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The Legitimacy of Administrative Law

Jed Handelsman Shugerman
Fordham University School of Law

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THE LEGITIMACY OF ADMINISTRATIVE LAW

Jed Handelsman Shugerman*

JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012). Pp. 432. Paperback \$ 50.00.

NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013). Pp. 584. Paperback \$ 55.00.

DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014). Pp. 240. Hardcover \$ 39.95.

JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012). Pp. 324. Paperback \$ 31.99.0

PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2013). Pp. 648. Hardcover \$ 55.00.

“How does an alien imposition attain legitimacy?” asks Nicholas Parrillo in *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*.¹ Parrillo and three other historians address this question in a group of outstanding new books on the rise of American administrative law. Each book reflects the various ways in which American administrative law has been an alien imposition: filling a “hole” in the text of the Constitution that did not address administrative powers;² changing the traditional separation of powers of legislative rule-making and judicial adjudication with individualized due process; imposing centralized bureaucracy over local self-rule; imposing the rule of experts over the populace; and imposing one party’s structure over the other party’s dissent.

Despite all of these challenges, administrative law evolved from alien to familiar, and from contested to accepted. These remarkable studies, with heroic depths of archival research, offer a twist on the legal positivists’ core question, “What is law?” H.L.A. Hart’s answer in *The Concept of Law* is, more or less, that law is the set of official customs and

* Associate Professor of Law, Fordham University School of Law.

1. NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* 34 (2013).

2. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 10 (2012).

norms that people generally recognize and obey.³ How did Americans arrive at obeying the administrative law revolution? Jerry Mashaw's approach, in *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law*,⁴ is to uncover a century of administrative law practice and tradition that set the stage for the twentieth century. Parrillo also delves into the nineteenth century (as well as the late eighteenth and early nineteenth) to trace the shift from profit motives to salaried public service in order to build public trust in administrators' motives. Daniel Ernst, in *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940*,⁵ and Joanna Grisinger, in *The Unwieldy American State: Administrative Politics Since the New Deal*,⁶ focus on how conservative opponents of the New Deal turned from general critique to procedural reform, which ultimately improved and legitimated the New Deal state. These books help answer Philip Hamburger's question in his new book, *Is Administrative Law Unlawful?*⁷ And the answer is no, thanks to American incrementalism.

I. CREATING LEGITIMACY: MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW*

Jerry Mashaw addresses two misperceptions, perhaps "governing myths" of administrative law.⁸ The first is that, for its first century, the national government was "a government of courts and parties."⁹ There was no meaningful "administration" to speak of, and the creation of the Interstate Commerce Commission was "a kind of genesis" of administrative law.¹⁰ (One might also cite Toqueville's observations, as well, that America had the good fortune to have no "centralized administration.")¹¹

The second is that administrative law is the law of "judicial review of administrative action," and that only the law of courts matters.¹² Mashaw's thorough research first shows the early emergence of administration starting from the earliest years of the Founding and growing through the nineteenth century. He finds an administrative law emerging, with a small role for the courts, but more significantly, an internal administrative law of guidelines and practices. Mashaw explains:

By administration I mean simply the development and implementation of law and policy by officials specifically charged with that responsibility, whether or not bureaucratized in a Weberian . . . sense. Moreover, I am not searching for big bangs, but for the accretion and development of administrative jurisdiction and capacity, sometimes in legislation, but

3. H.L.A. HART, *THE CONCEPT OF LAW* (1961).

4. *See generally* MASHAW, *supra* note 2.

5. DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014).

6. JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012).

7. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2013).

8. MASHAW, *supra* note 2, at 3.

9. *Id.* (citing STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920* (1982)).

10. *Id.*

11. *See infra* notes 42-51 and accompanying text.

12. MASHAW, *supra* note 2, at 3.

often in the initiatives and routines of administrators themselves.¹³

Chapter two, appropriately titled “Pragmatic State Building,” tracks the first Congress’s efforts to establish a workable government. Mashaw observes that the “American Constitution of 1787 left a hole where administration might have been.”¹⁴ The First Congress immediately tried filling that hole. Mashaw frames this effort as an effort to address the weaknesses of the Articles of Confederation as well as an effort to create a “legitimate” administration.¹⁵ If administrative power was “inevitable,” how might they make it “acceptable to a populace deeply suspicious of centralized authority?”¹⁶ Congress made sure to give citizens common law recourse in state courts to contest the payment of customs, taxes, and duties. This solution combined localism/federalism and the judiciary to build legitimacy. Statutes required warrants for searches. The enforcement relied upon “local worthies” to assist with valuation and adjudication.¹⁷ Mashaw argues that Congress sought political legitimacy for these offices by relying on the president’s political mandate, and, then, by creating commissions drawing from top appointees.¹⁸ He rightly focuses on the First Congress’s efforts to legitimate its administrative innovations with novel approaches to checks and balances, and to democratic, local, and judicial accountability. There was not much of a formalist commitment to separation of powers, as the departments mixed roles of rule-making and adjudication.

Chapter three traces the management of those new officials in the early republic. Instead of clear hierarchies, there was ambiguity. To control officers’ behavior, Congress experimented with oaths to foster loyalty, commissions and fees as carrots, and penalties and fines against officials as sticks.¹⁹ These mechanisms are central to Nicholas Parrillo’s project on the transition from commissions and bounties to salaries.²⁰ Mashaw reflects concerns that these incentives risked producing overzealous enforcement without legal constraints.

Chapter four, entitled “Legal Accountability: The Common Law Model,” is Mashaw’s turn towards the development of some legal constraints, a more recognizable administrative law in courts. But in the early nineteenth century, the judicial remedies were the traditional common law writs, such as tort suits, writ of mandamus, and quo warranto. Mashaw emphasizes that these suits gave the public a sense of individualized justice, which legitimated and checked administrative powers—but perhaps too effectively. Americans often sued federal officers. Mashaw suggests that these suits were part of strengthening legitimacy, but to the contrary, one could imagine that the large number of law suits were a means of challenging and undermining the administration’s legitimacy. The threat of liability against individual officers was especially powerful because they did not have immunity. Even the threat of litigation and having to finance a defense deterred officers

13. *Id.* at 16.

14. *Id.* at 30.

15. *Id.* at 34.

16. *Id.* at 35.

17. *Id.* at 37-38.

18. *Id.* at 50.

19. *Id.* at 61-62.

20. *See generally* PARRILLO, *supra* note 1.

from fulfilling some of their duties.²¹ Thus, the administrative law of the common law was perhaps too powerful a legal check on the emerging state.

Part II, “Reluctant Nationalists, 1801-1829,” and Part III, “The Administration and ‘The Democracy,’ 1829-1861,” reveal an increasingly familiar administrative state. As the country confronted national-scale challenges with enforcing the Embargo Act of 1807 and distributing massive amounts of land, Thomas Jefferson and his followers departed from their ideology of local governance and distrust of federal power by creating extensive national offices. These case studies offer examples of internal administrative rules that crystallized into a form of law.²² Ironically, Jackson’s closing of the Second Bank of the United States led to more centralized power in the Treasury Department and the creation of the Sub-Treasury System, the topic of chapter nine. Without a relatively independent bank managing financial matters, the Jackson Administration had to play a far more active role in fiscal and monetary policy, and had to create internal administrative rules and give the Treasury Secretary more discretionary power.

George Washington held onto an eighteenth-century vision of legitimacy for the growing bureaucracy: invoking character and virtue as a means of managing administrative officers. But the Jacksonians viewed this bureaucratic culture as entrenching elitist privilege, and they ushered in a nineteenth-century vision of legitimacy. Chapter ten follows how they embraced the rotation of office system to displace the elite bureaucrats. Ostensibly, rotation of office was a means of combatting undemocratic privilege, but it was actually a way of opening the door to party patronage, to rotate through more appointments in a systematic way. Party patronage may seem like corruption to modern ears, but it was a path to political legitimacy through partisan appropriation. Like the Jeffersonians, Jacksonians also distrusted centralized power, but they departed from their ideological stance as they saw opportunities and advantages in the growing federal government.

Steamboat explosions became a crisis in the 1830s and 1840s. The federal government stepped in with safety regulatory commissions that are increasingly recognizable as modern agencies. It was uniquely an interstate commerce problem, and one that required expertise and enforcement. The inspectors were not full-time federal employees, but rather, locals appointed by federal district judges, a flexible and practical approach to judicial power. Under the 1838 statute, inspectors were paid \$5 for every inspection, and an additional \$5 for every time they found a boiler safe for use—an incentive to err in favor approving boilers.²³ Moreover, the statute had other technical provisions that backfired.²⁴ Congress learned from these mistakes and passed a new statute in 1852 that reflected more scientific understanding and entailed a more advanced administration. Congress created a Board of Supervising Inspectors, which still worked with district judges to appoint local inspectors, but which exercised more supervision over the inspection system. The local inspectors had more power, more technical skill, and were paid a fixed salary, rather than fee-for-service (another link to Parrillo’s book).²⁵ There are other features that preview modern administrative roles: The Supervising Inspectors gained rulemaking authority, and

21. MASHAW, *supra* note 2, at 73.

22. *Id.* at 123.

23. *Id.* at 189.

24. *Id.* at 191.

25. *Id.* at 192.

the remedies were not common law or criminal, but were clearly administrative (such as licensing), and, for the first time, those administrative remedies required formal written explanations.²⁶ The regulation of steamboats was an early model for a modern regulatory agency governed by law.

Mashaw moves on to the Gilded Age in Part IV, focusing on case studies of the Pension Office and the Post Office to detail their processes of internal administrative law. In addition to the internal rules, federal courts created recourse in courts of equity and in common law.²⁷ Mashaw concludes that there were few external checks: “If political control of administration was relatively weak, judicial review remained anemic by modern standards.”²⁸ Nevertheless, he identifies the nascent development of a judicial administrative law, which was shaped by internal administrative guidelines and in turn shapes those guidelines. This dialogue set the stage for modern approaches to administrative procedure.

In general, Mashaw identifies three “overlapping systems of accountability”: political accountability to elected officials; supervisory accountability within an administrative hierarchy; and judicial accountability.²⁹ These types of accountability both increase the capacities and control the powers of administration. They also establish its legitimacy. Mashaw masterfully shows how these systems worked in tandem over a century to create the American administrative constitution. The persisting question is whether internal administrative law is really “law.” Once one adopts a broader understanding of law as an enduring system of rules and practices that create accountability and that are obeyed, then Mashaw’s answer becomes persuasive. If we mean “rule of law” in the sense of reliability and enforceability, then there were systems of reliability, predictability, and enforcement emerging over America’s first century. Congress borrowed from traditional legal institutions like the common law and equity, and those established norms constrained officers—internally and externally. They were also constrained by newer political institutions: the party system, which was not simply partisan caprice and corruption, but rather often led to structural checks like rotation of office. Mashaw traces how officials generally followed internal constraints and created a set of rules that persisted from one administration to another, from one administrative experiment to another. Those internal constraints survived and became the norms that informed the political and judicial systems of accountability. The “lost century” was not really lost: it was the deeper foundation for the modern administrative state, and that tradition helped legitimate later developments.

II. NICHOLAS PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*

Parrillo’s masterful book is a second study tracing American administration back to the eighteenth and nineteenth centuries. Like Mashaw’s effort, Parrillo ranges broadly and digs deeply, with remarkable archival discoveries, thought-provoking analysis, nuanced political insight, and a command of specific institutional workings and the theoretical big picture. Parrillo traces the surprisingly gradual evolution to salaries, rather than the “revolution” advertised in his subtitle. A revolution may sound more exciting, but it is precisely

26. *Id.* at 195.

27. *Id.* at 247.

28. *Id.* at 245.

29. *Id.* at 209.

the evolution that Parrillo tells in careful detail that is so fascinating and original. The subtitle's date range, 1780 to 1940, more accurately reflects the long dynamics of this transformation, as the battle over official compensation truly extended from the Founding Era through to World War II.

Parrillo questions two established accounts of the shift to salaries, both traced from Max Weber's theories of bureaucracy. The first is that "the 'salarization' of modern government was all of a piece," that there was a simple transition from an "undifferentiated hodge-podge of . . . profit-seeking."³⁰ Instead, Parrillo helpfully separates the hodge-podge into two categories of profits: "facilitative payments," such as fees and commissions for services; and bounties, or other kinds of penalties that the officer collected and kept personally.³¹ In many cases, Parrillo finds a more complicated series of experiments and institutional learning, as Americans sometimes tried fees, then bounties, before arriving eventually at salaries. Facilitative payments "drew officials too close to the layperson," while bounties "alienated them too far from the lay person."³² Salaries stabilized an equilibrium.

The second conventional assumption is a simple causal account: pre-modern government relied on flexible incentives because they did not have robust taxation and disbursement capacity, and fees and bounties were more easily collected in the direct exchange between the regulator and regulatee. Once those modern state taxing and spending powers developed, salaries were a natural result. Parrillo acknowledges that the weakness of early American fiscal mechanics made salaries less practical, but he shows that even if these institutions were necessary for the rise of salaries, they were not sufficient.³³ The federal and state governments continued to pay facilitative payments and bounties out of general public revenues decades after the rise of centralized taxation powers. Parrillo shows that additional factors were necessary to drive the change, and most often, he finds that driver was the political demands of legitimacy.

The facilitative payments declined because they fostered a bargaining relationship between the officer and members of the public, which appeared increasingly like bribes, or at best, these scattered bargains defied consistency and reliability.³⁴ The "customer-service" approach to administration had worked in a pre-modern society, but Parrillo argues that the emergence of modern interest-group democracy created rivalries and fears of scarcity of public goods, so that each interest group wanted to limit the incentives for officials to distribute those goods to rival groups. Bounties declined because they created adversarial relations between officials and the citizens they were ruling. Bounties undercut the public's trust that officials were enforcing the laws in the public interest, when it appeared they were motivated more by self-interest in direct profits. Lawmakers grew to understand that the letter of the law was not enough to generate compliance. They needed voluntary compliance, which depended upon the public's sense that the rules were legitimate.

30. PARRILLO, *supra* note 1, at 5.

31. *Id.*

32. *Id.*

33. *Id.* at 6.

34. *Id.* at 7.

Thus, Parrillo is connecting two of Weber's ideas that Weber himself had not connected: salaries are a hallmark of modern government, and modern government depends upon establishing legitimacy. Parrillo observes that salaries replaced profit not only for mechanical/fiscal reasons, but for a deeper relationship between the government and the governed. He draws from other academic studies that find that the key to voluntary compliance was "motive-based trust," a "trust in the benevolence of the motives and intentions of the person with whom one is dealing."³⁵ This trust is different from perceptions about the official's expertise, competence, or consistency. This trust depends upon the citizen's belief that the official's motive is to "act out of goodwill" and for the public interest.³⁶ Parrillo brings a new dimension to this scholarship: how compensation affects perceptions about motives and thus about government's legitimacy.

Part I, focusing on facilitative payments, starts with the common law's tradition of lawful or "due" payments, and with its permissiveness for tips and gratuities to officials. Officials negotiated openly with citizens for fees and tips, and remarkably, officials could even sue under the doctrine of *quantum meruit* to receive compensation for their services. Legislators embraced the practicality and flexibility of these direct commissions and tips, and they framed the relationship of mutual self-interests as a positive, not a negative. Chapter two portrays the first efforts to prohibit negotiations, because it too often devolved into monopolistic price-gouging and extortion, because it undercut legislative power and the letter of the statutes fixing fees, and because the rise of civic republicanism created an ideological conflict with government-by-mutual-self-interest. Legislatures prohibited non-statutory fees gradually from the 1810s through the 1850s. Public officers were less likely to be local community leaders, and more likely to draw from the rotation of outside party leaders. Negotiating with a respectable high-status neighbor had been acceptable, but negotiating with a series of party cronies was not acceptable. Moreover, the Jacksonian ideology of equality and consistency rejected the randomness and preferential treatment of ad hoc fee negotiations.

The legislative efforts to regulate fees was a failure, as chapter three, "A Regulatory Nightmare: Salaries as a Remedy for Corrupt Exchange and Official Lucre" shows. The pre-modern facilitative payment regime had worked because of its unregulated flexibility, but the new legislative limits were the worst of both worlds. They were too rigid and often were out of step with changing facts on the ground. When officials tried to adjust those fees on their own, those adjustments were now labeled corrupt and illegal, dooming the legitimacy of enforcement and discouraging citizens from taking on the risks of public service. In addition, as many local populations increased rapidly, as technology improved, and as regulation expanded, some officers were able to increase their number of transactions to earn more and more fees—so that they were earning huge incomes. These riches became public, and thus a public embarrassment for the fee system. Chapter four, "A Government Capable of Saying No," explains why the fee system still persisted through much of the nineteenth century, but then declined. The "customer service" ethos worked in the fields with very high volume: the processing of immigration applications, the adjudication of veterans' disability claims, and the resolution of western land claims. For most of the nineteenth century, Parrillo argues that it was acceptable to incentivize the distribution of

35. *Id.* at 35.

36. *Id.* at 35.

benefits to new immigrants, to veterans, and to western settlers. But the twentieth century ushered in the rise of interest group politics in modern America, with its rivalries, resentments, and fears of scarcity. Some groups opposed the incentivization of services and tax dollars to other groups. In the case of immigration, Parrillo acknowledges that American nativism was a political force in the 1840s and 1850s, and again in the 1880s and 1890s, yet the pro-immigration customer service system survived the nativist opposition.³⁷ But considering how powerful the nativist American (“Know-Nothing”) Party was in the early 1850s, and considering the nativist legislative successes in the late nineteenth century, it is still surprising that the fee structure survived so long. By the 1930s, legislatures had almost completely replaced facilitative payments with salaries.

Part II shifts to the bounty system. Bounties were a long established practice, but they gained renewed attention from lawmakers as “motivational fuel to enforce novel, ambitious, and intrusive legislative programs.”³⁸ As administration shifted from the local and familiar to the “alien” outsider, and as regulation of daily life increased, bounties were vital to incentivize enforcement. Instead of Weber’s assumption that bounties declined as the modern state machinery developed, Parrillo shows that bounties increased in order to fuel the growing machine. The problem was that bounties depended on the official’s self-interest, and thus undermined the legitimacy of the penalties and the officials. Parrillo notes that the Compromise of 1850 paid twice as much for a commissioner to declare a person in custody a fugitive slave rather than a free person. In Chapters five and six on state and federal taxation, Parrillo points out that tax systems depend heavily on voluntary compliance. Bounties undermined the “motive-based trust” and reduced compliance. Congress imposed higher tariffs after the Civil War, but then realized the incentive-laden tariff collection was backfiring. In 1874, Congress abolished the “moiety men,” the full-time customs detectives who had collected a piece of the action, and adopted salaries for these officials.

State and federal prosecutors are a particularly vivid case study of how bounty incentives worked—and did not work. The public prosecutor was an American state innovation in the late eighteenth and early nineteenth century. They were paid a fee for every case they brought to trial, whether or not there was a conviction. But in the mid-nineteenth century, the states and the federal government switched to conviction fees. The federal effort to crackdown on local moonshine in the 1860s failed, and the bounties had backfired. Congress continued the practice for a few decades, but eventually abandoned conviction fees and switched to salaries for prosecutors in 1896. Another poignant example was Birmingham’s crackdown on black “vagrancy.” Deputies received an arrest fee, and the effect was that instead of focusing on vagrants, deputies focused more on black workplaces, the easiest place to find black men, even if these men were the most obviously employed. As a result of overzealous and abusive enforcement, blacks left Birmingham and their white employers. These businessmen were unhappy about losing their workforce, and they successfully campaigned to switch to salaries for deputies. Parrillo separately shows the perverse effect of bounties when dealing with a criminal enterprise. A deputy would not want to shut down the enterprise, because he would lose his revenue stream of bounties. Instead, the deputy arrests the smaller players, and colludes to make sure the bigger players could

37. *Id.* at 135-36.

38. *Id.* at 24.

continue the overall enterprise.

Jails initially operated in a facilitative payment regime, receiving commissions for providing services for prisoners. Chapter eight examines the negative results of adopting a bounty system and profits from prison labor: unprecedented levels of riots. “Even in prison, power needed legitimacy and voluntary cooperation, which required banishing the profit motive.”³⁹ Parrillo’s final case study is naval warfare. In the wake of the Spanish-American War and the rise of American expansion overseas, Congress sought to put the American military in a more positive and legitimate light around the world. In 1899, Congress abolished naval prize money and head money.

Together, Mashaw and Parrillo show how the modern American administrative state emerged and achieved legitimacy. They each show how administration and regulation emerged incrementally, in response to widely understood necessities. They reveal an experimental, piecemeal approach, open to reform and “learning” from policy successes and failures. They each demonstrated how political leadership fostered accountability to the legal system, to politics and the machinery of the party system, and to managerial structures with balanced incentives. As a result, the “alien imposition” of administrative law won over American acceptance.

III. DANIEL ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* AND JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL*

Daniel Ernst and Joanna Grisinger pick up the story of legitimation from Mashaw and Parrillo. The alien imposition in the twentieth century was the New Deal regulatory state’s acceptance nationally, first by creating fair practices of administrative law and then by co-opting Republican opposition through reform.

Ernst’s book is clear, crisp, and concise. Whereas Mashaw and Parrillo focus on the lives of institutions, Ernst offers the lives of lawyers, scholars, and judges who shaped those institutions. His writing is engaging, and he brings otherwise dry debates about administrative law to life. He drives the narrative through seven main characters.

Ernst’s title draws from Alexis de Tocqueville’s observation that America had the good fortune to have no “centralized administration” in the antebellum era. But he warned that if one emerged, “a more insufferable despotism would prevail than any which could be found on this side of the confines of Asia.”⁴⁰ America eventually created a centralized administration, but Tocqueville’s nightmare of despotism did not come true. Ernst explains how Tocqueville’s original heroes, the lawyers, helped save the New Deal from both despotism and judicial invalidation. Tocqueville wrote in *Democracy in America* about how lawyers protect democracy by serving as a check against tyranny of the majority:

Some of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt

39. *Id.* at 46.

40. ERNST, *supra* note 5, at 1.

of the government of the people. I do not mean to say that the natural propensities of lawyers are sufficiently strong to sway them irresistibly; for they, like most other men, are governed by their private interests, and especially by the interests of the moment.⁴¹

Ernst's close studies of a handful of prominent lawyers and judges show how their tastes and habits—and their interests—helped craft a New Deal with a more balanced order of separation of powers and with formal procedures to protect due process. They did not find democratic rule repugnant at all, but instead were skeptical of too much concentrated power and too much populism.

Ernst begins with two law professors with German-Austrian backgrounds: Ernst Freund and Felix Frankfurter. Both were experts in administrative law, focusing on how to create a regulatory state that could solve modern problems with flexibility and efficiency, but not so much wide-open discretion that these bold new powers could be abused. Freund proposed the German *Rechtstaat*, in which the legislature professionally and expertly crafts legislation with precise wording and “definite rules,” rather than vague standards.⁴² Freund presented his ideal at an important meeting of the nation's administrative law experts. Unfortunately, Congress and state legislatures did not resemble the German professional legislative model. Few had faith that American legislatures had the capacity to agree on clear rules, and even if they could agree, they doubted that they could draft legislation competently. Frankfurter led the critique of the notion that rules could replace discretion.⁴³ Freund's legislature-based vision faded away.

A more conservative and traditional approach was rigorous judicial review of administrative actions. This court-centric approach is often identified with the English scholar A.V. Dicey and the clarion call of “the rule of law.”⁴⁴ Dicey and other conservative skeptics of the modern administrative state contended that in a common law nation, the common law courts had to have the last word on a legal question, and individuals had to have recourse in those courts. He contrasted these common law principles with the French *droit administratif*, a system that invited inequality, bias, and abuse. Dicey found adherents in America, and they cited his principles in contesting the powers of administrators to make rules and decide cases.

Perhaps the most central character in the book, Charles Evans Hughes, found many of the norms associated with the rule of law appealing. However, as a lawyer, he practiced administrative law, and litigated cases against corrupt gas companies. As a Republican Governor of New York, he campaigned to create the Public Service Commission, which regulated public utilities and railroads. His real world experience with modern problems led him to doubt whether courts could manage those problems efficiently. Hughes would later become a Supreme Court Justice with a pivotal vote on the constitutionality of the New Deal. Ernst deftly draws from Chief Justice Hughes's opinions and other writings to show that the Justices were open to new regulatory solutions. Thus, Ernst's focus on

41. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 243 (J.P. Mayer & Max Lerner, eds., George Lawrence, trans., 1966) (1848).

42. ERNST, *supra* note 5, at 13.

43. *Id.* at 19.

44. *Id.* at 30.

Hughes allows him to add a new challenge to the interpretation that the Supreme Court was a political actor first in striking down parts of the New Deal and then upholding it after Roosevelt's reelection in 1936. Instead, they needed to offer opportunities for due process and individualized fairness.

Instead of digging in their heels, New Deal lawyers grasped the Supreme Court's problems, and responded by proposing significant procedural reforms. Ernst identifies three centers of progressive lawyers learning from Chief Justice Hughes and building the modern administrative procedural regime: first, Louis Brandeis's recruits Benjamin Cohen and Thomas Corcoran, working with Securities and Exchange Commission Chair James Landis; second, Leon Keyserling and the office of Senator Robert Wagner; and third, the Solicitor General's office in the Department of Justice. These legal teams crafted court-like procedural protections and borrowed from judicial due process principles to produce a revised-and-resubmitted New Deal that the Supreme Court upheld 5-to-4 in 1937.⁴⁵ Instead of a constitutional revolution, Ernst finds reconciliation and continuity over the Court's 1930s jurisprudence.⁴⁶ Chief Justice Hughes and the Supreme Court were "teaching the New Dealers the first principles of administrative law and procedure."⁴⁷

In perhaps Ernst's most fascinating chapter, Chapter four, entitled "New York, 1938," those lessons engaged the voting public in the 1938 Senate race between incumbent Democrat Robert Wagner (one of the Supreme Court's most important students in 1936-37) and Republican John Lord O'Brian. Conservatives had proposed a state "anti-bureaucracy clause" to strengthen judicial checks against state agencies. The tight campaign turned on how the lawyerly compromises had produced administrative procedures that protected due process and individual rights, with Wagner prevailing. Ernst's research produces one of the best examples of popular constitutionalism—and it is even more remarkable to find popular engagement with administrative law and technical procedure. Chapters five traces how those compromises became fixed in practice and in statutes. Roscoe Pound, a progressive-turned-skeptic, openly battled SEC commissioner Jerome Frank over the potential for executive abuse of power. Pound and the American Bar Association teamed up with Republicans and conservative Democrats to attack the New Deal with the Walter-Logan Bill.⁴⁸ Congress passed this bill, but President Roosevelt vetoed it in 1941. Both sides seemed to be digging in to continue a longer battle over the administrative state, but then Ernst observes that after Pearl Harbor, a real battle overshadowed administrative law, and the public became more accustomed to and accepting of executive power.⁴⁹

Joanna Grisinger picks right up where Ernst leaves off, with similarly impressive skill at bringing the politics of administrative law to life. In Chapter one, she begins with the 1930s and the opponents of the New Deal's procedures. Opponents focused their critique on the power of single officials to hear and decide a case in which they had their own investment and their own pro-bureaucracy bias. As the end of Ernst's account, the narrative is that conservatives had lost several rounds of their fight against the New Deal, and their next attack had stalled. As the beginning of Grisinger's account, those conservatives

45. ERNST, *supra* note 5, at 67-69

46. *Id.* at 66-67.

47. *Id.* at 68.

48. *Id.* at 85.

49. *Id.* at 137-38.

opened up new fronts, and they began a new strategy of reform with more success. One theme of the chapter, titled “The War at Home,” is how World War II opened up new expansions of executive power as well as new critiques of executive power.⁵⁰ She focuses on the creation of the Office of Price Administration in 1942 for the purpose of controlling inflation during wartime, and also discusses the powerful new War Production Board, War Labor Board, and the Office of Emergency Management.

However, Grisinger’s conclusions sometimes were at odds with her other observations. She declares, “Political hostility to bureaucracy only intensified during World War II, as the Roosevelt administration met wartime challenges with an immense administrative apparatus. As the federal government expanded its reach even further into the marketplace, many complained that the White House was dressing New Deal programs in wartime garb.”⁵¹ She cites conservatives complaining that Roosevelt was using the war to expand his pro-regulatory agenda,⁵² and grouping “New Dealism” with Communism, Nazism, and Fascism as the “four horsemen of autocracy.”⁵³ She also concludes that the “sustained critiques” of the OPA and the War Production Board “created the political energy needed for legal reform once the war emergency ended.”⁵⁴ But one also gets the impression from her story that on balance, World War II increased the momentum for the growing administrative state. She acknowledges, “The OPA’s anti-inflationary mission was remarkably popular with the American public and its role in war effort made it remarkably difficult to attack head on.”⁵⁵ Of course, the critics of the New Deal were going to find new critiques, but Grisinger is not persuasive that World War II “only” intensified opposition to the New Deal. In fact, it seems her book offers evidence of the opposite story, especially as the New Deal state survives the many reform efforts and electoral challenges in the post-war years.

Chapter two turns to Congress reforming the executive, with the vetoed Walter-Logan Act of 1941 evolving into the foundational Administrative Procedure Act (“APA”) of 1946.⁵⁶ The APA concretized the basic modern structure of rulemaking, adjudication, and prosecution as separate functions. These reforms focused on strengthening due process and individual rights protections. Grisinger offers a very astute observation that the APA was simply codifying what courts had already been doing or requiring of agencies.⁵⁷ Chapter three turns to Congress reforming itself, bolstering its role in overseeing the administrative state through the Legislative Reorganization Act,⁵⁸ passed the same year as the APA. The Republicans then retook Congress in the 1946 election, and then, as Chapter four traces, they pursued reforms by creating a new commission to be chaired by former President Herbert Hoover.

One theme in these chapters is how Republicans used the Cold War and anti-Communism against the administrative state. In addition to McCarthyist hunts for Communists

50. GRISINGER, *supra* note 6, at 14.

51. *Id.* at 15.

52. *Id.* at 41.

53. *Id.* at 18.

54. *Id.* at 17.

55. *Id.* at 15-16.

56. *See generally* 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 5372, 7521 (2012).

57. GRISINGER, *supra* note 6, at 81.

58. The Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (1946).

within the administration, they also attacked the “totalitarian methods” of administrative process.⁵⁹ The conservative Chicago Tribune even changed the spelling of “bureaucracy” to “burocracy,” which Grisinger attributes to journalistic efficiency, but which one might also observe as a switch from a French root to a Russian root (as in “politburo”).⁶⁰ Republicans had assumed that Republican presidential nominee Thomas Dewey would defeat Truman in 1948, and they had begun planning the “biggest, fanciest housecleaning in the history of the Federal Government” coordinated with the Hoover Commission’s conservatives.⁶¹ But Truman shocked them by winning, and instead of a significant reversal of the New Deal, the chastened commission moderated its efforts and proposed more incremental reforms in the name of efficiency and anti-waste. The Democrats embraced the commission’s critique, reclaimed Congress, and then continued the work of the commission to produce even more moderate reforms. The Democrats’ appropriation of the Republicans’ efficiency theme helped legitimate the New Deal. A shortcoming of Grisinger’s interpretation of the election of 1948 is that she portrays Dewey as an anti-New Deal conservative Republican, but he was actually more of a moderate who was famous for his vagueness. His campaign in 1948 was no frontal assault on the New Deal, and it might even be interpreted as a consolidation of the New Deal because Dewey did not run against it vocally or explicitly. Grisinger acknowledges that Eisenhower’s 1952 campaign accepted the New Deal, and his administration even expanded some New Deal programs like Social Security, unemployment insurance, and federal minimum wage.⁶² The modern administrative state gained its legitimacy partly due to the acquiescence of Republican campaigns and Republican administrations.

Nevertheless, Eisenhower revived the Hoover Commission with a renewed commitment to reform. But again, this effort stumbled and then was co-opted by the Democrats. With the lived experience of the 1940s and 1950s, a mix of elite lawyers, political leaders, and the public had grown accustomed to the New Deal state. Once Republicans had succeeded in softening the rough procedural problems, and strengthened the initially soft separation of powers, Americans accepted the new regime. There was no turning back substantively; there would only be tacking to the left or right procedurally. The Republican strategy of shifting from substance to procedure—and increasingly narrow procedural reform—simply legitimated the overall regime. Grisinger’s research is thorough, her writing is clear, and most importantly, it is nuanced and balanced. She is very perceptive of legal technical details and political intrigue. As a result, her book is the model of efficiency and effectiveness to which the Hoover Commission aspired.

IV. IS ADMINISTRATIVE LAW UNLAWFUL?

Philip Hamburger’s new book, *Is Administrative Law Unlawful?*, asks a bold question, or rather, reinvigorates an old, bold answer. He turns to centuries of common law history to argue that the modern administrative state is invalid. As a history of Anglo-American law and institutions, it is a tremendous resource, and it is well-organized along important themes. It is an important reframing of the seventeenth century, the English Civil

59. GRISINGER, *supra* note 6, at 145.

60. *Id.* at 159.

61. *Id.*

62. *Id.* at 198.

War, and English judges' reactions, with helpful conceptual legal categories to sort out the enormous amount of historical research. But, as a legal argument based on history, it falls short—or wide.

Others have written more detailed critiques of his legal/constitutional argument.⁶³ The most powerful critique is that Hamburger is never clear about how he defines “unlawful.” The book is not a mainstream constitutional argument based on the familiar textualist or originalist lines of argument. That legal brief has been written.⁶⁴ Hamburger's intensive examination of English legal and political history since the seventeenth century is impressive, but he does not show much evidence that it directly shaped the Framers' or public ratifiers' understanding of the Constitution in 1787, or of the First Congress's understanding in 1789, when it began filling out the executive branch. He does not seem particularly interested in that line of attack. Instead, Hamburger's argument is based more on an English unwritten constitution of precedent, procedure, and institutional incrementalism.⁶⁵ It is perhaps more consonant with the school of common law constitutionalism that developed robustly in the 1990s.⁶⁶ It is perhaps even fairer to describe Hamburger's definition of “lawful” as “historically legitimate,” and, in turn, to define historical legitimacy as a continuity of basic principles.

Unfortunately for Hamburger's argument, the common law approach is more strongly in favor of the modern administrative state, particularly in light of the work by Mashaw, Parrillo, Ernst, and Grisinger. Even if one sets aside the basic English common law notion of legislative supremacy, there are three basic problems. First, these four books show how Americans incorporated the basic principles of due process, individual rights, fairness, and separation of powers into American administrative law. While there are obvious discontinuities between the medieval English executive and the twenty-first century American executive, each of the four historians show how lawyers translated the core values of the Anglo-American tradition into administrative law and procedure over the past two centuries.

Second, if incrementalism is one of Hamburger's legal values, then all four histories are studies in incrementalism, a piecemeal approach from the Founding through the 1950s. Americans addressed specific problems on the state and federal level in the eighteenth and nineteenth centuries, learned from each laboratory of regulatory democracy, and adjusted accordingly. The New Deal was certainly a larger leap of innovation, but Mashaw, Parrillo, and Ernst show how rule-of-law values of consistency, reliability, fairness, and motive-based legitimacy shaped the basic structure of the New Deal for more than a century leading up to the Great Depression. One might see more problematic mission creep than consistency in this evolution, but it was an incremental evolution nonetheless. Even the opponents of the modern regulatory state would be wise to recognize the incrementalism of this history.

Third, judicial precedent is a core principle of Anglo-American common law. Once

63. Adrian Vermeule, *'No' Review of Philip Hamburger, Is Administrative Law Unlawful?*, (Harvard Pub. Law, Working Paper No. 14-34, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488724.

64. Gary Lawson, *The Rise and Rise of the Administrative State*, 10 HARV. L. REV. 1231 (1994).

65. HAMBURGER, *supra* note 7, at 12-13.

66. *See, e.g.*, David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

again, all four histories show how judges applied common law precedents to shape administrative law, and how legislators and executive officials took those precedents seriously, and then adjusted their administrative institutions and procedures accordingly. Mashaw states that he is more interested in the internal administrative law by executive officials, but he also shows how judges followed administrative practices, and adopted the procedures they found fair in light of Anglo-American legal principles. They cultivated due process in response to the nineteenth-century experiments, and built a foundation of precedent that shaped the twentieth century expansion. Parrillo is more focused on legislators' responses over time to the problem of incentives and legitimacy, but those perceptions were shaped by precedent. Even more explicitly, Ernst and Grisinger show how the courts were in dialogue with politicians and lawyers, and the precedents developed with continuity and coherence, rather than bare politics.

So, perhaps it is more helpful to reframe Hamburger's question. Given that American public opinion and elite opinion have accepted the modern administrative state as lawful, how did this consensus of lawfulness come about? Over the nineteenth century, the incremental, piecemeal approach was democratically acceptable. The federal government remained small, and by taking on specific necessities narrowly, officials limited their experiments and studied them for lessons. There was no looming prospect of a European bureaucratic state, i.e., Tocqueville's nightmare. Americans adjusted gradually to the growing state, and when the state overstepped its bounds in terms of overincentivized commissions and bounties, or in terms of abuses of power, legislators, judges and lawyers responded with reform.

But the story of legitimization in the twentieth century deserves even more attention. Ernst and Grisinger touch on this factor by acknowledging how Pearl Harbor and World War II reinforced the New Deal and executive power. Grisinger emphasized how critics of the New Deal cited World War II and the Cold War to scale back the administrative state. The spectre of fascism and communism added power to the Republican warnings about executive power. But on the other hand, Republicans and Democrats both united in support of strong executive power to maintain a strong military and a stable economy, as long as that executive power was checked and balanced. The threat of the Cold War forced both sides to recognize the arguments of the other side, to acknowledge the necessities of both regulation and liberty, and to hammer out efficient compromises. One lesson for today is that without a true existential threat to American security, the spirit of compromise has weakened, and mutual attacks on each party's legitimacy has in turn opened up new fronts in the battle over the modern administrative state's legitimacy.