible made intuitive sense, and the ability to pursue that remedy in state court—rather than in the newly formed federal courts, which some viewed with skepticism—lent both the challenge and the government more legitimacy in the eyes of an affected individual (pp. 73–78).

### III. JEFFERSONIANS, JACKSONIANS, AND “THE DEMOCRACY”

In its first 100 pages, *Creating the Administrative Constitution* establishes that the early Republic displayed a pragmatic, experimental approach to governmental administration and its control by Congress, the president, and the judiciary. It traces certain threads through the Federalist period, in particular the “who” and “what” of the bureaucracy—who holds federal office, and what does the administration seek to accomplish? These threads are significant because they form the basis of a growing set of internal rules about how bureaucracy can work—essentially, through administrative law. Although Mashaw tells a complex and essential story about these threads during the Jeffersonian and Jacksonian eras, two parts of that story are so significant that they deserve special attention.

First, Mashaw shows that certain enormous governmental tasks—such as distributing land after the Louisiana Purchase and Mexican Cession (Chapter Seven), determining fiscal policy (Chapter Nine), and improving steamboat safety (Chapter Eleven)—were highly unlikely to happen (at least with any legal consistency or respect for individual citizens) without the personnel, internal controls, and oversight typical of bureaucracy. Nearly every account of the Jeffersonian and Jacksonian periods observes the conflict between the ideological goals and the practical accomplishments of its leaders. Jefferson and Jackson placed an emphasis on democratic government, suspicion of banks, self-sufficiency, and the primacy of state governments. But these emphases were accompanied by policies that led to a stronger and much larger national government, with a well-developed administrative apparatus. In some cases, this was because the policy objective (for example, the embargo of 1808) was so ambitious that it could not be implemented or enforced without an expansive national presence. In other cases, it was because policy choices that might be consistent with an agrarian, rural democracy (such as territorial expansion) were so individual and fact-specific that they required an apparatus with clerks, recordkeeping, rules, appeals, and enforcement mechanisms.

As discussed above, Mashaw details several examples to illustrate different aspects of the rules—largely developed internally—that governed the nascent administrative state. For example, he highlights the 1808 trade embargo as an enormous undertaking accompanied by breathtaking delegations of authority to the president (p. 93). The Land Office required an elaborate system of internal adjudications to allow individuals to bring claims and appeal administrative decisions (p. 123). And the establishment of steamboat safety standards highlighted the importance of specialized scientific and engineering expertise housed in a central administrative agency (p. 194).

The second major story of this section of the book is the change in federal personnel systems. Washington based his official appointments on the character, standing, and reputation of individuals in the community (p. 58). But by the time President Jackson was inaugurated, the “character” system had begun to look like the development of an office-holding class, which sometimes even featured sons following fathers into their appointments (p. 175). Even though the character system was a significant break from the British title-holding tradition arising from heredity, land, and royal grant, Jackson clearly saw a resemblance by 1829. In his first annual message to Congress, Jackson declared that the government had become “a means of promoting individual interests [rather] than . . . an instrument created solely for the service of the people.”<sup>33</sup> The new president made it clear that this injustice would not stand.<sup>34</sup>

In his combative style, Jackson went after this practice, motivated by the same political views supporting his attack on the Federal Bank: “In 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.”<sup>35</sup> Jackson’s solution was “rotation,” or the replacement of office holders with new faces—faces that presumably were supportive of Jackson’s policies or party.<sup>36</sup> But Mashaw does not question Jackson’s motives, noting their consistency with Jackson’s ideals and the anti-aristocratic, democratic emphasis of his other policies (pp. 176–77). At the same time, rotation ushered in the infamous “spoils system,” whereby the incoming party dealt the contracts, the offices,

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33. P. 175 (quoting Andrew Jackson, First Annual Message (Dec. 8, 1829), in 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 1005, 1011–12 (ed. not given)).

34. Cf. Op-Ed., ‘This Aggression Will Not Stand’, N.Y. TIMES, Mar. 1, 1991, at A26 (“This will not stand, this aggression against Kuwait.” (quoting George H.W. Bush’s statement on August 6, 1990)); THE BIG LEBOWSKI, at 13:50 (Polygram Filmed Entertainment 1998) (“This aggression will not stand, man.”).

35. P. 176 (quoting Andrew Jackson, First Annual Message (Dec. 8, 1829), in 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 1005, 1011–12 (ed. not given)).

36. See pp. 175–77.

and the power to its own supporters.<sup>37</sup> This system endured in one form or another through the 1881 assassination of President Garfield by a man who believed that his deluded pro-Republican pamphleteering had earned him a consul position in Europe.<sup>38</sup> When Garfield and his administration refused, the assassin devised a plan to put pro-spoils stalwart Vice President Arthur in his debt and in the presidency.<sup>39</sup> By that time, civil service reform had become something of a moral crusade. It now had its martyr, and the Pendleton Act followed.<sup>40</sup>

A modern historical analysis of the spoils system renders something of a mixed verdict. The system jettisoned the security of “character” and the efficiency of experienced personnel in favor of fresh blood entitled to office by political allegiance. In that way, the system valued political loyalty (or, viewed less charitably, graft) over stature or knowledge. Seen another way, however, the spoils system tied a voter’s evaluation of governmental performance to his vote; if a voter was unhappy with the way the tax collector or port inspector worked, he could vote to replace those people at the ballot box, a solution unavailable under a character system.

Mashaw’s larger contribution to analysis of this historical development, however, is the recognition that with rotation came a greater need for clarity about the nature of each office, rather than each individual office holder. In other words, the rotation system separated office holder from office, and actions came to be seen as actions of an officer of the United States (whoever that person might be), rather than actions of a respected local figure (p. 177). In this way, the spoils system was, paradoxically, a step toward the rule of law in American administration (p. 177). In addition, Jackson’s repudiation of a strong central government and a ruling class manifested itself, in part, in a focus on tweaking the structure of the governmental organization itself. This focus led to the development of rules and principles guiding the new limits on the organization, leading in turn to the development of a bureaucracy to follow those rules (p. 179). In this respect, Jackson’s animosity toward office holders and offices themselves laid the groundwork for the

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37. P. 176. “Rotation” as a system may also have been more important in rhetorical emphasis than in actual numbers. One study of federal officers found that Jackson only replaced approximately one-tenth of John Quincy Adams’s appointees. Erik McKinley Eriksson, *The Federal Civil Service Under President Jackson*, 13 *MISS. VALLEY HIST. REV.* 517, 528–29 (1927), cited in Joel D. Schwartz, *Liberty, Democracy, and the Origins of American Bureaucracy*, 97 *HARV. L. REV.* 815, 825–26 (1984) (reviewing Nelson, *supra* note 8).

38. P. 238; see also CANDICE MILLARD, *DESTINY OF THE REPUBLIC* 93–97 (2011).

39. KENNETH D. ACKERMAN, *DARK HORSE: THE SURPRISE ELECTION AND POLITICAL MURDER OF PRESIDENT JAMES A. GARFIELD* 345–47 (2003). It is an oversimplification to state that Garfield was shot by a disgruntled office seeker; the war over civil service and presidential appointment was a major national issue and almost certainly had the effect of assuring the assassin, Charles Guiteau, in his delusion that his acts would be rewarded by a grateful nation. ACKERMAN, *supra*, at 281–98; MILLARD, *supra* note 38, at 136–37.

40. ACKERMAN, *supra* note 39, at 437.

development of law to govern them (pp. 182–83). It may have only been one step toward a rule of law in administration, but it was a significant one.<sup>41</sup>

These developments represent three growing and overlapping systems of administrative accountability: political accountability to elected officials, administrative accountability to hierarchical superiors, and legal accountability to courts (p. 209). So where is the “Administrative Constitution” of the book’s title? Mashaw posits that where these accountability regimes establish stable patterns over time, they “define the character of the administrative constitution for any particular era.”<sup>42</sup>

In the Jacksonian era, Mashaw finds little consistency in the patterns regarding legal accountability to courts (p. 216) and a still-developing pattern of administrative accountability to superiors (pp. 221–23). But the implications for political accountability of the Jacksonian era are enormous (p. 218). Under Jackson, the spoils system was part of a form of “presidentialism” rooted in a clam to democratic legitimacy (p. 219). This idea, Mashaw states, is the direct intellectual antecedent of now-Justice Kagan’s contemporary theory of presidential administration.<sup>43</sup>

#### IV. THE GILDED AGE AND THE BIRTH OF INTERNAL ADJUDICATION

Mashaw skips over the Civil War and much of Reconstruction—a difficult but ultimately understandable decision. The Civil War was a national endeavor on a scope previously unseen. Accordingly, Mashaw takes off from 1861, touches down briefly in the Johnson administration to discuss appointments and removals (the subject of President Johnson’s impeachment) and lands again somewhere in the Grant administration, while elsewhere sketching some of the intervening years’ major developments, such as the expansion of railroads and the concentration of wealth (pp. 227–36).

If our current administrative constitution incorporates principles of political accountability, with roots in the Jacksonian popular takeover of the bureaucracy, and principles of supervisory authority, with roots in a tug of war between the president and Congress going back to the Federalist era, then its concept of legal accountability appears to have grown from the adjudicative procedures developed in the Gilded Age. Mashaw paints a picture of a postbellum America featuring the growth of extensive veterans’ disability programs, together with widespread corruption paralleling the consolidation

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41. Pp. 178–79. Mashaw credits this insight to Matthew Crenson and Leonard White. Pp. 181 & 377 n.32; see also MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* 104–11 (1975); LEONARD D. WHITE, *THE JACKSONIANS* 270–83 (1954).

42. P. 209. Mashaw formulates these three questions with slightly different phrasing, but consistent meaning, in other parts of the book. See, e.g., p. 285 (“What is the appropriate relationship of administration to the electoral branches of government? What structures and processes for administrative action satisfy our demands for effective government and the legitimate exercise of governmental authority? And, what external legal checks on administration are necessary to protect individual legal rights?”).

43. P. 219; see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

of private capital (p. 228). As the opportunity for and incidence of government malfeasance increased, the already limited civil and equitable actions available against public officials were becoming increasingly ineffective. The concept of externally given administrative due process, like that enforced in *Mathews v. Eldridge*,<sup>44</sup> was utterly foreign (although internal procedural requirements had become highly developed), and substantive due process had not yet been widely developed as a check on governmental action (pp. 249–50).

Nevertheless, administrative adjudication started taking steps toward the modern appellate model during this period, especially in the General Land Office (p. 246). Administrative agencies began to be seen as courts of first resort for challenges to official action, and the adjudication of facts and application of the law in these forums were given deference; pure questions of law were reserved for the courts (pp. 246–48). Mashaw finds the seeds of the modern appellate model in the 1870s but finds equally significant the fact that adjudicatory institutions and procedures “were designed and built almost entirely by the administrative agencies themselves” (p. 251). Across a range of different agencies and different types of controversies, internal rules laid out the ways in which claims or protests could be brought, what material could be submitted, what the deadlines were, who the adjudicatory officer would be, and what intermediate internal appellate review might be available (pp. 252–54). Again, Mashaw notes that the internal nature of this adjudicative system, and its independence from the judiciary, produced a secondary effect: a growing expectation on the part of the public that they could get fair and accurate administrative adjudication (p. 254).

Mashaw examines closely the roots in this period of today’s appellate model of judicial review, taking particular notice of the development of the law-versus-fact distinction inherent in the model (p. 248). Courts today struggle to manage the court–agency partnership. In the nineteenth century, there was no partnership; the executive branch and courts occupied completely different spheres (p. 248). The change since that time is, in part, due to the actions of Congress; Congress creates processes and rights of action enabling challenges to agency action where they previously did not exist. But our standard contemporary approach to judicial review, review for “reasonableness,” was virtually missing from this jurisprudence (p. 302).

#### V. THE ADMINISTRATIVE CONSTITUTION AND WHY IT MATTERS

Mashaw argues that the nation’s first 100 years evince an unwritten administrative constitution consisting of the following principles:

1. Congressional statutes are the foundation for administrative authority.
2. The president is the administrative head of the government.
3. There exists unity of control within both the executive branch and individual departments.

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44. 424 U.S. 319 (1976).

4. Ordinary courts provide relief from legal wrongs perpetrated by administrative officials.
5. Agencies will provide fair processes for the administrative adjudication of claims. (pp. 289–308)

With the exception of the method for judicial review, these principles endure to this day, having been restated by transsubstantive statutes, judicially created common law, and constitutional interpretation.<sup>45</sup> If it can be summarized briefly, the transition from the early administrative constitution to the one we live with today features two major developments: first, the changing nature of judicial review, and second, the replacement of agency-specific rules and procedures that are internally developed with ones that are externally given and enforced and often transsubstantive (p. 290).

The import of *Creating the Administrative Constitution* is clear: the modern failure to engage with the history of administration in the first century of the Republic has caused us to misunderstand the administrative law of that period and has blinded us to the administrative constitution that developed.<sup>46</sup> This, in turn, has left us pondering questions about the constitutional legitimacy of aspects of the administrative state without the benefit of 100 years of largely internal law.<sup>47</sup>

This ignorance or oversight can affect our analyses in a number of ways. First, it can leave us surprised by the novelty of a legal issue when, in fact, that issue has been the subject of conflict for many decades. For example, we struggle with the lack of oversight—often described in superlative and unique terms—of the Federal Reserve.<sup>48</sup> But the remoteness of the Federal Reserve has a direct analogue in the structure of the First and Second Banks of the United States (and in the controversy surrounding those institutions) (p. 291). Second, judicially imposed rules, if announced without historical context or precedent, appear to be drawn freehand, when in fact their language and standards stem from long-standing internal agency practice. For example, the Supreme Court opinions in *Goldberg v. Kelly*<sup>49</sup> and *Mathews v. Eldridge*,<sup>50</sup> which ushered in the due process revolution in administrative adjudication, failed to note the long history of procedural and substantive fairness that had developed in internal administrative law (pp. 279–80). And third, we perceive fundamental weaknesses in administrative structures that

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45. See pp. 289–90.

46. See pp. 312–13.

47. Even recent efforts to articulate an unwritten administrative constitution presume a legitimacy deficit in administrative law, declining to review constitutional sources beyond the last century. See, e.g., Bremer, *supra* note 4. Bremer, for example, starts her otherwise excellent analysis in the 1920s or 1930s, noting that “[o]ver the course of nearly a century of development, administrative law has thus evolved to accommodate the administrative state, filling the Constitution’s silence with an unwritten administrative constitution.” *Id.* at 61–62.

48. See, e.g., Michael S. Greve, *Is the Fed Still Constitutional?*, LIBR. L. & LIBERTY (Sept. 21, 2012), <http://libertylawsite.org/2012/09/21/is-the-fed-still-constitutional/>.

49. 397 U.S. 254 (1970).

50. 424 U.S. 319 (1976).

we assume are beyond the purview of the Founders' plans for the government, without realizing that the Founders themselves recognized the need for a pragmatic approach to national governance. As Mashaw puts it, the evidence

suggests that we should rid ourselves of the nostalgic idea that the emergence of administrative governance in the twentieth century upset the grand design of a non-administrative state. . . . The American administrative constitution has been a continuous experiment in institutional design that has sought, through a host of differing techniques, to accommodate administrative efficacy to multiple conceptions of democracy and the rule of law. (p. 312)

Freed of the shock of novelty or the ignorance of historical internal agency processes, our scrutiny of administrative structure and doctrine might focus more intensely on the relative institutional capabilities of the agencies, the courts, the legislature, and the president. Just as a congressional grant of lawmaking power is essential to an agency's regulatory process, the president's ability to make policy choices through administration should not be a controversial matter. The limits on that ability are themselves a pragmatic choice. For example, the problems that the Banks of the United States and the Federal Reserve posed are close cousins to the contradictory rationales behind independent agencies. And while the Court in *Myers v. United States*,<sup>51</sup> *Humphrey's Executor v. United States*,<sup>52</sup> and *Morrison v. Olson*<sup>53</sup> sought a solution rooted in separation of powers, it eventually upheld a system that works.

#### VI. A PRAGMATIC REPUBLIC, POLITICS AND ALL

Mashaw's study of the emergence of the nineteenth-century administrative constitution forces us to rethink one of the more vexing problems in modern administrative law: how we should treat regulatory decisions that arise from political policy choices. The conventional account views political preference as a meager rationale at best and a corruptive cancer at worst.<sup>54</sup> But politicized agency decisionmaking has existed from the beginning of the Republic, and Congress and the agencies themselves developed an array of tools to handle it.

To find the connection, recall that *Creating the Administrative Constitution* delves deeply into the transformation of judicial review of agency action from a bipolar tort-and-writ system to the current system of appellate-style review. The book points out that modern appellate-style review serves well the distinction between fact and law: facts are developed at the agency level,

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51. 272 U.S. 52 (1926).

52. 295 U.S. 602 (1935).

53. 487 U.S. 654 (1988).

54. E.g., Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).



but law is interpreted (and given) by the courts (p. 248). This change, however, sidesteps a major source of constraint on agency action during the first 100 years of the United States: voluminous internally developed rules that governed how an agency did its job. This internally developed administrative law arose without significant congressional or judicial oversight, and it represented the policy choices of a presidential administration and its appointees (p. 293). In other words, we have a wealth of internally developed law about political influence over policy.<sup>55</sup> Ignoring this history means that we are left with a system of judicial review that handles the law–fact distinction well but trips up at the law–policy distinction.

Significantly, our modern failure to embrace the first 100 years of administrative law leaves us apt to assign a role to agencies that is decidedly nonpolitical—a role that would be entirely foreign to our Jacksonian forebears. Courts and scholars look to an agency’s unbiased expertise in a particular field for justification that the agency should be trusted with deference.<sup>56</sup> And when politics appears in agency work, we are scandalized; it is grounds for a closer look, for more scrutiny at least, and for disgust with the ugliness of the process at worst.<sup>57</sup> As Mashaw wrote a dozen years ago, when courts look for proper reasons for agency action, “retreat to political will or intuition is almost always unavailable to modern American administrative decisionmakers. . . . [S]uch claims delegitimize administrative action rather than count as good reasons.”<sup>58</sup> Part of our easily offended nature comes from the sources of our current administrative law: the pages of the Federal and U.S. Reporters. Were we to look to the creation of the statutes, to the histories of our regulations themselves, and to the agencies that develop them, we would not be so surprised at the appearance of politics.

In fact, the expectation that apolitical reasons support agency action is a relatively recent development, with roots in the Progressive movement and its accompanying political science. Then-Professor Wilson envisioned a government that administers the law “with enlightenment, with equity, with speed, and without friction.”<sup>59</sup> Max Weber similarly predicated his theory of bureaucratic legitimacy on the exercise of power based on knowledge.<sup>60</sup> At the time, however, these ideas were aspirational, not descriptive. Transparency, and with it transparent rationality, actually arrived only with the

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55. See p. 279 (“The rich development of . . . internal administrative law is mostly missing from contemporary legal analysis.”).

56. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 408 & n.268 (2012).

57. See, e.g., McGarity, *supra* note 54, at 1679–82 (2012) (describing the invasion of politics into rulemaking and adjudication as novel and undesirable).

58. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 21 (2001).

59. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 198 (1887), reprinted in WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 231, 232 (Ronald J. Pestritto ed., 2005).

60. See 3 MAX WEBER, *ECONOMY AND SOCIETY* 956–1003 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968) (1922).

due process revolution and the enactment of statutes such as the Administrative Procedure Act (“APA”).<sup>61</sup>

Thus, one of the more concrete implications of Mashaw’s book may be an infusion of historical context into a recently revitalized debate: whether agency decisions can be properly based on politics.<sup>62</sup> Administrative law has historically faced a legitimacy problem not only because of questions about its constitutional provenance but also because the agencies are staffed by unelected government employees. Washington addressed this problem by ensuring that the people he appointed would possess “character.”<sup>63</sup> Jackson solved it by declaring that his appointees would hold his political views.<sup>64</sup> Although a generalized presidential control of the bureaucracy is one of the tenets of the early administrative constitution Mashaw describes, control of this course is channeled by Congress’s delegation of rulemaking authority. In 1983, the Supreme Court made clear in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.* that the APA’s baseline standard for review of agency action—that it not be “arbitrary and capricious”—stands for the primacy of reason giving, but a particular kind of reason giving.<sup>65</sup> Specifically, the Court clearly indicated that it preferred reasoning based on technical expertise rather than ideology.<sup>66</sup>

*State Farm* took place in the midst of the Reagan administration’s effort to reduce regulations and their effect on industry. In particular, President Reagan opposed requirements that new cars contain passive restraints such as air bags and automatic seat belts.<sup>67</sup> Early in the Reagan administration, the Transportation Department revoked a rule requiring passive restraints in automobiles.<sup>68</sup> According to the Court, the Department failed to provide sufficient reasons for the change.<sup>69</sup>

Although the opinion did not squarely address whether political reasons can justify a rule change, it has widely been interpreted as having so held.<sup>70</sup>

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61. See MASHAW, *supra* note 14, at 26–28.

62. Mashaw is, no doubt, well aware of the implications of his research for this question. In his excellent volume on public choice theory, he argued that presidential oversight can ensure an agency’s democratic responsiveness. MASHAW, *supra* note 13, at 153.

63. See p. 58.

64. See pp. 175–77.

65. 463 U.S. 29, 46–57 (1983); see also 5 U.S.C. § 706(2)(A) (2012).

66. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 57.

67. LISA SCHULTZ BRESSMAN ET AL., *THE REGULATORY STATE* 406 (2010). Interestingly, Reagan and his rival for the Republican nomination, George H.W. Bush, clashed over safety regulations, but as vice president under Reagan, Bush chaired the Task Force on Regulatory Relief, which, among other initiatives, delayed Transportation Department rules requiring that air bags be installed in cars. JOHN J. PATRICK ET AL., *THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT* 72 (2001).

68. See *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 34.

69. See *id.* at 46–57.

70. See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW* 183 (1990) (“[*State Farm*] entails a conception of politics as distinguishable from and in opposition to the required rationality of agency decision making.”); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 88; Kagan, *supra* note 43, at

And as Mashaw put it in a previous work, “[T]he submerged yet powerful message in the Supreme Court’s decision in *State Farm* [was] that the political directions of a particular administration are inadequate to justify regulatory policy.”<sup>71</sup> The implied prohibition on political rationale was reinforced in *Massachusetts v. EPA*, in which the Court rejected the Environmental Protection Agency (“EPA”)’s refusal to regulate automotive greenhouse gas emissions.<sup>72</sup> Although the EPA defended its decision in broader terms,<sup>73</sup> opponents contended that the decision was the result of inappropriate political interference.<sup>74</sup> This opinion has been widely interpreted as an attempt to “ensure that agencies exercise expert judgment free from outside political pressures, even, or especially, political pressures emanating from the White House.”<sup>75</sup>

Unsurprisingly, reaction to and application of the Court’s apolitical reason-giving standard has depended heavily on the speaker’s ultimate policy views. Liberals were aghast at the EPA’s apparently political refusal to regulate greenhouse gas emissions<sup>76</sup> and at the attorney general’s interpretation of rules regarding assisted suicide.<sup>77</sup> Conservatives were outraged at the Food and Drug Administration (“FDA”)’s “power grab” by increasing regulation aimed at curbing smoking<sup>78</sup> and the Department of Interior’s efforts to reduce overgrazing on public land.<sup>79</sup> These examples illustrate that when a commentator agrees with an agency decision, such a decision must have been based on fact and reason, but if one disagrees, the agency was acting from pure politics.

In other words, politics is a powerful epithet, especially against a judicial backdrop in which neutral or technical reasons are exalted as superior. But starting only a few years after the *State Farm* decision, courts and commentators began to suggest that there is, or should be, room for political choices

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2380; Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 307 n.191 (2006); Watts, *supra* note 3, at 5.

71. MASHAW & HARFST, *supra* note 12, at 226.

72. See 549 U.S. 497, 533–35 (2007).

73. *Id.*

74. See Freeman & Vermeule, *supra* note 70, at 54–65.

75. *Id.* at 52.

76. See *Massachusetts v. EPA*, 549 U.S. at 512–13; 150 CONG. REC. 7043–44 (statement of Rep. John Tierney).

77. E.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1177–78 (2008).

78. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (holding that FDA regulations on tobacco failed at *Chevron* step one); see also *Editorial: Court Stops FDA Power Grab*, SAVANNAH MORNING NEWS (Mar. 23, 2000), <http://savannahnow.com/stories/032300/OPEDthree.shtml>.

79. See *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 738–40, 750 (2000) (holding in a suit brought by ranching-related organizations that the Interior Department had statutory authority to adopt certain grazing reform measures); 141 CONG. REC. 37,164–65 (statement of Sen. Craig Thomas).

in regulation. Dean Edley and then-Professor Kagan developed this argument in a pair of influential publications a decade apart.<sup>80</sup> Edley's book contended that neither the litigants nor the Court in *State Farm* truly engaged the question of the proper role for politics in agency action.<sup>81</sup> Although he did not prescribe a particular test or role for politics, Edley urged courts to "credit politics as an acceptable and even desirable element of decision making."<sup>82</sup> Kagan argued that where political factors are disclosed (and demonstrate accountability), courts should evaluate these reasons as part of the arbitrary and capricious or hard-look review.<sup>83</sup> Other scholars have followed suit.<sup>84</sup> And members of the Supreme Court appear willing to grant legitimacy to political influence on agency action in certain circumstances. In particular, in *FCC v. Fox Television Stations, Inc.*, Justice Scalia suggested that a change in policy by the Federal Communications Commission ("FCC") could be justified by political pressure from Congress or other sources,<sup>85</sup> although because the policy at issue concerned the FCC's authority to ban "fleeting expletives," it might be more subject to judgment or discretion than a pure, technical expertise case.

Similarly, a pair of recent articles has sketched the ways in which it might be done within existing law or with marginal tweaks. Professors Mendelson and Watts approach the subject from a similar angle, but they diverge in the details of their solutions. Both will find support for their theories in *Creating the Administrative Constitution*.

Mendelson contends that political oversight or sway over agency action exists whether we like it or not but that this influence is opaque because agencies, litigants, and courts refrain from disclosing it and fear relying on it.<sup>86</sup> She argues that it is not the presence of this influence that threatens administrative legitimacy but rather silence about its presence.<sup>87</sup> Following this reasoning, she prescribes a disclosure requirement: agencies should summarize executive influence on significant rulemaking decisions.<sup>88</sup> In turn, courts should defer to value preferences or policy calls.<sup>89</sup> The deference, in Mendelson's formulation, is far less important than the disclosure requirement.

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80. EDLEY, *supra* note 70, at 183; KAGAN, *supra* note 43, at 2380.

81. EDLEY, *supra* note 70, at 183.

82. *Id.* at 192.

83. KAGAN, *supra* note 43, at 2380–83.

84. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1370–72 (2007).

85. 556 U.S. 502, 523 (2009). After remand and another appeal, the Court invalidated the profanity fines for vagueness but did not address rationale. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012).

86. Mendelson, *supra* note 3, at 1159.

87. *Id.*

88. *Id.* at 1163–66.

89. *Id.* at 1171.

Watts approaches the issue in ways very similar to Mendelson, but she sees the legitimacy question as more closely tied to executive oversight. Thus, Watts's solution is judicial deference to political influence but only under certain conditions—only for political influence that is disclosed and that reinforces supervisory accountability.<sup>90</sup> Her system would not mandate disclosure but would reward it,<sup>91</sup> allowing science or technical policy to stand separate from politics. Watts argues persuasively that existing interpretations of arbitrary and capricious review could incorporate her suggestions without major changes.<sup>92</sup>

Both Mendelson and Watts, however, adopt a definition of “politics” or “political influence or oversight” that sidesteps much of the problem. Mendelson writes that

[b]y “political reasons,” I mean reasons communicated from a particular source (rather than reasons with a particular content). “Political reasons” in this Article are those contributed by or adhered to by the President and the politically-appointed executive officials who oversee the administrative process and who answer most closely to the President.<sup>93</sup>

This definition is indistinguishable from a definition of hierarchical accountability. Similarly, Watts finds that “raw politics or pure partisanship” or “naked preference” falls outside the category of political oversight that her argument addresses.<sup>94</sup> Both authors find the rationale “the president made me do it” insufficient, but if an agency can find any description of why the president did so, it might suffice.

To so define “politics” is to cleanse it artificially. From a practical perspective, even an agency decision ordered by the president could be justified by whatever reasons animated the president to adopt his views and dictate the decision. And despite the rhetorical attacks of adversaries, every purely ideological policy position is adopted for a reason. A “purely political,” “purely partisan,” or “nakedly political” position is nothing other than a particular policy preference that cannot be seen as objectively better or worse than any other. To the extent that those preferences countermand Congress's delegation, the Constitution has established the trump: statutory law has the imprimatur of both Congress and the executive, and it cannot be unilaterally repealed. To the extent that policy preferences do not, their adoption seems neither arbitrary nor capricious in the abstract.

Mendelson's and Watts's prescriptions make good sense, but the devil is in the details. Their theories of disclosure and deference are well grounded in contemporary interpretations of the APA and political influence on rulemaking. But were those prescriptions adopted, a contentious fight

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90. Watts, *supra* note 3, at 8, 41–46, 56.

91. *Id.* at 77.

92. See *id.* at 39 (“[O]ne major advantage of rethinking hard look review as this Article proposes is that hard look could be better harmonized with administrative law's current embrace of political decisionmaking.”).

93. Mendelson, *supra* note 3, at 1128.

94. See Watts, *supra* note 3, at 53–54.

should (and would) occur over what types of political oversight are pure or impure and whether there is any way a court could ever tell the difference. If these solutions can be adopted without running afoul of executive privilege or the deliberative process exemption from the Freedom of Information Act, Mendelson's disclosure requirement should enable the debate that will help us illuminate just what it is, exactly, that we find abhorrent about politics in agencies.

But as courts wrestle with this question, they would do well to heed the main lesson of *Creating the Administrative Constitution*: pay attention to the internally developed agency processes that channel decisionmaking. Neither the Constitution nor the APA bars the use of political oversight to control policy; they require only that the control be neither arbitrary nor capricious. If an agency can demonstrate an internal process for incorporating, explaining, or disclosing directives from the president, then the political influence should be permissible under hard-look analysis. Importantly, from a policymaking perspective, internal controls should render externally given requirements unnecessary and overly burdensome. Political influence over agency decisions is not new; as Mashaw has shown in other contexts, our administrative state has often developed internal procedures of such significance and stability that they resemble unwritten constitutional rules. *Creating the Administrative Constitution* shows that the current debate about political oversight of agencies is a course correction following the overreliance on objective reason giving during the due process revolution and the application of the APA. With this history, courts and agencies will be better informed about the provenance of the administrative state and the implications for the debate concerning its constitutionality. What follows should be a greater tolerance for disclosed, politically based policy choices within the limits of arbitrary and capricious review. This increased tolerance should be legitimized by the president's democratic accountability and the authority delegated to agencies by Congress.<sup>95</sup>

#### CONCLUSION

The story goes that when Benjamin Franklin was leaving the Constitutional Convention, someone asked him what had been forged inside. Franklin famously replied, "A republic . . . if you can keep it."<sup>96</sup> Jerry Mashaw has given us back the lost century of American administrative law and with it an administrative constitution reflecting a political pragmatism worth keeping.

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95. For example, courts may soon have the opportunity to review such policy choices if faced with expected challenges to regulatory initiatives on firearms. See NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE (2013), available at [http://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_full.pdf](http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf) (describing a panoply of executive actions). To the extent that these initiatives may be seen as prompted by the president's political agenda, they are no less legitimate (and no more arbitrary or capricious).

96. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., rev. ed. 1937).