Review, <i>Creating the Administrative Constitution</i> by Jerry L. Mashaw

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including Alberico Gentili, Hugo Grotius, and Emerich de Vattel, jurists with whom the architects of the Courts of Mixed Commission were undoubtedly familiar, contain examples of ancient and modern arbitrations that could have served as models for the new tribunals. This, however, is a very small qualm with a truly monumental work of scholarship. Martinez proves a riveting storyteller and a first-rate historian, attributes that become particularly clear in her discussion of the intractable difficulties Britain had in dealing with the United States and Brazil. She is to be congratulated for producing a work that will be of inestimable value to historians, lawyers, and policymakers alike.

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“[T]here is a hole in the text of the U.S. Constitution,” writes Jerry Mashaw: “Administration is missing” (10). But the republic’s leaders did not wait a century to start filling it in, as conventional wisdom has it; instead, they began building the state’s administrative capacities from day one. Mashaw traces this first century of state-building through innovations in public law, focusing on techniques agencies developed themselves to regulate the exercise of discretion. The practices and norms that emerged form the core of what he calls “the administrative constitution.”

Mashaw sets out to correct prevailing views about the scope of national administration in the nineteenth century—but that is not all. He brings history to bear on current constitutional controversies, arguing that administrative practices some originalists condemn have been with us from the first. The book also underlines Mashaw’s case for a broader, less court-centered conception of administrative law, and the expanded research agenda that this entails. Uncovering a lost world of complex administrative processes where judicial involvement was limited, he suggests both that scholars following courts miss much of the action, and that administration can deliver fairness and accountability without aggressive judicial review. Mashaw’s contributions on all these fronts combine to make this richly-researched book essential reading for students of administrative law, public law history, and political development.
Using detailed case studies, Mashaw evaluates administrative practices in each of four eras—Federalist, Jeffersonian, Jacksonian, and Gilded Age—and how they promoted three forms of accountability: political, legal, and managerial. (Mashaw omits the Civil War, reasoning that its contributions to national administration were unique.) His account of administration in the young republic is vivid and sometimes surprising. When it came to designing administrative institutions and programs, the early Congresses were innovative and pragmatic. The first tax collection system regime, with a collector, naval officer, and surveyor in each major port, a careful allocation of authority among the three to reduce corruption, plus an incentive pay structure, shows a Congress attentive to institutional design and unafraid to project power. On constitutional issues, Congress’s approach was more practical than fastidious. Granting near-plenary power to the President to direct the Secretaries of War and Foreign Affairs, while giving Treasury officials a laundry list of specific duties and a measure of independence from presidential directive, the first Congress showed itself more attuned to the different functions of departments than to abstract principles of legislative non-delegation or executive control. Early Congresses also enlisted existing state and judicial institutions into national programs when it deemed them suited to the task.

Mashaw describes a growing rift between political ideology and the demands on government through the Jeffersonian and Jacksonian periods, and its consequences for administration. The dominant political creed stressed localism, limited national power, and (after Jackson) democratic control of institutions, while running the country meant tackling an expanding set of tasks: distributing land; managing the currency; regulating trade and transit. The mismatch generated a number of outcomes. Sometimes the result was open contradiction between principles and policies, as with the muscular enforcement of the Embargo of 1807 and the heavily bureaucratized administration of the land offices. Also, an urge to keep administrative power “off the books” reinforced the practice of relying on state or judicial institutions, as in the 1838 Steamboat Inspection Act, which provided for selection of local inspectors by federal district judges. Unintended, even ironic consequences could result. Jackson’s “Bank War” fed an expansion of administrative capacity, as the Treasury Department had to pick up the slack for managing the money supply after the Second Bank of the United States was dismantled (a point Mashaw credits to John McFaul).

Throughout the century, courts are a peripheral presence in administration, with an uneven impact. Reasonableness review of agency action was unknown in practice, although Chief Justice Marshall broached the idea. However, shoe-horning a complaint against an officials into one of the common law writs opened the door for collateral review, de novo, of the challenged action’s legality. Because officials lacked immunity, the threat of liability could be potent. But the writs provided uneven accountability, as some forms of administrative
action lent themselves more readily than others to styling as trover, detinue and assumpsit. Courts recede further from Mashaw’s account in later chapters, as maturing agencies are less likely to enlist courts in administration and less apt to fall under one of the writs.

What comes to the fore in Mashaw’s history are the attempts of agencies to police their own, through self-imposed accountability mechanisms. Something close to the full modern arsenal of techniques for reducing principal-agent problems and regularizing the performance of agencies was in place from early on. Agencies laid out detailed procedures for employees to follow; issued floods of circulars, letters, and other forms of guidance to constrain and guide the exercise of discretion; provided incentives; and established dedicated supervisory offices to monitor performance. The tone of Mashaw’s appraisal is positive; it seems that this “internal administrative law” struck a pretty good balance between promoting efficiency in government and procedural fairness to its constituents.

Mashaw’s book is unlikely to settle debates about the course of American state-building. The engine of controversy in these debates is divergent assessments of the relative impact of different institutional innovations on American politics and government, and Mashaw declares early in the book that he is not interested in making these judgments. Rather, his book is about the law of administration: the repertoire of formal techniques used to structure administrative practices. His tight focus on legal structures means that the book lacks the big picture political and historical perspective of works in the vein of American political development, and it’s not always clear how well different arrangements he described performed in practice. The focus on law, however, provides a valuable corrective to the inaccurate view of administrative history that persists in some precincts of the legal academy. Mashaw forcefully demonstrates that originalist critics of the modern administrative state “imagine a non-administrative state that never was” (312). The early republic relied on broad delegations of power, insulated officials from presidential control, and enlisted state and judicial officials in federal programs. It’s not that the first generations disregarded the Constitution, but that their approach to the questions it left open about the design of national programs was pragmatic rather than formalistic.

The conventions and norms reflected in the arrangements they adopted, Mashaw argues, made up our first administrative constitution. It’s distinct from our own because the normative demands for accountability are satisfied largely through internal administrative law, rather than judicial review or external political control. Mashaw is right to argue that scholars should pay more attention to what happens outside of judicial opinions and inside of agencies, and this work showcases the importance of agency self-regulation. But while Mashaw at several points highlights the quality of internal agency governance, it is not obvious to what extent internal controls can satisfy our normative
demands on administration today, or whether this is an argument Mashaw intends to push. In particular, the nineteenth century administrative constitution mostly addresses itself to the procedures for adjudications, and the most important business of contemporary agencies is rulemaking. And while agency leaders have strong incentives to regulate the front-line employees who conduct adjudications, it is less obvious that they would wish to bind themselves for the policy-level determinations that go into rulemaking. Moreover, the legitimacy of rulemaking rests in large part on the requirement of reasoned explanation, and for all the problems judicial review introduces, this requirement might be harder to insist on in its absence of someone to test it. And because rulemaking attracts presidential involvement more than individual determinations typically do, judicial review serves the further function of ensuring presidential influence remains within proper statutory bounds. It’s beyond the scope of Mashaw’s book to answer these questions. But it’s to the book’s further credit that it has raised them, by starting an important conversation about what administrative law’s past has to teach the present.

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The U.S.-Mexico border is a slippery subject. It is both a geographic reality and a malleable metaphor. It is crossed daily yet it is policed intensively. It is a powerful sovereign divide and also a unifying meeting point. In her book Line in the Sand: A History of the Western U.S.-Mexico Border, Rachel St. John does not shy away from the multiple meanings of the border. Instead, she demonstrates the specific ways that the border mattered, grounding her observations in rich and deep transnational research. This is a lively and elegant chronicle of the western land border’s transformation from an idea in a treaty to a line on a map to a bustling commercial crossroads and, finally, to a heavily regulated zone of interaction. The contributions of the book are both historical and conceptual: St. John gives us new ways to think about the dynamics of borders generally while also painting a fascinating portrait of this border in particular. She artfully demonstrates that the border is not one thing but rather “a space of evolving and multiple meanings and forms” (3).