

JERRY L. MASHAW

Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829-1861

ABSTRACT. Jacksonian America was a country in rapid transition. Intensified sectional divisions, exponential increases in urbanization and immigration, the rise of factory production, and repeated cycles of economic boom and bust helped to fuel an anxious desire for political reform. For Jacksonian Democrats the answer to this popular yearning was the reconstruction of American democracy—including a broadened electorate, offices open to all, and the elimination of monopoly and other special privileges. Government at the national level was to be kept small and returned to the people. But as is often the case, the institutionalization of democracy demanded a corresponding increase in governmental capacities. Destroying the power of the “Monster Bank” gave new powers and capacities to the Treasury for the management of monetary policy and fiscal transfers. Offices open to all through the new system of “rotation in office” created the need for bureaucratic systems of control that replaced status-based restraints and personal loyalties. And the side effects of technological development, in particular the human carnage that accompanied the rapid expansion of steamboat travel, generated public demand for protection that prompted the creation of a recognizably modern system of health and safety regulation. “The Democracy” established by the Jacksonians both furthered the building of an American administrative state and solidified an emerging nineteenth-century model of American administration law. In that model administrative accountability was preeminently a matter of (1) political oversight and direction and (2) internal hierarchical control. Judicial control of administration featured a cramped vision of mandamus review combined with almost unlimited personal liability of officials for erroneous action. Although administrative law structured in this fashion seems peculiar, indeed almost invisible, to the twenty-first-century legal imagination, it fit comfortably within Jacksonian democratic ideology.

AUTHOR. Sterling Professor of Law and Management, Yale University. My thanks to Josh Berman and Ethan Davis for splendid and cheerful research assistance, to colleagues far and wide who commented on earlier drafts, to Patricia Page for her usual excellent manuscript preparation, to the Yale Law School for financial support, to Theresa Cullen for marvelously efficient bibliographic assistance, and to Anne MacClintock for saving me from excessive use of the passive voice and for much else.



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Nobody knows what he will do when he does come. . . . My opinion is, that when he comes he will bring a breeze with him.

— Daniel Webster, 1829¹

INTRODUCTION

Daniel Webster's words, written on the eve of Andrew Jackson's inauguration, described not just a man or an administration, but an era. It was a breezy three decades of technological, territorial, social, economic, and, perhaps above all, political change.² Technologically, America went from the age of the sailing vessel, the stage coach, and the quill pen to the age of the steamboat,³ the railroad,⁴ and the telegraph.⁵ The technological revolutions in transportation and communications fueled economic growth and transformed the economy. Production of goods moved steadily from artisan or household fabrication toward industrial production organized on a factory model.⁶ Because manufacturing is capital intensive and relies heavily on the credit

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1. Letter from Daniel Webster to Ezekiel Webster (Jan. 17, 1829), in 17 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 467 (Fletcher Webster ed., 1903).
 2. And change is unsettling. Leonard White characterizes the Jacksonian era as "years of almost uninterrupted excitement, tension, crisis, and apprehension." LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861, at 18 (1954).
 3. Steamboats had begun to ply the waters of the United States in the early nineteenth century. By the time Jackson took office, they dominated river transportation in the United States and were the most important agencies of internal transportation in the country for the next two decades. Even toward the close of the Jacksonian period, steamship tonnage grew phenomenally—from 5631 registered tons in 1847 to 97,296 by 1860. 4 GEORGE ROGERS TAYLOR, THE ECONOMIC HISTORY OF THE UNITED STATES: THE TRANSPORTATION REVOLUTION 1815-1860, at 58, 116 (1951).
 4. The railroad had a similar and ultimately more profound impact. The Baltimore and Ohio Railroad Company laid the cornerstone for the first commercial railroad on July 4, 1828. From that standing start, railway trackage grew to cover 30,000 miles by 1860. ALBERT FISHLOW, AMERICAN RAILROADS AND THE TRANSFORMATION OF THE ANTE-BELLUM ECONOMY 3-8 (1965).
 5. Morse's telegraph had an even more rapid diffusion than the railroad. The first line from Washington to Baltimore was completed in 1844. By 1861, 50,000 miles of telegraph wires spanned the continent. In an astonishing display of entrepreneurial daring, a transatlantic cable was completed in 1858. That cable parted after a few weeks of operation, and the line was not relaid until after the Civil War. On the development of the telegraph system generally, see ROBERT LUTHER THOMPSON, WIRING A CONTINENT: THE HISTORY OF THE TELEGRAPH INDUSTRY IN THE UNITED STATES, 1832-1866 (1947). Daniel Howe argues that the communications revolution was the single most transformative cause of change. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 5-7 (2007).
 6. See TAYLOR, *supra* note 3, at 229-49.

system, industrialization tended to produce not only stronger economic growth, but also stronger swings in the economic pendulum of boom and bust.

Revolutions in technology and industrial organization changed peoples' lives and were experienced as revolutions in social⁷ and economic relations. Americans were wealthier, but economic life became both less secure and more depersonalized.⁸ Even more profoundly, factory production stripped workers of social status and of control over their own labor. Many Americans embraced these changes. But fear of corporate monopoly, soft-money speculation, and the debasement of the value of honest toil also fueled a groundswell of anxious popular sentiment.⁹

Urbanization further fanned the flames of popular anxiety. The factory system required that workers be brought together in large numbers. Population and economic growth occurred, therefore, at hubs where transportation and communications facilitated industrial and commercial activity.¹⁰ In the cities these newly urbanized and proletarianized Americans jostled together with wave after wave of foreign immigrants whose languages, customs, and religions reinforced native-born Americans' sense of a crumbling social order. Of thirty-one million Americans counted in the 1860 census,

7. For an excellent brief description of the social changes generated by the market revolution of the early to mid-nineteenth century, see HARRY L. WATSON, *ANDREW JACKSON VS. HENRY CLAY: DEMOCRACY AND DEVELOPMENT IN ANTEBELLUM AMERICA* 6-13 (1998). For a more extensive discussion reaching back into pre-Jacksonian roots of economic change, see CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846* (1991), which provides a substantial bibliographic essay on further sources at 429-47.
8. The rise of the corporation symbolized this shift from the personal to the impersonal and was understood primarily in ethical terms. A contemporary observer lamented, in words that seem almost timeless, "As directors of a company . . . men will sanction actions of which they would scorn to be guilty in their private capacity." ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 335 (1945) (quoting William M. Gouge).
9. For an extensive treatment, see TAYLOR, *supra* note 3, at 250-300, and sources cited therein. On the development of working class consciousness in New York, see SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850* (1984). At least one of America's largest antebellum employers, the ready-made clothing industry, managed to contract for home production by the seamstresses who made up the largest segment of its workforce. For a general history of the industry, see MICHAEL ZAKIM, *READY-MADE DEMOCRACY: A HISTORY OF MEN'S DRESS IN THE AMERICAN REPUBLIC, 1760-1860* (2003).
10. Within a few years of the building of the Erie Canal, for example, New York City became the leading population and commercial center of the nation. See Robert G. Albion, *New York Port and Its Disappointed Rivals, 1815-1860*, 3 J. ECON. & BUS. HIST. 602 (1931). Whereas only sixty-one towns or cities had 2500 or more inhabitants in 1820, there were 392 such places by 1860. See U.S. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 11 tbl. A43-56 (1975).

approximately one in eight was of foreign birth.¹¹ The United States began to see its first organized campaigns for workers' rights and restrictions on immigration.¹²

Economic and social change also exacerbated regional tensions. Manufacturing and urbanization were largely confined to the North and the East. And while northerners and southerners had viewed themselves as living in rather different societies almost from the time of the colonization of North America, the industrializing and urbanizing Northeast became ever more distant socially from the plantation South. While these territorial divisions would ultimately lead to war, social divisions between easterners and westerners were also pronounced. Andrew Jackson came to the presidency as a man of the West, embodying the agrarian, republican values of the more newly settled portions of the country. Easterners were, by contrast, more comfortable with an economy built on commerce and manufacturing and with politics centered around traditional elites.¹³ During the Jacksonian era, massive territorial expansion exacerbated these North-South¹⁴ and East-West divisions.

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11. Calculated from U.S. BUREAU OF THE CENSUS, *supra* note 10, at 14-15.
 12. See NORMA LOIS PETERSON, *THE PRESIDENCIES OF WILLIAM HENRY HARRISON AND JOHN TYLER* 2-3, 243-44 (1989). These changes, while apparently perceived as massive, should not mask the fact that America remained very much an agricultural economy. Nonfarm employment shifted from 28 percent of workers in 1820 to 41 percent in 1860, but that still left 60 percent of workers in the agricultural sector. See U.S. BUREAU OF THE CENSUS, *supra* note 10, at 134.
 13. FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY* 23-24 (1932).
 14. Both Whigs and Democrats struggled, unsuccessfully, to keep the slavery issue off the national agenda, sometimes at considerable cost. For example, knowing that the Whig platform would oppose annexation of Texas and that a proannexation position would inflame the slavery controversy, Martin Van Buren publicly stated his opposition to the annexation of Texas and thereby cost himself the Democratic nomination and almost certainly the presidency in the election of 1844. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 566-71, 613 (2005). The potential for sectional conflict could invade almost any issue. For example, when Abel Upshur was Secretary of the Navy, he proposed reforms that included increasing the number of naval ranks above captain to make naval ranks comparable to those in the Army. Because Upshur was a Virginian, and a sometimes southern apologist, his plans were resisted in Congress on the ground that he had secret plans to put the Navy under the command of officers from slave states. See PETERSON, *supra* note 12, at 152-54. Indeed, by the time of Buchanan's presidency, the slavery issue poisoned virtually every political discussion. See *generally* ELBERT P. SMITH, *THE PRESIDENCY OF JAMES BUCHANAN* (1975). Political conflicts were often articulated in the language of constitutional argument. See *generally* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861* (2005). On the way in which territorial expansion inflamed the slavery debate and contributed to the demise of the Whig

When Jackson arrived for his inauguration from Tennessee, the United States was only precariously settled on the western banks of the Mississippi and had no solid territorial claim to nearly one half of the lands lying between the Mississippi and the Pacific. By 1860, through war, annexation, purchase, and compromise with foreign powers, all of the territory that would ultimately comprise the forty-eight contiguous states was under United States dominion.

The rules and practices of politics were changing as well.¹⁵ By the time of Jackson's election, the states comprising the United States were shifting rapidly from restrictive, property-based voting regimes to eligibility rules that promoted universal white male suffrage.¹⁶ In most states this broadened electorate, rather than the state legislature, chose Electoral College delegates who were pledged to particular candidates.¹⁷ Candidate selection thus shifted from congressional caucuses to party conventions. These changes in voting rules and nominating practices transformed political participation. In 1824 roughly twenty-seven percent of the eligible population voted in the presidential election. In the period 1828-56, the percentage of the eligible population that voted in presidential elections averaged sixty-nine percent.¹⁸ Hence, from Jackson forward presidents could claim, with some justification, that they were the representatives of the people.¹⁹

Changes in voting rules, voter participation, and the democratic symbolism of the presidency demanded a reorganization of partisan political life. In order to elect a president, parties had to function both locally and nationally. Politics was no longer controlled by local notables, well-born, and well-to-do amateurs. It was becoming, if not a profession, at least a job. Much of politics

party, see ELBERT B. SMITH, *THE PRESIDENCIES OF ZACHARY TAYLOR AND MILLARD FILLMORE* 13-23, 91-194, 235-49 (1988).

15. The shifts in political ideology and political practice of the Jacksonian era are perhaps the most studied aspects of that period. Important general studies include: DONALD B. COLE, *MARTIN VAN BUREN AND THE AMERICAN POLITICAL SYSTEM* (1984); RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1969); RICHARD P. MCCORMICK, *THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA* (1966); ROBERT V. REMINI, *MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY* (1959); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945); and SEAN WILENTZ, *ANDREW JACKSON* (Arthur M. Schlesinger ed., 2005).
16. On the changes to state suffrage rules, see WILENTZ, *THE RISE OF AMERICAN DEMOCRACY*, *supra* note 14, at 181-217.
17. *Id.* at 308-09.
18. Calculated from U.S. BUREAU OF THE CENSUS, *supra* note 10, at 1072.
19. These shifting ideas of democracy and executive power are nicely developed in ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER* (1967).

remained local, but it could be mobilized nationally because it was supported by patronage distributed from Washington.²⁰

The massive changes that swept through Jacksonian America would seem to have set the stage for equally substantial changes in American governance. Political entrepreneurs usually mobilize to respond to what they perceive to be the underlying demands of the times. New issues emerge, old problems are redefined, and the political process generates new institutions to deal with both. And as government pushes out into new fields or deploys new techniques, governmental novelty generates anxieties about the control of governmental power and the accountability of governmental officials. If this pattern of governmental development is generally true,²¹ Jacksonian America should have been a boom time for activist government and for the growth of administration and administrative law.

Yet that is not the conventional story of Jacksonian democracy. According to that story, Jacksonian America was characterized not by the building of national capacities, but by the triumph of antigovernment, anti-state political ideology. “The Democracy” that Andrew Jackson symbolized was about power to the people, and to the states and localities, not power to the federal government.²²

From the perspective of electoral politics and partisan ideology, this conventional story is doubtless correct. In the late 1820s and early 1830s, a political realignment split the Jeffersonian Republican party into two warring factions.²³ The nationalist Clay-Adams wing became the National Republicans, which shortly morphed into the Whigs. The Whig party line embraced change. It emphasized a neo-Hamiltonian program of federally funded internal improvements, regulation and promotion of credit through a powerful national

20. CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE 173-85* (1905).

21. As I have argued elsewhere. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 *YALE L.J.* 1256, 1337-38 (2006).

22. Standard accounts of the Jacksonian era include ROBERT V. REMINI, *THE LEGACY OF ANDREW JACKSON: DEMOCRACY, INDIAN REMOVAL AND SLAVERY* (1988); SCHLESINGER, *supra* note 15; and WILENTZ, *supra* note 15. The Jacksonian commitments to popular democracy, small government and state and local authority are often viewed as a continuation of a Jeffersonian legacy that stretched from the end of the Federalist period until the New Deal. See, e.g., RICHARD HAFSTADTER, *THE AGE OF REFORM 303-05* (1955); MORTON KELLER, *AMERICA'S THREE REGIMES 67-200* (2007). Antebellum America is frequently characterized in Stephen Skowronek's terms as a state of courts and parties. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982).

23. HOFSTADTER, *supra* note 15, at 227-31.

bank, and protective tariffs to aid the growth of American manufacturing.²⁴ The “Old Republican” wing of the Jeffersonian Republicans became the Jacksonian Democrats, or sometimes just “The Democracy.” The Democratic party line was deeply conservative, even reactionary. It appealed to the anxious majority of Americans troubled by developments that the Whigs viewed as “progress.”²⁵ Ideologically, Jacksonian Democrats insisted on strict construction of the Constitution, a small and frugal federal government, and states’ rights.²⁶

Electoral,ly, the Democrats triumphed.²⁷ And, as a result, “The Democracy’s” political preferences also triumphed.²⁸ Thomas Jefferson had

24. WHITE, *supra* note 2, at 7.

25. *Id.* at 6.

26. Major L. Wilson argues that the Jacksonians saw American national identity in the commitment to individual freedom and states’ rights established at the founding. They envisioned progress as the spread of this freedom across the continent. National growth and the nation’s destiny were conceived in spatial terms. The Whigs, by contrast, saw freedom as an evolving set of capacities that was tied to the development of the nation through time. They wanted to speed that development by public works, protective tariffs, and the liquidity and monetary stability provided by the Bank of the United States. See MAJOR L. WILSON, SPACE, TIME, AND FREEDOM: THE QUEST FOR NATIONALITY AND THE IRREPRESSIBLE CONFLICT, 1815-1861, at 11-12, 94-119 (1974). On the intimate relationship between Jacksonian ideas of democracy and federalism see generally GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS (2002), which details the transition from “anti-party” constitutional thought to the idea of party as the bulwark of popular sovereignty.

27. Between 1828 and 1860, the Whigs won only two presidential elections, and, in fact, controlled the presidency for only four years. One victorious Whig, William Henry Harrison, died a month into his first term, yielding the presidency to John Tyler, a Jeffersonian Republican in recently acquired Whig clothing. And while the Whigs had some greater success in maintaining control of one or both houses of Congress, their majorities were seldom sufficient to override presidential vetoes. Indeed, the Whigs controlled both houses only in the 27th Congress during William Henry Harrison’s brief tenure and the first two years of Tyler’s presidency. WATSON, *supra* note 7, at 1-118, provides an excellent brief history of the Democrat-Whig conflicts as exemplified by the competition between Andrew Jackson and his democratic successors in the presidency and Henry Clay as the long-time Whig leader in Congress.

28. The so-called “Tariff of Abominations,” passed in the John Quincy Adams administration, was gradually dismantled. See Act of Mar. 2, 1833, ch. 55, 4 Stat. 629. The controversy over the protective tariff was, of course, much more than a mere policy dispute. It motivated South Carolina’s attempt to nullify federal law through state interpretation of the Constitution. That attempt provoked a constitutional crisis of major proportions that resulted in an ambiguous constitutional settlement. For details of the nullification crisis concerning the tariff, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 72-112 (1999). Jackson vetoed the recharter of the Bank of the United States, and the Bank’s defenders could not muster the

hoped that the government could operate so invisibly that citizens would hardly notice it.²⁹ Alexis de Tocqueville, visiting America at the beginning of the Jacksonian era, explained the strength of Americans' attachment to the Union in terms of a federal system that left citizens free to pursue their local interests through local politics. In his words, "The Union is a great republic in extent, but the paucity of objects for which its Government provides assimilates it to a small State."³⁰

Given their small government ideology and electoral successes, the Jacksonians might be expected, at most, to have left a weak national government much as they found it. To be sure, the federal government grew in the age of Jackson. While population doubled from 1830 to 1860, federal expenditures more than quadrupled.³¹ And federal government civilian employment also grew faster than population.³² But, as Leonard White again tells us, these increases in the size of the national government were not fueled by the government's taking on new functions.³³ He echoes the conventional view that the expansion of governmental functions in the period 1829 to 1861

votes for an override. The Bank ("The Monster Bank" to the Jacksonians) lost its power over monetary policy and retreated to state incorporation in Pennsylvania. For a synoptic treatment of the bank controversy, see WILENTZ, *supra* note 15, at 74-88. For a more extensive treatment of the banking controversy and its legislative politics, see JOHN M. McFAUL, *THE POLITICS OF JACKSONIAN FINANCE* (1972). Direct funding of internal improvements by the national government virtually disappeared, save for the federal government's historic responsibility for navigational aids and the short-lived subterfuge of redistributing excess federal funds to the states on the basis of population. On the other hand, the federal government made extensive grants of public lands to promote the construction of both roads and railroads. The constitutional and political controversies over internal improvements in the Jacksonian era are ably chronicled in DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829-1861*, at 9-34 (2005).

29. For a description of Jefferson's hopes for both the substance and style of government at the beginning of his first term, see JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 1793-1800* (1996); and Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *reprinted in* 1 JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 323 (1911).
30. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 108 (Henry Steele Commager ed., Henry Reeve trans., Oxford Univ. Press 1946). Indeed, as the extent of the country grew, de Tocqueville famously believed that "the continuance of the Federal Government can only be a fortunate accident." *Id.* at 268.
31. See U.S. BUREAU OF THE CENSUS, *supra* note 10, at 8 ser.A 6-8, 1104 ser.Y 335-38.
32. There were 0.86 federal civilian employees per thousand Americans in 1831. By 1861 the ratio had risen to 1.1 per thousand. Calculated from *id.* at 8 ser.A 6-8, 1103 ser.Y 308-17.
33. See WHITE, *supra* note 2, at 9. Throughout the period, for example, the Post Office accounted for the vast majority of federal civilian employees. See U.S. BUREAU OF THE CENSUS, *supra* note 10, at 1103 ser.Y 308-17.

affected primarily state and local government, not the federal establishment.³⁴ Such changes as there were in the administrative system during the Jacksonian era White ascribes to “changes in magnitude, in complexity, and in the influence of external forces, principally the political party.”³⁵

If these descriptions are accurate, there should be little in the Jacksonian era to hold our attention. If one is interested in how law evolves as it both builds and binds administration, a government that systematically avoids innovation is not likely to be very revealing. Yet, however persuasive this conventional story, it obscures some crucial developments in an era that is notoriously difficult to characterize.³⁶

First, changes in the scale of government can have effects that yield qualitative changes in government organization and practice. As size increases, reliance on bureaucratic or administrative systems of control almost necessarily displaces accountability structured through personal responsibility and loyalty.³⁷ Indeed, when substantial increases in the scale of administrative activities were combined with Jackson’s political program to democratize

34. See WHITE, *supra* note 2, at 9-10.

35. *Id.* at 7.

36. One nineteenth-century historian could do no better than to label it the “middle period” of American history. JOHN W. BURGESS, *THE MIDDLE PERIOD, 1817-1858* (New York, Charles Scribner’s Sons 1897). For a good brief description of the difficulties in capturing the meaning of “Jacksonian democracy,” see MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* 17-22 (1975).

37. The increases in the business and the size of preexisting national administrative organizations during the Jacksonian Era were both substantial and rapid. For example, a General Land Office that sold 2623 acres of public land in 1829 sold 20,074,871 in 1836. MALCOLM J. ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789-1837*, at 210, 234 (1968). The panic of 1837 burst the land office bubble, but even in that year sales were over five million acres, 2000 percent of those in 1829. *Id.* at 234. The number of local land offices grew from thirty-six in 1831 to sixty-two at the time of the economic panic of 1837. *Id.* at 250. And disposing of the public domain was a daunting administrative task even before the demand for public land reached the frenzied proportions of the 1830s. For a discussion of this process in the pre-Jacksonian period, see Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 *YALE L.J.* 1636, 1696-1723 (2007). For details of land claims adjudication in the Jacksonian period and beyond, see PAUL W. GATES, *PUBLIC LAND LAW REVIEW COMM’N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 87-119 (1968). By 1836, scale and complexity had forced a reluctant Congress both to increase funding and to authorize a functional reorganization of the Land Office business. A bucolic system presuming that the President would personally sign every land patent gave way to functionally differentiated, bureaucratic administration. For an extended discussion, see ROHRBOUGH, *supra*, at 280-94. The Post Office also grew exponentially, and it too was reorganized along functional lines. These developments are detailed in WHITE, *supra* note 2, at 279-83; and CRENSON, *supra* note 36, at 104-11.

administration through rotation in office, the bureaucratization of administration was almost assured. Experienced officials can operate on custom and institutional memory; constant turnover in personnel demands rules and routines. The Jacksonian period thus ultimately produced another revolution, one that changed both the understanding of the idea of “office” and ideas about how official fidelity to public duty should be controlled.³⁸ Democracy begat bureaucracy.³⁹

Second, although the Jacksonian Democrats opposed the Whig program of federal initiatives to stimulate economic development, their ideology was not the ideology of laissez-faire. Following Marvin Meyers,⁴⁰ Matthew Crenson argues persuasively that Jacksonian Democratic belief involved first and foremost a belief in republican virtue. Government had a high purpose: to

38. See *infra* Part II.

39. The scale of government business also explains the establishment of America’s first continuous Article I court, the Court of Claims. But here, unlike the changes in the Land and Post Offices, administrative developments were glacial. The demand for reform met stiff resistance based on long-established practices that had constitutional underpinnings. Congress’s Committee on Claims, established in 1794, had, by 1831, metastasized into five specialized claims committees to handle differing species of claims. See WHITE, *supra* note 2, at 158. Even so, the volume of claims was oppressive, and representatives chafed under the burden. John Quincy Adams complained that one-half the time of Congress was devoted to claims matters to the detriment of the other, more important, issues, and that Congress’s decisions on claims revealed “no common rule of justice.” 8 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 480 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1876). Indeed, a Senate Committee had recommended transferring this business to an administrative tribunal as early as 1828. See S. DOC. NO. 20-22, at 5 (1st Sess. 1828). But that move was stoutly resisted by those who believed that payments on claims were a core aspect of Congress’s constitutional control over appropriations. See CURRIE, *supra* note 28, at 196-97.

Twenty-seven additional years of backlogs, complaints, and recommendations finally produced an act establishing a Court of Claims. See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. But constitutional concerns still yielded a compromise body whose decisions were only recommendations to the Congress. See CURRIE, *supra* note 28, at 194-203. Some argued that because claims decisions entailed an appropriation, only Congress could make them. Others claimed that precisely because the decisions could not be made final, they could not be made by Article III courts. Hence the decision to create a nonfinal, administrative decision maker. But that system failed because Congress could not resist redetermining every case. In 1863, in the midst of Civil War, necessity finally overcame constitutional scruples and America established its first Article I court. See Act of Mar. 3, 1863, ch. 92, 12 Stat. 765. On the slow progress from legislative to judicial settlement of claims against the United States, see Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985). In short, scale can produce administrative innovation, even constitutional anomaly, in the face of a dominant and recalcitrant political ideology.

40. See MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF (1957).

make men good. But republicanism for the Jacksonians was not the classical republican ideal of the pursuit of virtue through civic engagement. It featured instead a commitment to governmental action that would tend to assure that virtue, understood as honesty and hard work, would be rewarded.⁴¹

To be sure, this commitment yielded mostly a negative program: avoidance of monopoly (hence the antipathy to the "Monster Bank" and to corporate charters generally); suppression of economic activity that was viewed as mere speculation (hence the Jacksonian aversion to all banks and the embrace of a "hard money" policy); and limitations on government actions, such as the funding of internal improvements, that were thought to lead to "systematic corruption."⁴² Yet the notion that government should make men good sometimes demanded that government grow. The refusal to recharter the Bank of the United States required that its functions be taken back into the government itself. As John M. McFaul put it in his study of Jacksonian financial policy, "This study . . . documents a curious but . . . familiar pattern of events in American political history: . . . Jacksonians with their anti-state, anti-government bias ended up strengthening both state and government."⁴³

Indeed, the Jacksonian period witnessed energetic exercises of national governmental authority to relocate Indian tribes,⁴⁴ enforce federal tariffs,⁴⁵ and press the boundaries of the United States to the Rio Grande and the Pacific.⁴⁶ At least where the War Department was the administrative instrument, whether to relocate Native Americans, enforce customs duties, or annex territory, Jacksonians were not bashful about projecting national power.

Of greater interest from the perspective of this article, the Jacksonian period also spawned regulatory innovation and the creation of entirely new administrative institutions. One tentative step was the Patent Reform Act of

41. CRENSON, *supra* note 36, at 22-30.

42. On the idea of systematic corruption in early American politics, see John Joseph Wallis, *The Concept of Systematic Corruption in American History*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY* 23 (Edward L. Glaeser & Claudia Goldin eds., 2006).

43. McFAUL, *supra* note 28, at 14. McFaul's conclusion concerning the "Bank War" anticipates in microcosm the theory of the growth of American government as a whole articulated by JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* (Yale Univ. Press 1998) (1990).

44. For a detailed analysis, see RONALD N. SATZ, *AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA* (2002).

45. The constitutional controversy over the protective tariff is chronicled in WHITTINGTON, *supra* note 28, at 93-106.

46. On the political fallout of the war with Mexico, see WILENTZ, *supra* note 14, at 581-86, 594-614. For a more in-depth treatment, see JOHN S.D. EISENHOWER, *SO FAR FROM GOD: THE U.S. WAR WITH MEXICO 1846-1848* (1989).

1836.⁴⁷ Since 1793 the United States had operated a pure registration system for patents. Any inventor presenting a formally complete application for a patent was entitled to receive one with no exercise of judgment about whether the invention was really new or was sufficiently useful or important to warrant a patent.⁴⁸ The 1836 statute created the new office of Commissioner of Patents, which was charged with examining alleged new inventions or discoveries and issuing a patent only if he found that they were in fact new and “sufficiently useful and important” to warrant patentability.⁴⁹ While this reform to some degree removed the patentability question from the common law courts and placed it in an adjudicatory administrative agency,⁵⁰ it was a partial measure. The Commissioner of Patents was given no rulemaking authority, and administrative precedents were surely difficult to develop when administrative appeals went to special boards appointed for each individual dispute. Moreover, these ad hoc boards’ decisions were subject to further review by federal circuit courts in a de novo proceeding in the form of a bill in equity.⁵¹ Under this system, the Patent Office took some of the load off of the courts, but the development of the law of patentability remained largely in judicial hands, as it is today.⁵²

47. See Patent Act of 1836, ch. 357, 5 Stat. 117.

48. Although the Patent Act of 1793, ch. 11, 1 Stat. 318, did not expressly require that the Secretary of State issue letters of patent to all comers, it omitted earlier language in the first patent statute that gave the Patent Board the discretion to issue a patent “if they shall deem the invention or discovery sufficiently useful and important,” Act of Apr. 10, 1790, ch. 7, 1 Stat. 109, 110. Both the courts and the Executive Branch subsequently treated the Secretary as having no discretion. See *Grant v. Raymond*, 31 U.S. 218, 241 (1832); 2 Op. Att’y Gen. 454 (1831).

49. Patent Act of 1836, ch. 357, § 7, 5 Stat. 117, 119-20 (1836).

50. Applicants disappointed by the Commissioner’s determination were given an administrative appeal to a three-person board appointed by the Secretary of State for that purpose. Based on the reasons provided by the Commissioner of Patents and a presentation of interested parties of “such facts and evidence as they may deem necessary to a just decision,” the Board was authorized to reverse the decision of the Commissioner either in whole or in part. *Id.*

51. See *id.* § 16.

52. For a general discussion of the 1836 Act and its effects, see John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1125-40 (2000). The statutes governing the issuance of patents were amended again in 1839, 1849, and 1861. Act of Mar. 2, 1861, ch. 88, § 16, 12 Stat. 246, 249; Act of Mar. 3, 1849, ch. 108, § 2, 9 Stat. 395, 395; Act of Mar. 3, 1839, ch. 88, § 7, 5 Stat. 353, 354 (1839). In the last amending statute, determinations of patentability were put on a more “scientific” basis by creating an Office of Examiners-in-Chief that was to be composed of persons having competent legal knowledge and scientific ability. Act of Mar. 2, 1861, ch. 88, § 2, 12 Stat. 246. For a description of the post-1836 amendments, see *Butterworth v. United States*, 112 U.S. 50, 65-66 (1884).

The rise of steamboat travel had more transformative effects. The human carnage that resulted from collisions, fires, and bursting boilers fueled popular demand for governmental action and propelled a reluctant Congress into authorizing a much bolder regulatory innovation—the national government’s first major health and safety regulatory program. Moreover, as will be discussed in much greater detail below, that program pioneered (1) “scientific regulation”; (2) the “board” or “commission” form of administrative organization that would loom so large in Progressive and New Deal regulatory legislation; and (3) the use of administrative rulemaking as a principal technique for articulating regulatory standards.⁵³

Old issues of governmental organization were also reopened and given new forms. For example, in addition to the establishment of the Court of Claims, similar, prolonged campaigns to establish a “Home Department”⁵⁴ and to augment the status and authority of the Attorney General⁵⁵ bore fruit during the Jacksonian era. And the democratic mandate claimed by a popular—that is,

53. See *infra* Part III.

54. Act of Mar. 3, 1849, ch. 108, 9 Stat. 395 (codified at 43 U.S.C. § 1451 (2000)), for a description of the opposition to this move on the grounds that to establish a Department of the Interior was the first step toward displacing the whole of the domestic authority of the states, see WHITE, *supra* note 2, at 507-08.

55. The tortuous history of reform of the Office of the Attorney General from 1789 to 1861 is economically recounted in LLOYD MILTON SHORT, *THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 184-95* (1923). One should not overstate the gains made during the Jacksonian era in the Attorney General’s authority to direct the activities of District Attorneys and Marshals. President Jackson called for the consolidation of authority over the U.S. Marshals and U.S. Attorneys in the Attorney General. See 2 RICHARDSON, *supra* note 29, at 1016-17. Congress responded not by giving the Attorney General more authority, but by reorganizing the Treasury Department to provide for a Solicitor of the Treasury who was to have authority over U.S. Attorneys and Marshals with respect to the collection of debts owed to the United States and who was to be advised by the Attorney General. See Act of May 29, 1830, ch. 153, 4 Stat. 414, 414-16. A similar authority of direction was given to the Auditor of the Post Office Department. See Act of July 2, 1836, ch. 270, § 16, 5 Stat. 80, 83. Indeed, prior to 1870, Congress was as likely to give the Attorney General additional responsibilities as to give him additional authority. See, e.g., Act of Aug. 31, 1852, ch. 108, § 12, 10 Stat. 76, 99. And the 1861 statute that purported to give the Attorney General direct authority over all U.S. Attorneys and Marshals, Act of Aug. 2, 1861, ch. 37, 12 Stat. 285, failed to clarify matters completely. The statute did not repeal the previous authority granted to the Solicitor of the Treasury and the Auditor of the Post Office, and U.S. Attorneys and Marshals remained lodged in the Department of the Interior. Moreover, other departments of the government continued to request and be given their own law offices. See HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 219-21* (1937). Supervising authority was not unified in the Attorney General until the establishment of the Department of Justice in 1870. See Act of June 22, 1870, ch. 150, § 16, 16 Stat. 162, 164 (1870).

popularly elected—President rekindled the struggle between the President and Congress over political control of appointments and removals. It also energized congressional oversight, investigation, and reorganization of administrative departments.⁵⁶ Finally, resolution of conflicts concerning the supervisory powers of upper level officials and their powers of direction became ever more critical to the maintenance of administrative consistency and the rule of law.⁵⁷

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56. Substantial reorganization of administrative affairs took place during just Jackson's two terms in the White House. Both the Land Office and the Post Office were significantly reorganized late in his presidency. See Act of July 4, 1836, ch. 352, 5 Stat. 107 (Land Office); Act of July 2, 1836, ch. 270, 5 Stat. 80 (Post Office). Other specialized offices were also created. Pension adjudication was transferred from the Treasury Department to the War Department, see Resolution of June 28, 1832, ch. 46, 4 Stat. 605; and a Commissioner of Pensions was provided to exercise the authority transferred, see Act of Mar. 3, 1835, ch. 4, 4 Stat. 779. Additional specialized offices were created from time to time, for example, a Commissioner of Indian Affairs. See Act of July 9, 1832, ch. 174, 4 Stat. 564. For a general discussion of the relations between Congress and executive agencies in the Jacksonian era, see WHITE, *supra* note 2, at 143-62.
57. Some appreciation of the importance of these matters of internal control can be gleaned from the extended essay submitted by Attorney General Caleb Cushing to President Pierce in 1854. See Office and Duties of Attorney General, 6 Op. Att'y Gen. 326 (1854), reprinted in H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 78-95 (1999). Although Cushing's opinion was designed to reinforce the need for reform in the control of the Attorney General over subordinate law officers, the opinion ranged across all departments and emphasized over and over again the necessity for hierarchical control running from the President to the lowliest official of the government. Some of Cushing's language is worthy of extended quotation, if for no other reason than its reference to something called "administrative law."

Now, from the fact that the executive agents, primary and secondary, are assigned by law to particular duties, it has been somewhat hastily inferred, that while it is indubitably true that he [the President] may direct the heads of departments, yet he has no authority over the chiefs of bureaus, and especially those in the department of Treasury. It needed only to carry this course of thought one step further, to say that the heads of departments themselves had no authority over those officers. This step was taken, and the doctrine it involves was, for a time, asserted. If maintained, it would have been the singular condition of a great government, in which the executive power was vested by Constitution in the President, and he had authority over the primary executive officers, but neither he nor they had any authority over the secondary executive officers, and, of course, it would be in the power of the latter to arrest, at any time, all the action of the Government.

Such a doctrine was against common sense, which assumes that the superior shall overrule the subordinate, not the latter of the former. It was contrary to the settled constitutional theory. That theory, as we shall hereafter see, while it supposes, in all matters not purely ministerial, that executive discretion exists, and that judgment is continually to be exercised, yet requires unity of executive action, and, of course, unity of executive decision; which, by the inexorable necessity of

Growth and development of administrative capacities despite the dominance of small government ideology are hardly unique to Jacksonian America. The constitutional politics of the whole of the antebellum period tends to obscure the relatively continuous growth and organizational development of national administrative capacity in the first century of the American Republic.⁵⁸ This is not, of course, to claim that developments followed a simple, linear trend line or to deny the transformative effects of the Civil War. If war is the great state builder, a civil war that successfully subdues sectional rebellion is the great consolidator of national power.⁵⁹ It would take some years after peace was restored to work itself out, but a regime change would occur. A new constitutional understanding would emerge in the postbellum world, one more sympathetic to the recognition of the uses of national power and less hostile to both the building and recognition of national administrative capacities.⁵⁹

In short, the conventional story of the postbellum emergence of national authority and a bureaucratized administrative state is hardly a historiographical conceit. But, like the Republican period of 1800 to 1829, in the "middle-period" from Jackson to Lincoln, ideological commitments and constitutional politics provide only a partial picture of how American government actually operated. Alongside the democratization of American governance, administration and administrative law were evolving in the Jacksonian era in response to a changing national reality. "The Democracy" laid waste the remains of the Federalist political system of rule by social and economic elites that Jefferson's "revolution" had not dismembered. But the institutionalization of democratic

the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will; and the doctrine is contradicted by a series of expositions of the rule of administrative law by successive Attorneys General.

Id. at 87-88.

58. These developments are described and analyzed in Mashaw, *supra* note 21; Mashaw, *supra* note 37; and authorities therein cited.
59. For a brief summary of the arenas in which the Civil War mobilized the postwar exercise of national power, see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 22-24 (1988). A more extensive treatment of postwar growth of government, and resistance to that growth, can be found in MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 1-196* (1977).
60. For an excellent discussion, see WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* (1982). See also RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877* (1990) (arguing that it was only after the Civil War and the collapse of Reconstruction that the administration of central government affairs became sufficiently separated from political party control that national state building really began).

reform also promoted the building of state capacities, the bureaucratization of offices, and regulatory innovation. At the same time, the recognition of the democratic authority of the executive branch sharply restricted the development of modern forms of judicial review of administrative action. The result was a distinctive structure of administrative legal authority and control of administrative action that contrasts starkly with our twenty-first-century understanding of administrative law.

All of the developments that characterize that evolutionary process cannot be explored here in any detail. This article will concentrate on three major topics: (1) the development of monetary policy and the internalization of government regulation of the money supply; (2) rotation in office and the shifts in ideas, organization, and technique that redefined the public service in the Jacksonian era; and (3) the regulatory system for steamboat transportation. These three case studies illustrate the major themes of administrative development in the Jacksonian Era. And in each case, although in slightly different ways, administrative innovation emerges out of democratic commitments.

The first, the de-chartering of the Bank and the internalization of monetary policy, is a harbinger of many Progressive Era regulatory reforms. Here, as in that later period, reform was motivated by loss of faith in private institutions and popular revulsion against the corruption of politics by the power of private monopoly. To control private power, democratic reformers were required to build state capacity. The second, rotation in office, is essentially a bureaucratization story. Democratization of offices yielded the bitter fruits of incapacity and corruption. Those disagreeable effects generated countermovements of reorganization and reform that began to build a functionally differentiated and hierarchically controlled civil service. Finally, popular demand for the regulation of steamboat travel not only thrust the federal government for the first time into domestic health and safety regulation, but it also introduced the quite modern theme of harnessing regulatory authority to both practical experience and scientific learning. Here, democratic demands for action generated a response that featured democracy's twentieth-century rival, administrative expertise.

These developments reveal different aspects of the development of national administration in response to the democratization of politics. Indeed, from the standpoint of institutional design or public administration, they are unified by little more than a common thread of institutional experimentation. The Jacksonians had theories of politics, but no theories of administration. Their reforms and initiatives were driven by both political commitments and emerging public demands, but neither motivation implied much, if anything, about administrative structure or technique.

Yet, however eclectic (and reluctant) the Jacksonian approach to building national administrative capacities, the emergence of those capacities would seem to suggest that corresponding attention be given to administrative accountability and control. Here, administrative law did play its conventional roles: mediating the struggle between presidents and Congresses for the control of administrative implementation; structuring the internal mechanisms of accountability within bureaus and within the executive branch as a whole; and providing opportunities for external accountability to law through judicial review of administrative action.

The development of administrative accountability in the Jacksonian era is not, however, necessarily a success story. This was an era whose administrative practices often challenge our contemporary understandings. We tend to assume that internal administrative structures, rules, and processes should be designed to assure the rule of law, not allegiance to persons, parties, or ideologies. Rotation in office and party control of administrative appointments and removals in Jacksonian America hardly facilitated fidelity to impersonal norms of effectiveness and legality. It was also an era in which interbranch struggles for political control of administration, and the inherited common law techniques of judicial review, revealed the weakness of administrative law, both as a set of consensus norms for the mediation of interbranch conflict and as an external check on administrative legality.

But this account anticipates and oversimplifies a complicated story. Parts I through III of this article will analyze the administrative structures and practices that grew up around the internalization of monetary policy in the sub-Treasury system, the system of rotation in office, and steamboat regulation. These parts provide, in some detail, a portrait of the body of administrative law that administrators of the Jacksonian period constructed from the often-divergent imperatives of congressional legislation, partisan political struggle, and administrative necessity. Part IV examines political and legal accountability in the Jacksonian era in order to illuminate some aspects of political control not touched on in the preceding case studies and to give content to the mid-nineteenth-century understanding of the role of courts in overseeing administration. A concluding Section summarizes the contributions of Jacksonian Democracy to public administration and administrative law.

I. THE BANK WAR AND SUB-TREASURY SYSTEM

The so-called "Bank War," generated by President Andrew Jackson's determination to curb the power of the Second Bank of the United States, has been studied from multiple perspectives. Economic historians explore the effects of Jackson's victory—the removal of the Bank from its position as the

chief fiscal and monetary agent of the national government—on the boom and bust economic cycles of the mid-nineteenth century. Political historians see the Bank War through the lens of the partisan ideological competition of the Jacksonian era, and mine the conflict for what it reveals about political beliefs and commitments, particularly those of Jacksonian Democrats. Students of constitutional and administrative history take particular interest in the perennial separation-of-powers issues evident in the struggles between the President and Congress in Jackson's second term. Those issues include: the appropriate use of the presidential veto, the power of the President to direct the actions of executive officers, and the power and responsibility of the President to make constitutional judgments independently of the judiciary.

Each of these perspectives has much to teach us about governance in the Jacksonian era. This article's focus, however, is on the less-studied question of what the Bank War and its aftermath reveal about the administrative techniques and structures deployed in implementing monetary policy in the mid-nineteenth century. The demise of the Second Bank of the United States ushered in first the so-called pet bank system—the practice of placing government deposits in politically favored state banks. That system was then superseded by the “sub-Treasury” or “independent Treasury” system, which lasted until the creation of the Federal Reserve System in the twentieth century. The administrative organization of fiscal agency for the federal government and the control of monetary policy thus passed through three distinct stages in the Jacksonian period. The statute that chartered the Second Bank of the United States delegated fiscal agency and monetary policy to a private institution that was expected to be guided by standard, conservative banking practices. The pet bank system shifted control of monetary policy strongly in the direction of the political branches, a form of regulatory control that was unlikely to produce sound monetary policies. The unhappy experience with pet banks thus gave way to the sub-Treasury device—a system in which the government, through the Treasury, provided its own depository and exchange services and had effective control over its funds. This last approach substituted a public bureaucracy for many of the standard safekeeping and exchange functions we normally associate with the private banking system.

Yet, while the focus in these pages will be on administrative organization of monetary policy, the changes that occurred during the Jacksonian period cannot be understood without some description of the economic, political, and constitutional dimensions of the Bank War and the events that followed the expiration of the charter of the Second Bank of the United States. Moreover, the constitutional dimensions of the Bank War include important and continuously contested issues at the intersection of constitutional and administrative law—the President's authority to direct subordinate officers,

Congress's power to limit that authority, and the coordinate powers and responsibilities of the courts, Congress, and the executive branch to interpret the Constitution.

A. Economics, Politics, and the Constitution

1. Economics

The standard or conventional economic analysis of Jacksonian monetary policy is relatively straightforward.⁶¹ In the beginning there was the First Bank of the United States. The Jeffersonian Republicans opposed the Bank on political and constitutional grounds and allowed its charter to expire. Chastened by the severe economic dislocations that followed, the Jeffersonians chartered a Second Bank of the United States, which provided the Republic with a sound currency and the government with an effective fiscal agent. The political struggle between Andrew Jackson, as President of the United States, and Nicholas Biddle, as President of the Second Bank of the United States, ended in the destruction of the Second Bank's central banking role when Jackson vetoed its recharter in 1832 and ordered the withdrawal of all government funds on deposit with it.

Government funds were then deposited in selected state banks, which used the federal deposits as reserves to issue a blizzard of paper notes. State bank paper fueled a frenzied speculative bubble, particularly in the acquisition of public lands. The bubble was almost self-perpetuating. The receivers of the federal land offices redeposited these state bank notes in the state banks, where they were treated as additional deposits upon which to issue yet more paper.

Seeing that the speculative boom was spiraling out of control, the federal government made the situation worse. First, Jackson instructed the Secretary of the Treasury to issue the so-called "specie circular," which required that, after August 15, 1836, all payments for public lands be made in gold or silver. Then Congress passed legislation that required the distribution of the federal surplus to the states in proportion to their populations. The specie circular had the effect of moving gold and silver to state banks in the South and West, where land sales were substantial, and away from eastern centers of commerce. The proportionate depositing of the federal surplus with state treasuries made it impossible for the federal Treasury to correct these imbalances by moving

61. The classic exposition of the conventional story is BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (1957), which owes a significant debt to the earlier study, RALPH C.H. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* (1902).

excess deposits from the West to the East, where they were needed to ensure liquidity.

The consequence of all these actions was a sharp contraction of credit and a bursting of the bubble. Banks called in their loans, debtors defaulted, and the banking system floundered. After a brief recovery in 1838, the economy plunged into a severe depression that lasted until at least 1843. In this conventional story, banking politics triumphed over sound economics and the country paid the price. Some version of this narrative appears in virtually all of the major accounts of the period.⁶²

The conventional account was challenged root and branch by Peter Temin's well-known 1969 book, *The Jacksonian Economy*.⁶³ According to Temin's analysis, the speculative bubble, and the collapse of prices and the banking sector that occurred when the bubble burst, both resulted from changes in international markets that affected the volume of gold and silver imported into and exported from the United States. Temin argues that neither the boom nor the bust were caused by the destruction of the Bank of the United States, the use of government deposits to finance speculation, the specie circular, or the distribution of surplus federal funds to the states.⁶⁴ But, whatever the soundness of Temin's account, the traditional story is based in large part on the understandings of people who witnessed both the bank war and the panic.⁶⁵ And for the purposes of domestic politics and policy in the mid-nineteenth century, what people believed at the time was what mattered. The puzzle for us is to understand how economic policy could have become so deranged by political considerations.

62. This sketch of the traditional or conventional history is based on the account by PETER TEMIN, *THE JACKSONIAN ECONOMY* 17-22 (1969). Specific documentation for the conventional story can be found in Temin's citations to the standard histories of the period, both economic and noneconomic.

63. *Id. passim*.

64. As might be expected, Temin's account is also contested. See, e.g., Peter L. Rousseau, *Jacksonian Monetary Policy, Specie Flows, and the Panic of 1837*, 62 J. ECON. HIST. 457, 457 (2002) (arguing that "a series of interbank transfers of government balances and a policy-induced increase in the demand for coin in the Western states drained the largest New York City banks of their specie reserves and rendered the panic inevitable").

65. For representative accounts, see CATTERAL, *supra* note 61, at 285-358; and HAMMOND, *supra* note 61, at 369-499.

2. *Politics*

Andrew Jackson’s political opposition to the Bank of the United States was both ideological and personal.⁶⁶ Ideologically, Jackson believed in republican virtue as exemplified by those he viewed as the productive elements of society—hardworking, ordinary Americans like farmers and mechanics. The Bank of the United States (BUS) was a statutory monopoly with special privileges. It represented elite financial, commercial, and manufacturing interests, not the interests of ordinary Americans. Indeed, Jackson viewed all banks as potential promoters of speculation rather than honest work.

Jackson also considered the Bank a threat to majoritarian democracy. It exercised enormous financial power pursuant to a statutory charter that left it unaccountable to the President, to Congress, or to the electorate. Moreover, financial power could be converted into political power. In Jackson’s view, the Bank was not just unaccountable to the government; it had the capacity, by deploying its financial resources for political ends, to shape the government for its own purposes. As a majoritarian democrat and a believer in the ordinary American as the backbone of a democratic republic, Jackson’s ideological commitments virtually demanded that the Bank’s power be brought under governmental control.

Jackson’s objections to the Bank were based on personal factors as well. He had been brought to the verge of bankruptcy by the deflationary policies of the Second Bank—policies that had been made necessary by the incompetent inflationary machinations of that Bank’s first president. From personal experience Jackson associated banks, and particularly the Bank of the United States, with speculative excesses and squeezes on worthy, small debtors. In addition, Jackson firmly believed that the BUS had used its funds in the election of 1824 to defeat both him and other Democratic candidates. Hence, whether the BUS had or had not interfered in the election, Jackson’s belief that the Bank’s power could undermine the right of suffrage was more than an abstract ideological commitment. And in some sense his beliefs became self-fulfilling. Once Jackson confirmed his intent to suppress the Bank’s power by vetoing the 1832 legislation rechartering it four years before its charter was to expire, undisguised political warfare broke out between the Jackson Administration and the Bank and its allies in Congress. If the Bank had stayed out of politics before, it was in politics now.

66. Jackson’s war with the Bank is treated in virtually every secondary source relevant to Jackson’s life, his presidency, the period of the 1830s, or any of its prominent actors. The account that follows is based importantly on REMINI, *supra* note 19, which contains a bibliographical review of the relevant literature. See *id.* at 179-84.

Returned to office following his veto, and after a campaign in which the Bank was a major issue, Jackson interpreted his new mandate as a mandate to defang the Bank. This may not have been true—many contemporary observers believed Jackson won despite his opposition to the Bank, not because of it—but Jackson believed it. Nicholas Biddle then played into Jackson's hands by artificially curtailing credit in 1833, thereby precipitating a panic. If the electorate had not rallied to Jackson's anti-Bank banner before, they were attracted to his position when Biddle flexed the Bank's monetary muscle.

Still, the Bank had considerable political support both in Congress and in the general public.⁶⁷ And it still had four years to run on its federal charter. Congress had rechartered the BUS shortly before the 1832 elections precisely because the Bank's supporters believed that its popularity with the electorate would force Jackson to sign the bill.⁶⁸ Anticipating legislative opposition, even after the 1832 elections, Jackson did not seek legislation to rein in the Bank. He used his wholly executive powers instead.

Believing that the Bank's power emerged importantly from its position as the sole depository for federal government funds, Jackson decided to withdraw them. But the statute establishing the Bank allowed removal of the government's funds only by the Secretary of the Treasury, who was required to state his reasons to Congress. Faced with a Secretary of the Treasury, Louis McLane, who favored the Bank, Jackson moved him to the State Department and replaced him with William Duane, a known Bank opponent. Once in office, however, Duane declined to remove the deposits. On his construction of the banking statutes, the only legitimate reason that he could give Congress for removal was that the deposits were unsafe with the BUS. Because it seemed to Duane that they were not only safe, but also safer there than in alternative depositories, he could not bring himself to make the necessary finding. In exasperation, Jackson removed Duane as Treasury Secretary and substituted Roger Taney, who promptly did the President's bidding.

Jackson had properly read the congressional mood. Taney was a recess appointment. When Congress returned, the Senate refused to confirm him. In addition, the Senate passed resolutions censuring the President both for removing the deposits and for removing Duane. The Senate resolutions

67. Indeed, the politics of banking and finance in the Jacksonian era is enormously complicated, and its interpretation a source of continuing historiographical conflict. Ideology, self-interest, partisan competition, and internal party divisions all played a role. See generally McFAUL, *supra* note 28.

68. There were also those like Henry Clay who believed that the bill to recharter the bank would cause Jackson difficulty whether he signed it or vetoed it. See PETERSON, *supra* note 12, at 12-13.

declared that those actions, combined with the President’s use of the veto, revealed Jackson to be embarked on a sinister campaign to aggrandize the power of the presidency.

Whatever the truth about Jackson’s intentions—the opposition press often referred to him as “King Andrew”—he had won the Bank War and, in the process, substantially increased the powers of the presidency. After the election of 1834, when the Democrats regained control of both houses of Congress, the Senate’s censure resolutions were expunged from the records and the Bank’s charter was allowed to expire. Moreover, in Robert Remini’s words:

In mortally wounding the Bank, President Jackson awarded himself tremendous powers over the financial operations of the country. Through his Treasury Secretary, he could direct the movement of vast sums of money in and out of state banks. Jackson never intended to seize this power, but the fact remained that he had it. And once taken he was extremely reluctant to part with it. . . .⁶⁹

3. *The Constitution*

The Senate censure resolutions were motivated by the strongest of partisan motives, but they raised serious constitutional questions. Jackson’s veto of the Bank bill had relied in part on a determination that a national bank, in the form provided, was unconstitutional. But had not *M’Culloch v. Maryland*⁷⁰ decided that question? Was Jackson claiming that the President’s view of the constitution trumped the Court’s? Was it constitutionally proper for a President to remove a cabinet official because the President disagreed with the official’s exercise of a discretion that was conferred on him by statute? Was the veto provided in the Constitution meant to allow the President to stymie the will of Congress any time Congress lacked a veto-proof majority?

Andrew Jackson would have answered no, no, yes, and yes to those questions. In asserting the President’s power as forcefully as he did, Jackson made important contributions to our understanding of the presidency and its relationship to administration.⁷¹

President Jackson’s veto of the rechartering of the Second Bank of the United States gave rise to two different constitutional complaints. One was

69. REMINI, *supra* note 19, at 168.

70. 17 U.S. (4 Wheat.) 316 (1819).

71. The constitutional questions surrounding the Bank War are treated ably and with merciful brevity in CURRIE, *supra* note 28, at 58-87.

that to the extent that the veto was based on policy grounds, it, like a number of Jackson's other vetoes, exceeded the proper role of the President in approving or disapproving legislation. That complaint was based on prior practice or constitutional convention, not the text of the Constitution. But, while it was true that former Presidents had vetoed legislation largely on constitutional grounds, this was not the uniform practice. President Madison, for example, had vetoed the first attempt to charter the second BUS wholly on policy grounds.⁷²

More to the point, the political position of the presidency had shifted. Because of the broadening of the electoral base and the move to popular selection of presidential electors, Jackson was the first President who could realistically claim to be popularly elected. He believed that he wielded veto power in the name of a majority of the people. Jackson's practice both reflected and solidified a change in the institutional relationships within the national government.

If Jackson's policy vetoes asserted a presidential equality with the Congress in legislation, his constitutional objections to the Bank claimed for the President an equal status with the Supreme Court in interpreting the Constitution. Jackson's critics interpreted this as a claim that the President was above the law.⁷³ But Jackson's veto message made no such assertion. To be sure, the Supreme Court had decided in *M'Culloch v. Maryland* that Congress had the power under the Constitution to charter a national bank. And much of Jackson's veto message chipped away at particular features of the bill rechartering the second Bank in an unconvincing fashion. Yet Jackson had two connected arguments that were both persuasive and important.

First, a crucial part of the *M'Culloch* rationale was that it was not proper for the Court to inquire into the degree of necessity for congressional action that was premised on the Necessary and Proper Clause. In Jackson's words:

Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to

72. James Madison, Veto Message (Jan. 30, 1815), reprinted in 1 RICHARDSON, *supra* note 29, at 540-42.

73. Both Daniel Webster and Henry Clay argued that the President was claiming a power to determine which laws to enforce. 8 REG. DEB. 1232 (1832) (Webster); *id.* at 1273 (Clay).

perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional⁷⁴

Jackson generalized this position in his well-known claim that every public officer takes an oath to support the Constitution and swears to uphold it as he understands it.⁷⁵ But that was not a claim that the President or Congress was entitled to nullify a judicial decision deciding a particular constitutional controversy. The Court had ruled on the constitutionality of the statute rechartering the second Bank in *M’Cullock*. But it had also indicated that the question of whether the Bank was “necessary and proper” was a prudential question for Congress. Hence, concluded Jackson, “The authority of the Supreme Court must not . . . be permitted to control the Congress or the Executive when acting in their *legislative capacities*, but to have only such influence as the force of their reasoning may deserve.”⁷⁶ As stated, Jackson’s constitutional position literally has no point of tangency with any claim that the President is above the law or that the Constitution authorizes the Chief Executive either to override judicial decisions or to refuse, on constitutional grounds, to enforce a law as passed and signed.

Like the veto controversy,⁷⁷ the constitutional debate over the removal of the government’s deposits from the BUS, and over the removal of a Treasury Secretary who declined to follow the President’s instructions, reopened questions that have continued resonance with twenty-first-century administrative and constitutional lawyers.⁷⁸ Jackson’s political opponents had two connected legal complaints. The first was that in removing the deposits, Roger Taney willfully misconstrued the statute under which he was authorized

74. Andrew Jackson, Veto Message (July 10, 1832), reprinted in 2 RICHARDSON, *supra* note 29, at 1139, 1146.

75. *Id.* at 1145.

76. *Id.* at 1145 (emphasis added).

77. Our contemporary controversy is, of course, over the use of so-called signing statements in which the President fails to veto the bill but puts an interpretive gloss on it that seems to promise a refusal to enforce some portion of the statute. For a general discussion of presidential signing statements, see PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002).

78. As these words are written, President George W. Bush and Congress are jousting over numerous issues, including Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007), which tightens and centralizes presidential control over the agency regulatory process. See Rebecca Adams & Michael R. Crittenden, *A Regulatory Rumble*, 56 CONG. Q. WKLY. 2162 (2007). And the power of the President to direct administrative action remains a hot topic for legal academics. For a thoughtful discussion of some of these contemporary issues and citations to the large and growing literature, see Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

to act. The formidable trio of Henry Clay, Daniel Webster, and John C. Calhoun all argued that the general purpose of the statute was to ensure safe and faithful custody of the government's funds—Duane's position before his removal. Because Taney had conceded that the money was safe and the Bank faithful, the Senators concluded that he lacked any authority to remove the government's money.⁷⁹ Taney relied instead on the plain text of the statute, which placed no restriction on the Secretary's authority, save the requirement to report his reasons to Congress.⁸⁰

We need not attempt to resolve who had the better of this statutory argument. The only important point from the standpoint of administrative law is that Taney's action was a dramatic illustration of the tens of thousands of interpretive decisions that are made by executive officials, most of which are unlikely ever to be subjected to judicial review. In our *Chevron*-saturated legal world, we are likely to forget that agency statutory interpretation is not important because the courts give agencies deference. It is important because in most cases federal statutes mean what administrative agencies take them to mean.⁸¹ If Congress disagrees, it is not without tools with which to shape agency or executive statutory construction. The one on display in the removal controversy was the Senate's refusal to confirm Roger Taney as Secretary of the Treasury. That action hardly saved the Bank's position, but it surely reminded Jackson that go-it-alone executive action had its costs.

The opposing senators' second argument was a constitutional claim that was also premised in part on the statute. According to Henry Clay, the statute vested authority to remove deposits in the Secretary of the Treasury, not in the President. In discharging Duane for refusing to follow his instructions, Jackson had, in effect, usurped the Secretary's statutory authority. In Clay's view this was part of a more general scheme by President Jackson to paralyze the Congress and consolidate all power in the President.⁸² Clay thus reopened the debate about the President's removal power and the position of the Treasury Department.

It is often said, even by the Supreme Court,⁸³ that the First Congress settled this question in 1789, in its extensive debates concerning whether the

79. See 10 REG. DEB. 51 (1833) (Clay); *id.* at 206-07 (1834) (Calhoun); CONG. DEB. APP. 148-50, 23d Cong. (1st Sess. 1834) (Webster).

80. See CONG. DEB. APP. 59, 23d Cong. (1st Sess. 1833).

81. For a plea to pay more attention to agency statutory interpretation as an autonomous enterprise, see Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

82. See 10 REG. DEB. 58, 64-65 (1833).

83. *Myers v. United States*, 272 U.S. 52, 114-25 (1926).

Constitution presumed a presidential power of removal or removal dependent on Congress's statutory prescriptions. But the so-called decision of 1789 was ambiguous. The language adopted in the statute establishing the Treasury Department satisfied both those who thought that Congress could decide whether the President should be able to remove the Secretary of the Treasury and those who believed that the Constitution gave him unfettered authority to do so without congressional authorization.⁸⁴

The Whig leadership in Congress contested Jackson's authority to direct the actions of Executive Branch officials, and the President's control over the Treasury, from a number of directions. But all of their attempts to curb the President's power failed. The Senate passed Henry Clay's resolution: "*Resolved*, that the President, in the late Executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."⁸⁵ Jackson responded by presenting a "protest"⁸⁶ that reasserted the President's power to control executive officers, including the Secretary of the Treasury, and to remove them at his pleasure. Jackson's staunch defender in the Senate, Senator Thomas Hart Benton, then waged a continuous campaign to expunge the censure resolution from the Journal of the Senate and, as has been noted, succeeded when the Democrats retook control of the Senate in the 1836 elections.⁸⁷

But the Whigs were not finished. Clay also offered a resolution denying the President's power to remove officers at his pleasure and instructing the Judiciary Committee to consider legislation requiring that removals receive the consent of the Senate before they became effective.⁸⁸ No such legislation ever passed. The Senate did pass a bill requiring the President to give reasons for removal whenever a nomination was made to the Senate to fill a vacancy occasioned by a presidential removal.⁸⁹ But that bill was never reported out of the House committee to which it was referred.

The issue came back when the Whigs gained the presidency in 1840. After Harrison's death, his successor, the crypto-Whig John Tyler, proposed to save

84. For a brief (further) discussion, see Mashaw, *supra* note 21, at 1282-88. See also Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 257 (2007) ("The only position . . . that had been definitively rejected was . . . that Congress could always participate in particular removals by refusing to consent to them.").

85. S. JOURNAL, 23rd Cong., 1st Sess. 197 (1833).

86. Andrew Jackson, Protest (Apr. 15, 1834), reprinted in 2 RICHARDSON, *supra* note 29, at 1288.

87. See S. JOURNAL, 24th Cong., 2d Sess. 123-24 (1836).

88. See S. DOC. NO. 23-155 (1st Sess. 1834).

89. See S. 41, 24th Cong. (1st Sess. 1835) (enacted); 11 REG. DEB. 575-76 (1835).

the liberty of the people by keeping public funds from the control of the Executive Branch. Tyler evocatively presented his plan as establishing “a complete separation . . . between the sword and the purse.”⁹⁰ Nothing less, presumably, would prevent the emergence of executive despotism. Tyler’s plan was presented to Congress in 1841 in a bill that established an independent Board of Exchequer, which would have exclusive power to receive, hold, and disburse public money.⁹¹ The Board’s five members were protected from presidential control by a provision that allowed their removal only for physical inability, incompetence, or neglect or violation of duty—with the reasons for removal to be laid before the Senate. Perhaps because Tyler had few friends in either party in Congress, nothing ever came of this proposal to give Congress effective control over the administration of public funds by turning the Treasury Department into what we would now characterize as an “independent agency.”

In some sense, therefore, the struggles over the Bank of the United States reestablished the President’s powers of direction concerning Executive Branch policies and actions that had atrophied under the Jeffersonian Republicans.⁹² But this position hardly established the elected monarchy that Clay, Webster, and others occasionally invoked. As the Supreme Court subsequently made clear in *Kendall v. United States*,⁹³ where legislation gave an executive official no discretion, a direction from the President (in this case Jackson again) that countermanded the explicit terms of a statute did not protect the officer from a writ of mandamus. In those admittedly rare instances where Congress leaves no implementing discretion, executive authority can be controlled by legislation.

Perhaps more importantly, the power to direct generated by an implicit threat of removal does not give the president a power of direct implementation where Congress has authorized action by a different officer. For example, while the requirement that land offices only accept specie in payment for public land purchases is often called “Jackson’s specie circular,” that circular was issued by

90. John Tyler, Inaugural Address (Apr. 9, 1841), reprinted in 3 RICHARDSON, *supra* note 29, at 1889, 1890.

91. See H.R. DOC. NO. 27-20, at 6, 13-14 (2d Sess. 1841).

92. “[B]y 1825, unless the trend were checked, the presidency bade fair to represent, in time, not much more than a chairmanship of a group of permanent secretaries of the executive departments to which Congress . . . paid more attention than to the President.” WILFRED E. BINKLEY, *PRESIDENT AND CONGRESS* 64 (1947).

93. 37 U.S. (12 Pet.) 524 (1838). The *Kendall* case and its implications are treated further in Part IV.

Levi Woodbury, Secretary of the Treasury,⁹⁴ at President Jackson’s direction.⁹⁵ Using statutorily authorized officers as conduits for presidential policies was as common in Jackson’s time as it is today.⁹⁶ But these “directions” are not claims that the President can himself exercise the officer’s statutory authority. Both Jackson and Taney fully understood this. Indeed, Roger Taney, while Jackson’s Attorney General, clearly articulated the legal distinction, insisting that while the president could remove an officer, he could not substitute his action for the action conferred on the officer by statute.⁹⁷ And authority, once given to an officer, may be removed. The effect of the specie circular was annulled when Congress, in 1838, passed a resolution making it unlawful for the Secretary of the Treasury to create any difference between the payments that were to be received for the various branches of federal revenue (land sales, taxes, fees, etc.).⁹⁸

Moreover, the politics of appointments and removals do not necessarily follow the formal authority laid down in the Constitution or in the statutes. Jackson’s removal of Duane gave practical effect to his formal, constitutional claims, but prudent Presidents do not pick such fights with Congress very often. Nor is the formal power to appoint officers a guarantee that presidents will be able to choose officials free from powerful congressional influence. Commenting on the degree to which the Congress had insinuated itself into the appointments process by the end of the Jacksonian era, Leonard White concluded, “In this aspect of the struggle for power, the legislative branch emerged relatively a victor in 1861 even though the executive still held high [i.e., constitutional] ground.”⁹⁹ Roger Taney was hardly the only appointment rejected by Congress during the Jacksonian period. Indeed, with the exceptions of Jackson and Polk, presidents in the Jacksonian era were forced to yield substantial control over appointments to Congress.¹⁰⁰

Finally, Jackson’s victory for presidential control of administration did not set the tone for the remainder of the nineteenth century. Tyler’s Exchequer bill

94. Circular from the Treasury, No. 24-1548 (July 11, 1836), *reprinted in* 8 AMERICAN STATE PAPERS, PUBLIC LANDS 910 (Asbury Dickinson & John W. Forney, ed., Gales & Seaton 1861).

95. Jackson noted this in his final state of the union report to the Congress on December 5, 1836. See Andrew Jackson, Eighth Annual Message to Congress (Dec. 5, 1836), *in* 2 RICHARDSON, *supra* note 29, at 1455, 1468.

96. See generally COOPER, *supra* note 77, at 81-116.

97. 2 Op. Att’y Gen. 482, 489-93 (1831); 2 Op. Att’y Gen. 507 (1832).

98. A Resolution Relating to the Public Revenue and Dues to the Government, res. 4, 5 Stat. 310 (May 31, 1838).

99. WHITE, *supra* note 2, at 124.

100. JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 55-71 (1953).

suggested his willingness to capitulate to Congress on the question of the control of the Treasury.¹⁰¹ And, aside from President Polk, the remaining presidents of the Jacksonian era were relatively weak. The battles between presidents and congresses over appointments and removals would continue throughout the nineteenth century and beyond.¹⁰² Indeed, in this never-ending struggle, Jackson's successes were a high water mark from which presidential power and authority over administration ebbed almost continuously (Abraham Lincoln's tenure excepted) until world wars and major depressions reenergized presidential leadership.¹⁰³

B. The Administrative Organization and Control of Monetary Policy

Whatever the political disputes between Federalists and Jeffersonian Republicans or between Jacksonian Democrats and Whigs concerning the Bank of the United States, no one doubted the importance of a sound and stable currency. Nor was there much argument about whether agriculture, commerce, and manufacturing required a well-functioning credit system or whether the government (and others) required efficient and trustworthy fiscal agents for collections, payments, and transfers. The question was how to organize these functions in ways that were effective, consistent with the Constitution, and politically viable, given competing political visions of the meaning of accountable and democratic governance. Building on prior efforts, the Jacksonian period saw experiments with three different methods for

101. On the other hand, Tyler also defended the presidency by refusing to provide congressionally requested documents concerning treaty negotiations, investigations that might lead to criminal prosecution, and presidential appointments. PETERSON, *supra* note 12, at 170-73. Indeed, Tyler fought unrelenting trench warfare with Henry Clay to protect executive prerogatives in the face of constant challenges from the Congress. *Id.* at 77-112.

102. See LEONARD D. WHITE, *THE REPUBLICAN ERA: 1869-1901*, at 20-67 (1958).

103. While Woodrow Wilson clearly overstated the case in 1885, he had this to say about the presidency:

The business of the President, occasionally great, is usually not much above routine. Most of the time it is *mere* administration, mere obedience of directions from the masters of policy, the Standing Committees. Except in so far as his power of veto constitutes him a part of the legislature, the President might, not inconveniently, be a permanent officer; the first official of a carefully-graded and impartially-regulated civil service system, through whose sure series of merit-promotions the youngest clerk might rise even to the chief magistracy.

WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 170 (World Publishing Co. ed., 1973) (1885).

holding and dispersing the government's money and for regulating the soundness of the currency.

1. *The Bank of the United States*

The chartering of a national bank was contentious from the very beginning of the Republic. The first substantial dispute over public policy in Washington's administration arose out of Thomas Jefferson's declaration that Alexander Hamilton's plan to charter a national bank was unconstitutional.¹⁰⁴ Jeffersonian Republicans disliked the first Bank of the United States for reasons similar¹⁰⁵ to those later voiced by Jacksonian Democrats. Hence, when that Bank's charter came up for renewal in early 1811, the recharter bill failed in the Senate by the casting vote of Vice President George Clinton.

The demise of the First Bank left the national government without a fiscal intermediary to hold and disburse its funds. Albert Gallatin, Secretary of the Treasury, acted to fill the void by instructing all Collectors of Revenue to deposit their collections in one or more state banks selected by the Secretary or by the Collector where there was no designated depository bank in the relevant locale.¹⁰⁶ The Treasury then entered into agreements with the depository banks

104. LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 223 (1961).

105. Similar, but not identical. While Jeffersonians objected to the way in which the Bank tended to favor commercial and financial interests over agrarian pursuits and the Bank's influence on the government, Jefferson himself seems not to have believed that the Bank's political influence was entirely independent of the government. It was, instead, one of the means by which Hamilton, as Secretary of the Treasury, influenced members of Congress and controlled economic policy. Jefferson complained:

While the government remained at Philadelphia, a selection of members of both [the House and the Senate] were constantly kept as directors [of the Bank], who, on every question interesting to that institution, or the views of the federal head [Hamilton], voted at the will of that head; and together with the stockholding members, could always make the federal vote that of a majority. By this combination, legislative expositions were given to the constitution, and all the administrative laws were shaped on the model of England and so passed.

Quoted in D.S. Dickinson, *Address to the Democratic Republican Electors of the State of N. York*, OHIO STATESMEN, June 2, 1840, at 2, available at <http://docs.newsbank.com/s/HistArchive/ahnpdoc/EANX/113207D3DD166b28/oDoCB59DC0938355>.

106. See Statement of the Several Banks in Which the Public Money Is Deposited (Dec. 30, 1811), reprinted in 2 AMERICAN STATE PAPERS, FINANCE 517 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1850).

concerning how they were to carry out their fiscal intermediary functions for the government.¹⁰⁷

The new contractual system worked well for a short period. But a combination of the fiscal strains of the War of 1812, the proliferation of state banks, which issued a blizzard of paper notes, and the flight of specie out of the country because of trade imbalances, rapidly produced a crisis. Banks were unable to redeem their notes in gold or silver; the United States was forced to accept depreciated state bank paper in payment for debts due the government; and because most of this paper was not accepted outside of the locale where it was issued, interstate trade and government transfers rapidly became difficult, if not impossible.¹⁰⁸

In 1816, the chastened Republicans chartered the Second Bank of the United States. Presumably, a chartered national bank could solve both the payments and the soft currency problems. A properly funded and administered national bank, with branches all over the country, could make payments in specie, if demanded, or in its own notes, redeemable in specie at any of the Bank's branches. A merchant in Ohio could thus have confidence in a national bank note, even though it was issued in Boston. The payments and fiscal-transfers problem would be solved.

Soft money was more difficult. But once confidence was restored sufficiently that state banks could again redeem their notes in specie, the BUS could regulate the issuance of state bank notes by influencing their specie reserves. Because the BUS was the depository bank for all U.S. government funds, it accumulated large quantities of state bank paper. By constantly presenting this paper for specie redemption, state banks would be limited in the amount of new paper that they could issue. This regulatory effect assumed, of course, that the state banks would operate in a sound manner, that is, that they would maintain reasonable reserves of specie against the possible redemption of their outstanding notes. Because any bank that was thought unable to redeem would see its notes circulate at large discounts, this economic discipline was mostly effective.

The BUS system was obviously somewhat more complicated than this brief description allows, but our principal interest is in the way in which it

107. The agreement entered into by the Treasury and the Bank of Washington provides a standard example. See Letter from Albert Gallatin, Sec'y of the Treasury, to Daniel Carroll, President of the Bank of Wash. (Mar. 28, 1811), reprinted in 2 AMERICAN STATE PAPERS, FINANCE, *supra* note 106, at 520.

108. On the events surrounding the fiscal crisis following the lapse of the First Bank charter, see JOHN BURTON PHILLIPS, METHODS OF KEEPING THE PUBLIC MONEY OF THE UNITED STATES 11-24 (1900).

structured administrative governance.¹⁰⁹ The BUS was, obviously, carrying out significant governmental functions, but what was its relationship to the government itself?

The answer lay on the face of the statute establishing the bank.¹¹⁰ The government was to be part owner of the bank, but to hold only a 20 percent share. Similarly, the United States would have only five of the twenty-five directors. These five would be appointed annually by the President, with the advice and consent of the Senate. The United States was not permitted to vote its shares in the election of the other twenty.¹¹¹ The only other relationship to the United States was a provision for reports to the Secretary of the Treasury concerning the capital stock of the corporation, its debt, its deposits, the notes of the bank in circulation, and the specie in hand. The Treasury Secretary was permitted to inspect the general accounts in the books of the bank that related to the subjects covered in the required reports, but had no further right of inspection.¹¹²

There was, of course, a *quid pro quo* relationship with the United States. The bank was to be the fiscal agent of the United States for which it was not allowed to charge any commissions or allowances.¹¹³ Compensation for these services took the form of the deposit of all of the monies of the United States into the Bank, which it held without paying interest.¹¹⁴ Moreover, during the existence of the charter, the United States pledged not to create any competing bank other than banks for the District of Columbia.¹¹⁵ The charter could be cancelled if the bank violated it, but only through an elaborate procedure involving congressional investigation and an action in the circuit court for Pennsylvania, with all issues of fact tried before a jury.¹¹⁶

The Bank was given full power to regulate its own affairs by bylaws, ordinances, or regulations,¹¹⁷ and to open branches wherever it thought useful. Those branches would operate under regulations provided by the Bank’s

109. For further description, see, for example, WILLIAM M. GOUGE, *A SHORT HISTORY OF PAPER MONEY AND BANKING IN THE UNITED STATES* 64-94 (1st ed. 1833).

110. Act of Apr. 10, 1816, ch. 44, 3 Stat. 266.

111. *Id.* § 8, 3 Stat. at 269.

112. *Id.* § 11, 3 Stat. at 273-74.

113. *Id.* § 15, 3 Stat. at 274.

114. *Id.* § 16, 3 Stat. at 274.

115. *Id.* § 21, 3 Stat. at 276.

116. *Id.* § 23, 3 Stat. at 276.

117. *Id.* § 10, 3 Stat. at 270-71.

central office and be managed by directors appointed by the directors of the Bank itself.¹¹⁸

In short, aside from contributing to the capital stock, appointing one-fifth of the directors and having a limited right of inspection, the statute farmed out all decisions concerning how the Bank would carry out its important fiscal and monetary functions to its directors. Moreover, in a provision that Nicholas Biddle subsequently exploited,¹¹⁹ the Bank was given authority to take any action by a quorum of seven members of its board of directors.¹²⁰ There was no requirement that any of these seven directors be the directors who had been appointed by the President. Hence, the Board could delegate all its activities to an executive committee of seven directors, no one of which represented the interests of the United States.

The Second BUS was, thus, authorized to carry out many of the functions that we ascribe to a modern central bank, or to the Federal Reserve system, under a statute that allowed it to operate, if it chose, almost completely independently of the government.¹²¹ Ideological commitments and personal experience aside, it is not difficult to see why men like Thomas Jefferson and Andrew Jackson viewed the existence of the BUS with alarm.¹²² The Bank could exercise enormous economic and political power on the basis of a governmentally granted monopoly, with extremely modest accountability to the government for any of its actions.

In some sense, of course, that was the point. Virtually all modern developed economies have created independent central banking functions. Fiscal intermediation and monetary policy are handed off to experts, not only because they are expert, but because political institutions are recognized as overly susceptible, at least in democracies, to the public's consistent preference for easy credit. The question was whether some economically responsible and politically accountable institution could be devised to carry out these essential financial functions. The Jacksonians experimented with two additional institutional designs.

118. *Id.* § 11, 3 Stat. at 273.

119. WHITE, *supra* note 2, at 471-75.

120. Act of Apr. 10, 1816, § 11, at 271.

121. There is considerable dispute about whether the Second Bank acted, or was expected to act, like a true central bank. 1 FRITZ REDLICH, *THE MOLDING OF AMERICAN BANKING* 135-36 (1968), thinks that it was performing true central banking functions, while TEMIN, *supra* note 62, at 44-58, thinks not. But as Temin recognizes, this is probably the wrong question. The idea of a central bank was a late nineteenth- or early twentieth-century development.

122. On the differences between Jefferson's view of the first BUS and Jackson's concerns about the second, see *supra* note 105.

2. Contracting with "Pet" Banks

The return to the BUS system did not instantly solve the problems of an unstable currency or of embarrassments in making transfers from one region to another.¹²³ But by 1820 calm had returned. For the next decade the fiscal machinery of the government operated smoothly and currency fluctuations were modest. Whether these good times were attributable to sound banking policies on the part of the BUS is difficult to determine. For one thing, the government continued to use state banks as depositaries and fiscal agents in western states where the BUS had not established branches.¹²⁴ In this way the Treasury could both support state or local banks by leaving deposits beyond those immediately needed for transfers, and also pressure them to maintain sound banking practices by the implicit threat of removing the deposits. In addition, the Treasury by circular instructed all receivers of public money to accept no bank notes below the value of five dollars.¹²⁵ Because issuance of state bank notes in small denominations had been a primary cause of prior inflationary bubbles the Treasury believed that this regulation would also curtail inflationary pressures from the state banks.¹²⁶ Hence, the Treasury as well as the BUS was active in regulating the money supply and stabilizing the currency.

Nevertheless, the BUS system was viewed as a success. A Senate Committee, headed by Senator Smith of Maryland, reported in 1830 that the customs houses, land offices, post offices, receivers of internal revenue, marshals, and clerks of court now numbered more than nine thousand. The report then states:

From these persons, the Government has, for the ten years preceding the 1st of January, 1830, received, \$230,068,855[.]¹⁷. This sum has been collected in every section of this widely extended country. It has been disbursed at other points, many thousand miles distant from the places where it was collected; and yet it has been so collected and distributed,

123. On the difficulties of this period, see PHILLIPS, *supra* note 108, at 33-45.

124. A few state banks were used in the East as well. See Banks in Which the Receipts from the Public Lands Are Deposited (Feb. 14, 1822), *reprinted in* 3 AMERICAN STATE PAPERS, FINANCE, *supra* note 106, at 718, 720; S. DOC. NO. 21-40 (1st Sess. 1830); H.R. REP. NO. 23-312, vol. 2, at 46 (1st Sess. 1834); S. DOC. NO. 21-84, at 4 (1st Sess. 1830); H.R. DOC. NO. 23-27, at 47-48 (2d Sess. 1834); S. DOC. NO. 23-13, at 45-46 (2d Sess. 1834).

125. 5 AMERICAN STATE PAPERS, FINANCE, *supra* note 106, at 522.

126. *Id.*

without the loss, as far as the committee can learn, of a single dollar, and without the expense of a single dollar to the Government.¹²⁷

Smith's report may have been overly optimistic,¹²⁸ but even as Jackson was beginning his war on the bank, the BUS system was viewed as working smoothly.

The withdrawal of the government's deposits from the Bank of the United States ended the BUS system. And because leaving the government's money with nine thousand receivers of funds, to be called upon by Treasury drafts, was both unsafe and inefficient, the government once again was required to deposit its funds with state banks. Yet the use of state banks was not necessarily fated to produce the inflationary exuberance and breakdown of the fiscal transfer system that had been experienced in the period from 1811 to 1816. Even under the BUS system, the Treasury had used some state banks as depositories and had supported and regulated them by contract. And it could reduce the proliferation of small banknotes by circumscribing what the government would accept in payment for taxes, fees, postage, and public lands.

Indeed, using state banks permitted the Secretary of the Treasury to regulate monetary policy in very much the same way that the Bank of the United States regulated the state banks under the BUS system. Because the Secretary could choose banks for deposit, he could increase or decrease liquidity in different sections of the country as it was needed. Because the deposits were valuable to the banks and their shareholders, the Secretary could impose specie reserve requirements on them to either tighten or loosen the money supply.¹²⁹ And by choosing to leave the government's major deposits in large Wall Street banks where New York state banking regulations demanded conservative banking practices, the Secretary could assure the safety of much of the funds deposited.¹³⁰ The system might allow the Secretary to choose his "pets," but it also allowed him to regulate them in the national interest.

The fly in this ointment was of course politics. While the Secretary of the Treasury might easily have made decisions about depository banks based upon

127. S. REP. NO. 21-104, at 2-3 (1st Sess. 1830).

128. There is other evidence that during this period losses to the government through this system had exceeded three million dollars. S. EXEC. DOC. NO. 26-10 (1st Sess. 1840).

129. The original proposal for the Deposit Bank Act of 1836 had included a requirement that state depository banks maintain specie reserves of at least 20 percent of all their "responsibilities and notes." That provision was replaced with a clause that explicitly provided regulatory authority to the Secretary of the Treasury. Richard H. Timberlake, Jr., *The Independent Treasury and Monetary Policy Before the Civil War*, 27 S. ECON. J. 92, 92-93 (1960).

130. On the use of these techniques prior to 1836, see MCFAYL, *supra* note 28, at 150-59.

fiscal prudence and good monetary policy, the economic benefits of being a depository institution made that status a part of the patronage system.¹³¹ And patronage produced forms of corruption that tainted the whole process. Because deposits enhanced the value of state bank stock, favored parties could get a quick and direct reward by buying and selling bank stocks on inside information about where deposits were moving. And government deposits increased specie reserves. These reserves facilitated loans to bank directors that permitted them to speculate—often extremely profitably—in public lands.¹³²

Moreover, in 1836, Congress intervened to regulate the distribution of federal deposits in ways that sharply limited the Treasury’s capacity to regulate state banks and the money supply. The “Act to regulate the deposits of the public money”¹³³ contained two provisions that seemed unobjectionable on their face but seriously inhibited the Treasury’s flexibility. The first limited deposits in any bank to an amount equal to three-quarters of the bank’s capital stock.¹³⁴ While this provision was designed to protect the safety of federal funds, it had the effect of requiring that deposits be spread among a much larger number of banks than had previously been chosen. This not only made it much more difficult for the Treasury to monitor the practices of depositories, it made it impossible to implement another section of the statute disqualifying banks as depositories if they issued notes in denominations of less than five dollars.¹³⁵ There were too few banks that satisfied both conditions. If restraining the issuance of small notes was as important in reducing inflationary pressures as the Treasury believed it to be, easy money was about to return. Indeed, a new inflationary bubble was almost certain for an additional reason. The United States Treasury was running large surpluses which swelled the coffers of the depository state banks.

The three-quarters provision was, however, a minor problem compared to the further provision of the 1836 statute requiring that the federal surplus be apportioned among the states in accordance with their relative representation in Congress.¹³⁶ In order to implement this provision the Treasury had to transfer colossal sums out of existing depository institutions. And, in order to honor the Treasury’s transfer drafts, the depository banks were required to call

131. PHILLIPS, *supra* note 108, at 65-70.

132. *Id.*

133. Act of June 23, 1836, ch. 115, 5 Stat. 52.

134. *See id.* § 1, 5 Stat. at 52.

135. *See id.* § 5, 5 Stat. at 53; PHILLIPS, *supra* note 108, at 63-64.

136. § 13, 5 Stat. at 55.

loans that had been made on the understanding of the continuation of the federal deposits. The consequences were severe.

The transfers themselves caused huge amounts of specie to be withdrawn from the commercial system. As one commentator put it:

The monetary affairs of the whole country were convulsed—millions upon millions of coin were *in transitu* in every direction, and consequently withdrawn from useful employment. Specie was going up and down the same river, to and from the South and North and the East and West at the same time; millions were withdrawn from their usual and natural channels and forced against the current of trade in literal fulfilment of the distribution law, to points where public money had previously never been either collected or expended except to a very limited extent.¹³⁷

In short, equitable distribution of the federal surplus to the states correlated poorly with where specie was required to promote and sustain commerce.

Moreover, the calling of the loans in order to make transfers created a general economic panic. Virtually all banks suspended specie payments and the public distress was substantial. The situation in New York was described in the following terms:

Since the independence of America there has never been so much distress as at present. Trade and manufactures are prostrated. All confidence and all personal credit have disappeared. Thousands are without bread. Promenades and pleasure places are deserted. . . . The theaters are empty; social gatherings and concerts have ceased to be. In short, everything appears as if we had been either plundered by an invading army or persecuted by devastating plague.¹³⁸

The Treasury's quandary was also acute. Banks that had suspended redemption in specie were ineligible for federal deposits. Virtually all had done so. Through a series of circulars, the Secretary of the Treasury instructed the collectors and receivers of federal funds to retain them. These thousands of officials were to serve as fiscal agents for the government by transferring funds

137. EDWARD G. BOURNE, *THE HISTORY OF THE SURPLUS REVENUE OF 1837*, at 36-37 (1968) (quoting 1 HAZARD 328 (1885)).

138. PHILLIPS, *supra* note 108, at 80 (quoting MAX WIRTH, *GESCHICHTE DER HANDELSKRISEN* 211-12 (1858)).

in response to Treasury drafts.¹³⁹ That primitive system was virtually certain to cause enormous inconveniences. But there was no lawful alternative.

Moreover, the government was required to choose between (1) obeying the law requiring that it accept and pay only in specie, or bank notes from banks that would redeem in specie, and (2) disobeying the law in order to pay its debts and collect on its obligations. It briefly chose the latter, accepting and making payments in the depreciated notes of suspended banks, which was the only currency generally available.¹⁴⁰ But this practice could only work where the government’s creditors were willing to accept depreciated state paper—and many were not. The government was in a peculiar position. By 1838 the Treasury accounts showed a surplus of \$34 million, but it was unable to pay its bills in legal tender because \$28 million of that amount was in state banks that had suspended specie redemption. Congress was required to authorize a nominally overflowing Treasury to borrow to satisfy its outstanding obligations.¹⁴¹

3. *The “Sub-Treasury” System*

One response to the unreliability of the state bank system, and the obvious difficulties of using 13,000 fiscal agents (the number of officials who received federal funds in 1838), would have been a return to the National Bank. This was, of course, the Whig position. Protective tariffs, federal financing of internal improvements, and the regulation of finance through a nationally chartered bank were the principal components of Henry Clay’s so-called American System. But the Whigs seldom controlled Congress and the presidency at the same time, or held Congress with a veto-proof majority. Some different system would have to be found.

Martin Van Buren, who inherited the economic mess that Andrew Jackson narrowly escaped, had a plan. He proposed that the Treasury be its own bank, or at least its own fiscal agent.¹⁴² The Treasury, and certain other designated

139. See 3 SEC’Y OF THE TREAS., ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES, in REPORTS OF THE SECRETARY OF THE TREASURY 3, 10, 56-59 (Washington, Gale & Rives 1837); S. EXEC. DOC. NO. 25-29, vol. IV (1st Sess. 1837).

140. See S. REP. NO. 25-634, vol. III, at 40 (2d Sess. 1838).

141. See PHILLIPS, *supra* note 108, at 91-95.

142. Van Buren was not the first to propose the sub-Treasury system. Thomas Hart Benton claimed to have recommended it to Andrew Jackson early in the bank war. See 1 THOMAS HART BENTON, THIRTY YEARS’ VIEW; OR, THE HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT FOR THIRTY YEARS, FROM 1820-1850, at 158 (1854). Like much of Benton’s self-serving memoir, that claim is suspect, but something like the independent Treasury

entities, would receive and hold funds credited to the United States. Those funds would then be disbursed on the basis of Treasury drafts, as needed. Outside of major commercial centers, land offices, post offices, and customs houses would continue to act as depositaries and transfer agents.¹⁴³

From an economic point of view this system had much to recommend it. Deposits of federal funds would be kept out of the hands of state banks, which used federal deposits of specie to paper the country with bank notes. The government's funds would be safe from state bank failures and, if depositaries were created in major commercial centers, the inconvenience of having the government's money in the hands of multitudinous federal officials might be mostly overcome.

The creation of the independent Treasury system was seen, however, primarily in political terms. Van Buren presented his plan as a means for divorcing the operations of the government from the banking system.¹⁴⁴ The government would no longer be beholden either to the power of a single national bank or to the weaknesses of the state banking system. Moreover, because American banks of any stripe were intimately connected to their British counterparts, an American government holding its own funds was seen as escaping the tyranny of the British banking system as well.

Van Buren's presidency was, of course, plagued by the depression of 1837, the smaller one of 1839, and by the resurgence of the Whigs in Congress. Congress failed to pass the centerpiece of his domestic program, the bill creating the Independent Treasury, until he was nearly out of office. But, when he finally got his proposal adopted in 1840,¹⁴⁵ he made the most of it. Van Buren signed the bill on the Fourth of July, and it was hailed as the "Second Declaration of Independence." In describing the difference between the two "Declarations," a contemporary declared, "The former delivered the American people from the power of the British throne, the latter delivered them from the power of British banks."¹⁴⁶

system was proposed in Congress as early as 1834 and again in 1835. See Timberlake, *supra* note 129, at 92.

143. On Van Buren's presidency and its relationship to the development of the independent Treasury system, see generally MAJOR L. WILSON, *THE PRESIDENCY OF MARTIN VAN BUREN* 123-46 (1984).

144. Similar proposals had been made earlier, perhaps as early as 1803. See PHILLIPS, *supra* note 108, at 57.

145. See Act of July 4, 1840, ch. 41, 5 Stat. 385 (providing for "the collection, safe keeping, transfer, and disbursement of the public revenue").

146. WILSON, *supra* note 143, at 123.

The 1840 statute made the Treasury Department in Washington, D.C.; the Mint in Philadelphia and the branch Mint in New Orleans; the customs houses in Boston and New York; and new special depositories in Charleston and St. Louis the custodians of federal funds.¹⁴⁷ The responsibility for safekeeping and disbursement of these funds fell to the Treasurer of the United States, the Treasurer of the Mint and the branch Mint, and four new appointees denominated "Receivers General of Public Money." These new officials were to be located at the customs houses at New York and Boston and at the new institutions envisioned for Charleston and St. Louis.¹⁴⁸ Of course, because all of the money would not be held in these places, all collectors of customs and receivers of public money at land offices and post offices would also have responsibility for holding federal funds until they were transferred to one of the major depositories or paid out to satisfy the government's obligations.

In order to insure that government funds would not pile up in places where they were not needed and would be available in places where they were, the Secretary of the Treasury was given full power to transfer funds amongst any and all custodians.¹⁴⁹ The details of keeping deposits safe and making transfers were left to the Secretary of the Treasury "by way of regulation and otherwise."¹⁵⁰ He was also directed to appoint special agents to audit the books, accounts, and returns of all officers holding public money. Congress established internal checks as well. An officer other than the principal custodian at each depository was required to provide reports on the status of the public money in their location to the Secretary of the Treasury quarterly, or more frequently as the Secretary should direct.¹⁵¹

Van Buren's legislative victory was short lived. The Whigs won the presidency and a slim majority in both houses of Congress in the elections of 1840. The new Congress promptly repealed both the Independent Treasury statute and the 1836 statute regulating the use of state banks as depositories.¹⁵² Having thus eliminated all statutory authority for the deposit of federal funds, Congress failed to create any substitute system. Clay's congressional Whigs would not settle for anything that did not look rather like the Bank of the United States, and President Tyler, a nominal Whig with Jeffersonian

147. See §§ 2-4, 5 Stat. at 386.

148. See *id.* § 5, 5 Stat. at 386.

149. Similar powers were given to the Postmaster General with respect to those funds that would be lodged in the Post Office. See *id.* §10, 5 Stat. at 388.

150. *Id.* §§ 14, 23, 5 Stat. at 389, 391.

151. See *id.* § 13, 5 Stat. at 388.

152. See Act of Aug. 13, 1841, ch. 7, 5 Stat. 439.

Republican sympathies, would not sign any bill creating an institution that did.¹⁵³ This put the Treasury back in the position of cobbling together some sort of depository and transfer system by using receivers of federal monies in the custom houses, land offices, and post offices, and contracting for services with state banks.

The elections of 1844 ushered in a more popular and effective president. Very early in his administration, James K. Polk confided to George Bancroft that he would do four things in his presidency that would make it successful and memorable: (1) he would lower the tariff; (2) he would recreate Van Buren's Independent Treasury; (3) he would acquire Oregon from the British; and (4) he would acquire California from Mexico.¹⁵⁴ He did them all.

The statute reestablishing the Independent Treasury, which Polk called the "Constitutional Treasury," and that subsequently came to be known as the "sub-Treasury," was virtually identical to the 1840 Legislation.¹⁵⁵ The title of "Receivers of Public Monies" in the prior statute was changed to "Assistant Treasurer's"—hence the "sub-Treasury" nomenclature.¹⁵⁶ This system remained in place in one or another form until superseded by the Federal Reserve System in the twentieth century.¹⁵⁷

The government now controlled its own money and could direct the activities of its depository agents by the simple expedient of issuing Treasury circulars. But the sub-Treasury system was not without its difficulties. One was that, outside of the special vaults that were constructed at the Treasury and the sub-Treasuries, receiving officers did not necessarily have any safe place to hold the government's funds. In 1854 the Treasury's Special Agent William M. Gouge¹⁵⁸ reported that there was no suitable building for the government "in

153. See generally PETERSON, *supra* note 12, 57-93.

154. See CHARLES SELLERS, JAMES K. POLK, *CONTINENTALIST: 1843-1846*, at 213 (1966).

155. See Act of Aug. 6, 1846, ch. 40, 9 Stat. 59 (providing for "better Organization of the Treasury, and for the Collection, Safe-Keeping, Transfer, and Disbursement of the public Revenue").

156. *Id.* § 3, 9 Stat. at 59.

157. Indeed, the sub-Treasuries continued as depositories of government reserve and trust funds of gold and silver after the federal reserve banks were created. See SEC'Y OF THE TREASURY, REPORT OF THE SECRETARY OF THE TREASURY RELATIVE TO THE UNITED STATES SUBTREASURIES AND THEIR RELATION TO THE FEDERAL RESERVE BANKS, H.R. DOC. NO. 64-1777 (1916).

158. William M. Gouge was no mere Treasury functionary. He was a newspaper and journal editor and author of a short history of money and banking in the United States, see GOUGE, *supra* note 109, and a number of other works on fiscal and monetary policy. Gouge was a hard money advocate and an early supporter of the independent Treasury system. See

which to deposit [sic] a dollar or a paper” in the whole of the Ohio valley.¹⁵⁹ Some custodians went to great, even comic, lengths to make the best of a bad situation. The Receiver of the Land Office in Jeffersonville, Indiana, hired a room adjoining the bar in the chief tavern of the town. The only entrance was through a passage requiring that the party entering the room crawl in on his hands and knees or bend over double. Inside was a store of silver lodged in boxes concealed in a wooden case that looked like a giant coffin. Gold was kept in an iron safe. Around the room a low gallery had been constructed. From this perch the Receiver could throw down stones and bottles on any intruders. Gouge reported that this diligent agent kept an ample supply of both, and that he also slept in the room with guns, pistols, and pikes.¹⁶⁰

Other custodians adopted the sensible – and illegal – practice of depositing their funds in a special account with a local bank. This, of course, compromised the divorce of the government from the banks that the 1846 Act was meant to effect. In 1857, Congress expanded the sub-Treasury and required that all receivers deposit their collections with one of the sub-Treasury depositories.¹⁶¹ In the panic of that year, as banks failed and suspended redemptions, the government, unlike its position in 1837, continued to discharge its obligations without “loss or embarrassment,”¹⁶² thanks to the Independent Treasury system.

Safety of government funds was, however, bought at a price. Transfers were not made as efficiently through the sub-Treasuries as through the banking system.¹⁶³ And while the divorce of the government from the banks meant that government deposits would not abet bank overexpansion of credit,

Dictionary of American Biography Base Set, American Council of Learned Societies, 1928-1936, available at <http://galenet.gale.com>.

159. WILLIAM M. GOUGE ET AL., REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES, S. EXEC. DOC. NO. 33-2, at 256 (1854).
160. See *id.* at 257.
161. See DAVID KINLEY, THE HISTORY, ORGANIZATION AND INFLUENCE OF THE INDEPENDENT TREASURY OF THE UNITED STATES 60 (1893).
162. *Id.* at 61-63 (quoting Sec’y of the Treasury Howell Cobb). President Buchanan also credited the Independent Treasury system with saving the government from suspending payments, as it had been compelled to do by the bank failures of 1837. See *The Banking System and the Sub-Treasury: Views of President Buchanan*, BANKERS’ MAG. & STAT. REG., Jan. 1858, at 530, 533.
163. A commentator in 1852 complained, “The scheme of a Sub-treasury, too, one of the greatest follies of the age, has had its effect in obstructing the free intercourse between the government and the people, and has rendered troublesome and difficult that which would otherwise be harmonious and easy.” *Government Finances*, BANKERS’ MAG. & STAT. REG., Sept. 1852, at 169, 169.

the panic of 1857 demonstrated that government control of its own funds could not prevent inflationary bubbles and their inevitable bursting. Moreover, because the government collected funds continuously, but made large payments of salaries and pensions only monthly or quarterly, its transactions alternately shrank and expanded the money supply without any necessary connection to the needs of commerce. The Independent Treasury system could thus undermine monetary stability as well as support it.¹⁶⁴

Notwithstanding these limitations, the sub-Treasury approach had much to recommend it. Government policy was no longer the potential hostage of a private commercial banking institution. And the Treasury was permitted to pursue safety and soundness¹⁶⁵ without significant political meddling or reliance on the weak reed of state banking regulation. Control of government funds was lodged firmly with the national government, and the Treasury apparently operated as a politically independent custodian. The disastrous experience with the 1836 Distribution Act seems to have convinced Congress to leave the allocation of deposits and the regulation of transfers to the Treasury.¹⁶⁶

Moreover, on the way to this result, the Treasury demonstrated that, even without explicit statutory authority, it could piece together a minimally workable system by contract, instructions to federal receivers of funds, and circular instructions to state banks that the latter could ignore only at the risk

164. See generally Timberlake, *supra* note 129, at 120-216 (discussing the relation of the Independent Treasury system to business and financial crises).

165. In Timberlake's opinion, "the institution of the Independent Treasury as it developed prior to the Civil War anticipated most of the monetary policies more lately practiced by the Federal Reserve System." *Id.* at 92.

166. Negatives are difficult to demonstrate, but Congress passed no new legislation during this period that sought to control the discretion of the Secretary of the Treasury in operating the Independent Treasury system. A review of the materials in the U.S. Congressional Serial Set, including all reports from the Treasury from the years 1846 through 1861, the *Congressional Globe*, *Hunt's Merchants' Magazine and Review*, the *Bankers' Magazine and Statistical Register*, secondary literature from the period failed to unearth evidence of congressional intrusion into the Treasury's independence. To be sure, Congress had a lively interest, as always, in the government's money. It solicited reports from the Secretary of the Treasury regarding measures taken to prevent frauds on the revenue, see S. EXEC. DOC. NO. 31-79 (1st Sess. 1850), on the manner of keeping the revenue, see H.R. EXEC. DOC. NO. 33-42 (1st Sess. 1854), and on persons appointed as designated depositaries pursuant to the Sub-Treasury Act who performed those duties without compensation, see S. EXEC. REP. NO. 30-14 (1st Sess. 1849). The Treasury also provided yearly reports on the state of the government's finances and the conditions of the banks. See, e.g., SEC'Y OF THE TREAS. R.J. WALKER, LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING HIS ANNUAL REPORT ON THE STATE OF THE FINANCE, H.R. DOC. NO. 29-7 (1st Sess. 1846).

of losing federal deposits. This was hardly administration at its finest,¹⁶⁷ but it surely justifies McFaul's ironic conclusion that ultimately Jackson's war with the Bank, far from promoting The Democracy's small government agenda, substantially strengthened the central government's administrative capacities. The United States emerged not just with a stronger presidency, but also with a stronger national government. Jacksonian Democrats believed the first promoted electoral democracy as they understood it; the latter was hardly a part of their political creed.

The sub-Treasury system also reveals a government increasingly attentive both to matters of administrative institutional design and to the need for administrative discretion. The disastrous legislative distribution scheme for federal funds was replaced with Treasury judgment concerning where funds should be kept. The potential for inefficiency and confusion should the Assistant Treasurers adopt different practices concerning transfers of government funds was avoided by giving the Secretary of the Treasury explicit authority to regulate depositary and transfer policy. And elaborate checks and balances were provided to assure that federal depositary agents were accountable both to external auditors and to on-site officers who were required to make continuous reports to the Secretary of the Treasury. The 1840 statute establishing the sub-Treasury system thus both echoed the attention to governmental organization exhibited by the reorganization legislation passed during Andrew Jackson's two terms and anticipated reforms that would be made necessary by the new system of rotation in office.

II. ROTATION IN OFFICE

Andrew Jackson's attack on the entrenched officials of the federal government was motivated by the same political considerations that supported his war with the Bank. He viewed the system that he had inherited as undemocratic. Both the Federalists and the Jeffersonian Republicans had selected officeholders largely on the basis of "character" or "standing in the community." Although Jefferson had engaged in partisan removals to establish parity between Federalists and Republicans in the public service, the general practice from 1789 to 1829 was to retain appointees in office unless demonstrably incompetent or corrupt. In some sense this produced a "career service" of experienced administrators, which may have contributed to the

167. For a skeptical treatment of the effectiveness of the sub-Treasury system, see BENSEL, *supra* note 60, at 240, 244. By the 1870s the Treasury's regulation of the money markets came in for constant criticism, with the spoils system often blamed for its incompetence. *See id.* at 275-81.

efficiency of federal administrative operations. It unquestionably produced a relatively stable class of officers, with sons sometimes following their fathers into the same positions.¹⁶⁸

A. Rotation's Democratic Rationale

Jackson attacked this system in his famous first annual message to the Congress:

There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. . . . Office is considered as a species of property, and government rather as a means of promoting individual interests than as an instrument created solely for the service of the people. . . . The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience. . . .

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.¹⁶⁹

In short, government was to serve the people and rotation in office was a means by which that service could be secured. The aristocracy of office that had grown up in the first three decades of the Republic was to be no more.

There is no reason to believe that Jackson was insincere when articulating his reasons for instituting rotation. Many others had voiced similar rationales for a system of rotation or limited terms of office holding. As Carl Russell Fish's classic study demonstrates,¹⁷⁰ public-spirited rationales for rotation can be traced back to Dutch, English, colonial, and state practices.¹⁷¹ Prominent

168. See CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 75-78 (1905); WHITE, *supra* note 2, at 300-01.

169. Andrew Jackson, First Annual Message (Dec. 8, 1829), in 2 RICHARDSON, *supra* note 29, at 1005, 1011-12.

170. FISH, *supra* note 168, at 52-104.

171. The Dutch system of partial retirement was adapted for use in the colony of New York under the laws of the Duke of York: four of the eight overseers (selectmen) in each town would retire each year, and one of these retiring overseers would be selected to assume the job of constable for that year. See Albert E. McKinley, *The Transition from Dutch to English*

among them are Jackson's reasons—that is, avoiding autocracy and corruption, and eliminating any sense of property in office. Other rationales had included: educating citizens in the responsibilities of governance;¹⁷² weakening executive power (where appointments required approval of the legislature); assuring the loyalty of officials to the elected government;¹⁷³ and avoiding the need to assign cause to rid the government of ineffective personnel.¹⁷⁴

The results of Jackson's rotation policy, which were eagerly carried forward by his successors, both Whig and Democratic, were not so happy. Leonard White describes the consequences of rotation as including a loss of effectiveness of the public service, the loss of the prestige previously attached to offices, and the more or less blatant use of administrative officials for partisan advantage in elections.¹⁷⁵ By the 1850s the partisan political obligations of office holders were so routinized that political contributions were collected on a schedule that looked like progressive taxation. Office holders paid in accordance with the size of their salaries.¹⁷⁶

Yet, the so called "spoils system"¹⁷⁷ was not utterly destructive of the integrity of the public service. If tax collectors were abusive, the mails failed to

Rule in New York: A Study in Political Imitation, 6 AM. HIST. REV. 693, 712 (1901). Systems of rotation also appeared in New England states during the same period. See FISH, *supra* note 168, at 80.

172. See FISH, *supra* note 168, at 81 (explaining how Elbridge Gerry adapted Jackson's argument into a broader argument about the merits of educating officers in the virtues of the people).

173. Jackson's controversial removal of Treasury Secretary William Duane in 1833, of course, fits in this category. See PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 39 (1958).

174. Fish attributes this rationale to the adoption of term-limits for governor and a variety of other officers by the majority of states by 1830. See FISH, *supra* note 168, at 81-82.

175. WHITE, *supra* note 2, at 325-43. In exchange for the opportunities afforded by public office to attain wealth and political power, voting allegiance was expected of public servants under the system of rotation, as was the provision of considerable resources to their political party in the form of time, energy, and money. See VAN RIPER, *supra* note 173, at 46. Additionally, newspaper editors were appointed to public office with increasing frequency during the Jacksonian Period with the expectation of sympathetic partisan news coverage. See *id.* at 47-48.

176. WHITE, *supra* note 2, at 335.

177. This nomenclature is credited to Senator M.L. Marcy, who praised the system on the Senate floor in these words:

It may be, sir, that the politicians of the United States are not so fastidious as some gentlemen are, as to disclosing the principles on which they act. They boldly preach what they practise. When they are contending for victory, they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim, as a matter of right, the advantages

be delivered, or pensions were not paid, the political party in power would pay for it at the next election. Party officials hardly had an interest in selecting incompetents or thieves.¹⁷⁸ Moreover, while rotation was substantial, it was never complete. Some men who knew their jobs were retained so that the government's business could be carried on with an acceptable level of efficiency. While Nathaniel Hawthorne comically described his lazy, incompetent, and superannuated colleagues in the Customs House at Boston, he also noted that important posts, such as the Surveyor, were awarded without regard to political services and describes with a respect bordering on awe a man he called "a man of business," who knew the customs rules inside out and who routinely remedied the errors of his politically appointed brethren.¹⁷⁹

There were also democratic gains from rotation. It was surely correct, as Jackson observed, that continuance in office had created a sense of property rights in office that were antithetical to the pursuit of the public interest. And the shrewd political operative, Martin Van Buren, defended the spoils system as essential to a democratic politics that simultaneously featured party competition and widespread participation by the populace.¹⁸⁰ Fish gave a normative justification for the spoils system that closely tracked Van Buren's. For the mass of the people to influence the ordinary operations of government they must be organized. Having a party is not enough; the party must be continuously active in order to shape the agenda of government and to bring out the vote on issues of moment. The continuous effort of a party organization requires resources; and if influence is not to be limited to the rich and well-born, the party must supply those resources. Politics must be made to

of success. They see nothing wrong in the rule, that to the victor belong the spoils of the enemy.

8 REG. DEB. 1325 (1832).

178. Of course, they sometimes did. The poster child for thievery was one Samuel Swarthout, Collector of Customs for the Port of New York. Swarthout served from 1830 to 1838, after which he decamped for England having pillaged the Treasury of over \$1.25 million—a sum equal to approximately one fifth of the government's annual budget. See H.R. DOC. NO. 25-13, at 25 (1838).
179. NATHANIEL HAWTHORNE, *The Custom-House: Introductory to "The Scarlet Letter,"* in THE SCARLET LETTER 12, 23-24 (Washington Square Press 1955) (1850). Hawthorne's anecdotal account represented a general practice. Senior personnel were often retained to provide continuity and expertise. BERNARD S. SILBERMAN, CAGES OF REASON: THE RISE OF THE RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES AND GREAT BRITAIN 244 (1993).
180. MARTIN VAN BUREN, INQUIRY INTO THE ORIGINS AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES (1867). For a brief description of Van Buren's views, see HOFSTADTER, *supra* note 15.

pay. The only way that it can is for the civil service to provide the payroll for the party leadership.¹⁸¹ In Fish's words, "[P]resent appreciation of the evils of the spoils system should not blind us to the fact that in the period of its establishment it served a purpose that could probably have been performed in no other way, and that was fully worth the cost."¹⁸²

B. Objectification of Office

While today we view the insertion of partisan politics into the routine administrative operations of government as a formula for inefficiency, administrative favoritism, and, possibly, lawlessness, the creation of the spoils system in Jacksonian America had an almost opposite symbolic effect. As Jackson had maintained, offices belonged to the public, their inhabitants were temporary placeholders. When offices became impermanent and open to all, offices were separated from officeholders. The government's actions were thereby depersonalized and objectified. Administrative actions were the actions of the United States, not the personal actions of longtime incumbents.

Objectification of office is, of course, one step toward the bureaucratization of office holding.¹⁸³ And, bureaucratization, in accordance with Max Weber's classic analysis, is a movement toward both efficiency and formal legality. Could it be that the spoils system was a movement toward the rule of law in American administration?

The answer seems to be both no and yes. In a nonbureaucratized system of administration, officers tend to have authority because of their status or standing in a community rather than because of their expertise. Offices are defined in terms of general responsibilities rather than functionally differentiated ones, and officials have broad discretion to act in accordance with community values rather than in accordance with well-developed rules. Private and public functions of officials are perceived to be commingled rather than sharply separated, and compensation often comes from fees,

181. See FISH, *supra* note 168, at 156-57.

182. *Id.* at 157. Gerald Leonard's more recent account, LEONARD, *supra* note 26, similarly links the acceptance of parties as an essential element in America's originally antiparty constitutional ideology to the recognition of how party organization promoted both electoral democracy and government that was close to the people.

183. See Max Weber, *The Presuppositions and Causes of Bureaucracy*, in ROBERT K. MERTON ET AL., *READER IN BUREAUCRACY* 60, 64 (1952) ("The purely impersonal character of office work, with its principal separation of the private sphere of the official from that of the office, facilitates the official's integration into the given functional conditions of a fixed mechanism based upon discipline.").

commissions, and indirect emoluments, rather than from fixed salaries for full-time performance of public duties.

The early American reliance on character or status for office holding certainly suggested this nonbureaucratized model of administration. Moreover, many officials were paid by fees and commissions rather than by salary. On the other hand, federal officials were never given general jurisdictions like those that pertained to a local justice of the peace, a sheriff, or a county judge. And while discretion under early federal statutes was sometimes broad, superior officers tended to circumscribe that discretion by the formulation of administrative rules.¹⁸⁴

The Jacksonians inherited a system that exhibited some characteristics of personal authority and some characteristics of bureaucratic organization. Moreover, the time seemed ripe for movement in bureaucratic directions. The economy was becoming more specialized and complicated. And the democratization of politics was moving in the direction of a demand for formal legal equality of citizens. If Weber is correct, effective administration in this context—that is, administration that is both efficient and formally lawful—could only be accomplished by officials who were detached, objective, expert, and legally accountable.¹⁸⁵

But as William Nelson has argued, the United States by 1830 might best be understood as having the necessary but not the sufficient conditions for bureaucratized administration.¹⁸⁶ So long as the emphasis in American government was on majority self-rule, administration could remain organized around political parties. The authority of the majority party, and appointment through the party machinery, would serve as a substitute for the older status-based authority system. In a spoils system both expertise and objectivity are suppressed by the demands of party loyalty and rewards for partisan political service. Hence, on Nelson's view, bureaucratization, and with it formal legality in administration, developed in the United States only after the Civil War, when the emphasis on majority self-rule was displaced by concerns for the legal protection of minority rights.

Yet, this seems not to be the whole story either. Matthew Crenson has argued that “the chief administrative legacy of the Jacksonian's was

184. See Mashaw, *supra* note 21, at 1304-18; Mashaw, *supra* note 37, at 1660-73, 1705-08.

185. On Weber's views, see Talcott Parsons, *Introduction to MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 3, 73-74 (A.M. Henderson & Talcott Parsons trans., 1947); and Weber, *supra* note 183.

186. NELSON, *supra* note 60, at 4-5.

bureaucracy.”¹⁸⁷ Crenson’s argument focuses on several developments during the Jacksonian period. First, departmental reorganization: during the first forty years of the Republic there were only two significant reorganizations, but during Jackson’s two terms virtually every federal department was reorganized at least once.¹⁸⁸ And, according to Crenson, the “capacity to reorganize implies an ability to deal with administrative operations in formal and abstract terms. . . . Administrative functions have to be abstracted from the people who performed them before they can be divided, combined, or redistributed.”¹⁸⁹

With reorganization much that was informal became formal. Administrative jurisdictions and responsibilities were explicitly defined; hierarchies became more elaborate as agencies were divided into specialized bureaus and offices. Moreover, executive control of subordinates increasingly relied on systematic audits, investigations and reporting systems, rather than on personal loyalty and personal supervision.¹⁹⁰ If Crenson is correct, there was substantial development in the Jacksonian era of what I have called elsewhere “the internal law of administration,” that is, rules, routines, and organizational checks and balances that promoted bureaucratic adherence to effective and consistent implementation of statutory mandates.¹⁹¹ And in an era of limited judicial review of administrative action,¹⁹² this internal law was, even more than today, a crucial determinate of administrative legality. But exactly how did reorganization promote legality?

C. Bureaucracy at the Post Office

The Post Office is an important case in point. Leonard White devotes an entire chapter of his administrative history of the Jacksonian period to the “Decline of the Post Office.”¹⁹³ White’s description is based on investigations by both House and Senate committees in 1834 and 1835.¹⁹⁴ Congress had become concerned because of deficits in the Post Office accounts. Historically the Post Office had been essentially self-sustaining. It financed its activities out of postal revenues, often ran a surplus, and plowed the surplus back into

187. CRENSON, *supra* note 36, at 4.

188. *Id.* at 3.

189. *Id.* at 3-4.

190. *Id.*

191. See Mashaw, *supra* note 37, at 1737.

192. See *infra* Section IV.B.

193. WHITE, *supra* note 2, at 251-69.

194. S. DOC. NO. 23-422 (1834); S. DOC. NO. 23-86 (1835); H.R. REP. NO. 23-103 (1835).

expanded service. That was certainly the happy situation under the leadership of Postmaster General John McClane from 1823 to 1829.¹⁹⁵ But by 1835, under the stewardship of Major William T. Barry, the department was several hundred thousand dollars in debt (the exact figure could not be determined),¹⁹⁶ and a Senate committee estimated that Barry had, in four years, wasted over three million dollars.¹⁹⁷

The most substantial losses had resulted from maladministration in the letting of contracts for the carriage of mail and in their administration after the contracts were let. By statute contracts were required to be let by competitive bidding. But under Major Barry collusion between the contractors and Post Office personnel had made competitive bidding into a sham. Unreasonably low “straw bids” were put in by fictitious bidders, or by bidders incapable of posting the necessary bond to secure performance. Post Office personnel would then disqualify these winning “low bids,” and let the contract to the next highest bidder, who just happened to be a Post Office favorite.¹⁹⁸ The government might not have lost much money on these contracts with the second lowest bidder, had the contracts been performed as bid. Often they were not. Sometimes the favored bidder actually submitted two bids—one for services as advertised by the Department, the second in the form of an “improved bid” proposing better service at a higher price. The improved bid was then accepted, thus eliminating all competition.¹⁹⁹

Even if the contract was let through competitive bidding, the government was not necessarily protected. The Department also accepted combined bids for multiple routes.²⁰⁰ Because these combined bids by large contractors could not be compared with individual bids for specific routes, the contract officer could declare a low bid at his own discretion. In addition, contractors often found that their services went beyond those that were specified in the contract.

195. According to the House Report, the General Post Office had a positive available balance of \$329,723.51 on December 31, 1829. H.R. REP. NO. 23-103, at 9 (1835).

196. *See id.* at 1.

197. WHITE, *supra* note 2, at 266.

198. *See* CRENSON, *supra* note 36, at 94.

199. H.R. REP. NO. 23-103, at 14-15 (1835). Crenson describes how in one particularly egregious example, the postal entrepreneur James Reeside submitted a bid of \$40 for postal service between Hagerstown, Md., and McConnellstown, Pa., and a \$99 bid for “improved service” for this route. After being awarded the contract, he claimed that the figures submitted were the product of clerical errors and that the intended figures were \$1400 and \$1999—the contract was eventually kept at the “improved” rate of \$1900. *See* CRENSON, *supra* note 36, at 94-95; *see also* S. DOC. NO. 23-422, at 11-12 (1834).

200. H.R. REP. NO. 23-103, at 14.

They routinely claimed extra allowances, which, in Barry’s administration, seemed to have been just as routinely allowed.²⁰¹ The House report found that in four years Barry had managed to authorize over \$1.5 million in extra allowances.²⁰²

The awarding of contracts without competition probably cost the government more than the Post Office’s other failings, but other failings were also prominent. The Department neglected to supervise contracts in ways that required the contractors actually to perform them. It made extravagant contracts for advertising of bids to favored printers.²⁰³ And it allowed large increases in personnel in order to increase the Department’s already extraordinary patronage possibilities.²⁰⁴ Even the Postmaster General’s partisan friends, the Democrats on the House committee, concluded that “[t]he finances of this department have hitherto been managed without frugality, system, intelligence, or adequate public utility.”²⁰⁵ Major Barry resigned and Amos Kendall, one of General Jackson’s closest advisors, was brought in to clean up the mess.²⁰⁶

Both Crenson and White describe Kendall’s reforms in some detail.²⁰⁷ The basics of Kendall’s system were relatively simple—a functional division of authority that created checks and balances, both within the central office in Washington and in the widely distributed offices of assistant postmasters around the country. Kendall intended “to make postmasters and contractors feel that [the Department’s] eye was constantly upon them, not only collectively, but individually.”²⁰⁸ At the national level Kendall made it his policy to separate the three major functions of (1) making the postal system

201. See *id.* at 12–13. James Reeside was apparently particularly adept at extracting money from the Post Office, as evidenced by his increasing compensation for running the mails between Bedford and Blair’s Gap and Cumberland: without any additional bidding process he was able to increase his payment for these routes from \$275 annually in 1831 to \$7411.72 in 1834. See CRENSON, *supra* note 36, at 97.

202. H.R. REP. NO. 23-103, at 42-43.

203. And advertised postal contracts in a statutorily impermissible and unnecessarily large number of newspapers. See *id.* at 42.

204. WHITE, *supra* note 2, at 260-67.

205. H.R. REP. NO. 23-103, at 50.

206. On Kendall’s career generally, see DONALD B. COLE, *A JACKSON MAN: AMOS KENDALL AND THE RISE OF AMERICAN DEMOCRACY* (2004). On his functions as the chief strategist and patronage dispenser of the Democratic Party while serving as Postmaster General, see DOROTHY GANFIELD FOWLER, *THE CABINET POLITICIAN: THE POSTMASTERS GENERAL: 1829-1909*, at 21-39 (1943).

207. See CRENSON, *supra* note 36, at 104-11; WHITE, *supra* note 2, at 270-283.

208. AMOS KENDALL, *AUTOBIOGRAPHY OF AMOS KENDALL* 341 (William Stickney ed., 1872).

work through contracts and regulations, (2) making payments of money to get the job done, and (3) auditing and settling the accounts of the various post offices. Indeed, he did not believe that even he, as Postmaster General, should have supervisory authority over the settlement of accounts, if he also supervised operations and payments.²⁰⁹

Congress obliged Kendall by passing a major Post Office reorganization act in 1836.²¹⁰ Henceforth, the Post Office would not be self-funding. It transferred its receipts to the Treasury and received annual appropriations like other departments.²¹¹ Perhaps more crucially, an Auditor of the Treasury for the Post Office Department was appointed to oversee all charges against the Department. No deduction from the appropriated funds for the payment of expenses was valid until submitted for examination and settlement by the Treasury Auditor.²¹² Kendall further differentiated the functions of the central office by establishing an Appointments Office to supervise the location of new post offices and the selection of postmasters; a Contract Office to approve and oversee contracts; and an Inspections Office to monitor the performance of mail contracts and the behavior of postmasters.²¹³

Keeping the Department's eye on local postmasters was a more difficult administrative task. The General Land Office had much earlier established a system of independent and unannounced inspections of local offices by personnel dispatched from Washington.²¹⁴ That system could work for roughly three score local land offices, but not for thousands of local post offices. The principal difficulty with local postmasters was delinquency in balancing their accounts with the Department. Kendall's idea was to have the contractors collect their payments directly from the local post offices along the routes that they served. The contractors were then required to submit quarterly reports to the Department showing the amount that they collected from each office.

209. CRENSON, *supra* note 36, at 108.

210. See Act of July 2, 1836, ch. 270, 5 Stat. 80 (intending "to change the organization of the Post Office Department and to provide more effectually for the settlement of the accounts thereof").

211. See *id.* § 3, 5 Stat. at 80.

212. *Id.* §§ 4, 8, 5 Stat. at 80, 81. Kendall was not the principal author of the 1836 Reorganization Act, which also explicitly prohibited many of the contracting practices that had led to the waste of government funds. See *id.* §§ 25-29, 5 Stat. at 86, 87. But the statute followed, in part, his announced reorganization designs and he assisted in drafting the bill. See RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 247-48 (1995).

213. WHITE, *supra* note 2, at 280.

214. See Mashaw, *supra* note 37, at 1719-21.

Similarly the local post offices were directed to report how much they had paid out and to whom. Presumably the contractors would be energetic in getting their payments and most of local post office's receipts would go to honor contractors' drafts. Less post office money would be in the hands of recalcitrant local postal officials, and the books could be checked in Washington by simply comparing contractors' reports of collections against postmasters' reports of payments.²¹⁵

Performance by contractors was checked by adding a new set of reports from the local postmasters. Those reports provided a record of each contractor's service during the preceding quarter, including timeliness, the means of transport and any infractions of departmental rules. Fines were required to be levied against contractors for every infraction.²¹⁶ With postmasters reporting on contractors and contractors reporting on postmasters, Kendall hoped to have created a self-policing system. Evasion and collusion were obviously still possible, but the improvement in operations was substantial.²¹⁷

The Post Office example lends credence to Crenson's claim that Jacksonian administration was moving from reliance on reputation, status or personal relations, to reliance on bureaucratic systems to assure integrity in administration. Indeed, Amos Kendall thought it unwise to trust even himself, and his reorganization plan, aided by congressional legislation, moved the Department toward functionally differentiated roles and systematic checks and balances to ensure proper behavior.²¹⁸

These developments were replicated elsewhere. As Crenson claims, at the beginning of the Jacksonian era the organization of federal departments was much as it had been in 1800. At the capital clerks aided the Secretary, and field offices were established to carry out the government's business as and where necessary. Virtually all action was taken in the name of the Secretary, who often had to sign and seal every official document personally. By 1860 there were not only more departments, they were organized into bureaus which carried out specific functions, often almost independently of the department in

215. CRENSON, *supra* note 36, at 110.

216. *Id.* at 111.

217. See WHITE, *supra* note 2, at 278.

218. Kendall reinstated a system of organization by function, with clearly differentiated functional roles for postal assistants, and restructured revenue handling so that all money was paid directly into the U.S. Treasury and annual appropriations were made by Congress based on estimated expenditures. See *id.* at 280.

which they were lodged.²¹⁹ Departments and bureaus had inspection systems to assure the integrity of field activity. And they had begun to compile and index records so that the rules and practices of the departments could be made available to those who needed to know them.²²⁰ Custom and personality still mattered, they always will, but system was increasingly entering the public service.²²¹ Action according to law was hardly assured, but it was made more probable.

D. The Limits of Reform

Other aspects of a full-fledged bureaucratic system, however, were only beginning to develop. Many field personnel were still paid by fees and commissions, although they were now more firmly under the control of central office personnel, all of whom were salaried full-time officials.²²² And under the spoils system, selection into much of the public service was certainly not based on a merit system. Examinations had long been used for selection of Army and Navy surgical personnel, West Point cadets, and naval midshipmen; and, by the 1850s examinations were being used for clerks in a number of departments.²²³ But outside of the military, these examinations were applied

219. For discussion of the development of the bureau system and its consequences, see *id.* at 534-40. The creation of bureaus within departments, while leaving existing hierarchies in place, elevated principal clerks to the title of bureau chief or commissioner, granting them greater autonomy and making room for additional levels of bureaucracy beneath them. See *id.* at 534-35. Such developments were not always initiated by Congress. The War Department internally created a "pension office" in 1826, with a nominal clerk serving as its commissioner. Despite the clerk's elevated responsibilities including the disbursement of nearly \$2.5 million, the pension office was not officially recognized by Congress as a permanent office until 1849. *Id.* at 536; see H.R. DOC. NO. 22-34, at 1-3 (1833).

220. See WHITE, *supra* note 2, at 540-48. For example, the Chief Clerk of the General Land Office recommended to Congress that the Surveying Bureau be charged with superintending the arrangement of field notes and reviving the book of quantities which recorded the quantities of land surveyed for each township. See S. DOC. NO. 24-216, at 10 (1836). And the Supervisor of the Bureau of Private Land Claims in the Land Office, citing a lack of indexing and disorganization of documents, encouraged Congress to authorize the transcription of all reports to Congress adjudicating private land claims. See *id.* at 12-13.

221. Indeed, strong bureaucratic organization had long been the tradition in the War Department, particularly in the bureau that expended the lion's share of funds, the Quartermaster's Department. For extended discussion, see MARK R. WILSON, *THE BUSINESS OF CIVIL WAR* 34-65 (2006).

222. WHITE, *supra* note 2, at 376-93.

223. Examinations for the military academies originated in 1818 (West Point) and 1819 (midshipmen) and for army and navy surgeons in 1814 and 1824. See VAN RIPER, *supra* note 173, at 52.

after the fact to assure that appointees were not wholly incompetent. Moreover, examinations were under the control of the departments, not a separate civil service commissioner.²²⁴ And, of course, under "rotation," neither experience nor effective performance was a guarantee of security of tenure, save in the military and the central offices of the two most important departments, Treasury and War.²²⁵ Finally, hierarchal control of field offices from the capital was far from perfect.

Malcolm Rorbough's description of administration in the land offices from 1830-1837 provides vivid illustrations of this latter problem.²²⁶ From Thomas Jefferson's presidency forward Congress was as intent on surveying and selling the public lands as settlers and speculators were eager to buy them. Jacksonian Congresses wanted particularly to assist the little guy, the settler, and in the early 1830s passed the first general preemption acts giving persons illegally occupying public lands preemptive rights to acquire them. For the local land offices this meant a determination of whether a settler claiming preemption had in fact been in possession and cultivating the land prior to the relevant preemption act. Making these determinations became an administrative nightmare.

The General Land Office attempted to regularize the process by circular instructions. But the instructions were differently interpreted in different land offices, often based on local and congressional pressures. Some local officials admitted that while they would like to follow central office rules, they were simply unable to do so because of resource constraints and local resistance. Fraud was practiced wholesale, and local land clubs banded together to assure that no neighbor's preemption claim would be denied and the land sold to an outsider.²²⁷ Speaking of the influence of land clubs on auctions, Commissioner Hayward of the General Land Office lamented, "When a large population stands thus affected it is futile to attempt to counteract such combinations . . ."²²⁸

Similar local opposition undermined the enforcement of the postal statutes. Abolitionists in New York and Boston sent tens of thousands of pamphlets into the South through the postal system. Fearing slave insurrection, local citizens in Charleston, New Orleans, and Norfolk broke into the post office buildings,

224. *Id.* at 363-75.

225. WILSON, *supra* note 221, at 40, following Leonard White, describes this as a "dual system" of appointments and tenure.

226. The following description is based on ROHRBOUGH, *supra* note 37, at 200-70.

227. On the land clubs also see CRENSON, *supra* note 36, at 152-56.

228. *Id.* at 155-56.

seized the pamphlets, and burned them. Hearing these reports, the postmaster in New York refused to transmit any further abolitionist literature until he received instructions from Washington.²²⁹

While fearlessly stamping out corruption in the financial affairs of the post office, Amos Kendall was more circumspect with respect to this political controversy. He informed the postmaster in Charleston that the latter had no legal authority to exclude any newspapers from the mails or to prohibit their delivery because of their contents. On the other hand, said Kendall, "We owe an obligation to the laws, but a higher one to the communities in which we live, and if the *former* be perverted to destroy the *latter*, it is patriotism to disregard them."²³⁰

Kendall then sought instruction from the President, who provided shrewd political advice. Jackson was clear that as the executor of the law the Post Office had no power to prohibit transportation in the mail of anything that the statutes authorized. Hence he suggested to Kendall that the papers should be delivered, but only to persons who specifically subscribed to them. In addition Jackson suggested that the postmasters should take down the names of the subscribers and have them published in the local newspapers. Local pressure, Jackson was certain, would thereby suppress the pernicious influence of these abolitionist rabble rousers. Kendall issued these instructions which, while perhaps technically within the law,²³¹ were designed to permit local sentiment to undermine federal administration.

229. The description of the abolitionist literature controversy here follows Crenson. See *id.* at 149-152. See W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE, 1830-1860* (1938), for a much fuller description.

230. Amos Kendall, *The Incendiaries*, NILES' WKLY. REG., Aug. 22, 1835, at 448.

231. Whether the President's suggestion was technically within the law is itself doubtful. The Postal Reorganization Act of 1836 contained a prohibition on detaining any matter in the mails with the intent "to prevent the arrival and delivery of the same to the person or persons to whom [it] . . . may be addressed or directed . . ." Postal Reorganization Act of 1836, ch. 270, §32, 5 Stat. 80, 87. The statute did not presume that recipients of mailable matter needed to subscribe to a specific publication to have it directed to them. Nevertheless, as late as 1857 the Attorney General took the position that a principle of maintaining the public peace could override the rule that the mail must be delivered. Responding to a complaint concerning the failure of the Deputy Postmaster at Yazoo City, Mississippi, to deliver a copy of a Cincinnati newspaper, Caleb Cushing wrote:

On the whole, then, it seems clear to me that a deputy post-master, or other officer of the United States, is not required by law to become, knowingly, the enforced agent or instrument of enemies of the public peace, to disseminate, in their behalf, within the limits of any one of the States of the Union, printed matter, the design and tendency of which are to promote insurrections in such State.

Southern resistance to the delivery of abolitionist literature by the Post Office mirrored northern resistance to the implementation of the fugitive slave laws. Commenting on the effectiveness of the Fugitive Slave Statute of 1793²³² in 1850, Senator Mason said that it was "just as impossible to recover a fugitive slave now" in Pennsylvania or Ohio "as it would be to bring him up from the depths of the sea."²³³ The principal problem was that state officials in the North and in free soil territories would not implement the original Fugitive Slave Statute, and there were too few federal circuit or territorial courts to do the job. In an attempt to keep the peace and maintain the union, Congress adopted a much stronger version of the Fugitive Slave Act.²³⁴ The 1850 Act authorized circuit court judges and superior court judges in the organized territories to appoint sufficient numbers of "commissioners" to provide "reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act."²³⁵ The statute also contained substantial penalties for federal marshals who failed to carry out their duties under the Act and for private citizens who interfered with its enforcement.²³⁶ Even so resistance continued at a sufficiently high level to inflame southern passions,²³⁷ and in some states, such as Wisconsin, was articulated by the legislature in terms that precisely paralleled Calhoun's South Carolina doctrine of state nullification.²³⁸ It was not until after the Civil War that Congress was prepared to oppose sectional resistance by constituting a specialized agency, the Freedman's Bureau, to enforce its will rather than relying on the traditional remedy for failed enforcement of federal law, simple enhancement of judicial authority.

What then of Matthew Crenson's thesis that the spoils system, born of a commitment to democracy, instead promoted bureaucracy? The record is surely mixed. For the Jacksonians, as for any governing coalition, on large questions politics often dominated administration. When the chips were down, impersonal and objective administration could be sacrificed to the needs of the party or to the insistent demands of local sentiment. And even were that not so,

8 Op. Att'y. Gen. 489, 501 (1857).

232. Ch. 7, 1 Stat. 302.

233. CONG. GLOBE, 31st Cong., 1st Sess. 234 (1850).

234. Act of Feb. 12, 1850, ch. 60, 9 Stat. 462.

235. *Id.* § 3, 9 Stat. at 462.

236. *Id.* §§ 5, 7, 9 Stat. at 462-63, 464, 465.

237. SMITH, *supra* note 14, at 208-214. On the debates leading up to the adoption of the 1850 Statute, see CURRIE, *supra* note 28, at 184-94.

238. See BERNARD SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877, at 105-06 (1973).

faithful execution of the laws was no easy task. Congress, as usual, was extravagant in its criticism of administrative failures and parsimonious in providing administrative resources.²³⁹ Nevertheless, Crenson is certainly correct that Jacksonian administration made progress toward regularizing and bureaucratizing administration and assuring administration in accordance with law. As we have seen, there was administrative success as well as failure, and both Congress and federal administrators supported organizational innovations to reform and regularize administration.

Moreover, in one instance, the administrative system created by the Steamboat Safety Act of 1852, federal administration took giant steps toward modern techniques of regulatory administration. In that legislation Congress created a quasi-independent board; gave it broad rulemaking, licensing, and adjudicatory authority; and allowed it to carry out its functions based on the best available scientific understanding of the problems of steamboat safety. The origins and operation of that statutory scheme hold an interest far beyond the limited attention that they have been given in the literature on the development of the American administrative state.

III. REGULATING STEAMBOATS

The passage of the Interstate Commerce Act in 1887 has a strong hold on the American legal imagination. It is conventionally understood to mark the starting point for significant national regulation of interstate commerce and the rise of the American administrative state.²⁴⁰ As I have argued elsewhere, this conventional view is, at best, incomplete. It ignores both the significant growth of administrative institutions²⁴¹ and a number of national regulatory initiatives that date from the earliest years of the Republic.²⁴² But none of these early

239. See ROHRBOUGH, *supra* note 37, at 258-63; *see also* WHITE, *supra* note 2, at 143-62 ("On the whole, however, the record of Congress in the field of administration was a record characterized by delay, indifference, partisanship, and reluctance to provide the resources for effective work.").

240. Among the authorities taking this conventional view, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439 (2d ed. 1985); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189 (1986); and Richard J. Stillman II, *The Constitutional Bicentennial and the Centennial of the American Administrative State*, 47 *PUB. ADMIN. REV.* 4 (1987).

241. These developments are explained in some detail in Mashaw, *supra* note 21; and Mashaw, *supra* note 37.

242. Statutes regulating seamen's contracts, licensing vessels in the coastal and foreign trade, and regulating the exportation of subquality goods are briefly described in Mashaw, *supra* note

regulatory schemes was as innovative, indeed downright modern, as Congress' regulation of the safety of passenger carriage by steamboat. Beginning in 1838 and carried forward in multiple statutes thereafter, Congress launched a regulatory enterprise that persisted well into the twentieth century.²⁴³

The steamboat inspection system was innovative along three dimensions: Legally, it wielded the national commerce power to regulate matters of personal safety that were conventionally addressed through the police power of the states. Scientifically, it pioneered the development of regulation motivated by and based on new scientific understandings. Administratively, it combined something of the "New Deal" independent, regulatory commission and "Great Society" health and safety regulation by delegating administrative authority to a multimember Board that combined licensing, rulemaking, and adjudicatory functions.

A. "Bursting Boilers and the Federal Power"

In his pioneering and award-winning study of antebellum steamboat regulation,²⁴⁴ John G. Burke claims that steam power, and particularly its use in steamboats, changed American's attitudes about the legitimacy of the exercise of national governmental power in relation to private property. According to Burke's account, while nineteenth-century Americans often believed that the government should promote industry through "patent rights, land grants, or protective tariffs . . . they opposed any action that might smack of governmental interference or control of their internal affairs. The government might act benevolently but never restrictively."²⁴⁵ The steamboat changed opposition into support, indeed a demand, for federal regulation.

It was not steam propulsion itself, of course, that caught Americans' attention in ways that would demand regulatory controls. It was instead the propensity of steam boilers to explode. Injury and loss of life from bursting

21, at 1277-78. The much more extensive regulation of commerce via the embargo of 1807-1809 is analyzed in some detail in Mashaw, *supra* note 37, at 1647-95.

243. The steamboat inspection service, as it came to be called, was one of the fifty or so most important organizations of the federal government selected for monographic study by the Institute for Government Research (now the Brookings Institution) in the early 1920s. See LLOYD M. SHORT, *STEAMBOAT-INSPECTION SERVICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* (1922).

244. John G. Burke, *Bursting Boilers and the Federal Power*, 7 *TECH. & CULTURE* 1 (1966).

245. *Id.* at 1.

boilers rose steadily in the early years of the nineteenth century.²⁴⁶ The explosion of the “Aetna” in New York Harbor in 1824 provoked Congress to consider the expediency of enacting legislation, but the bill reported out of committee died amidst the crush of other business.²⁴⁷ The death toll continued. Two hundred seventy-three persons were reported to have died between 1825 and 1830, and by 1829 the high-pressure steam boiler had insinuated itself into American speech as a metaphor for unsafe power in quite different contexts.²⁴⁸ President Andrew Jackson urged Congress to pass legislation in his State of the Union message in 1833.²⁴⁹ Nothing happened. Jackson’s successor, Martin Van Buren, took up the call²⁵⁰ and, following some spectacular loss of life in boiler explosions in 1837 and early 1838, Congress responded.²⁵¹

While Burke presents this congressional action as overcoming serious doubts about the constitutionality of national regulation of private enterprise, his evidence for that claim is rather weak. Reviewing the constitutional debates in the Congress for the same period David Currie finds that the steamboat regulatory statutes raised no questions of constitutionality in either house.²⁵² It is surely true, as Burke asserts, that the steamboat regulatory system “created the first [federal] agency empowered to supervise and direct the internal affairs of a sector of private enterprise in detail.”²⁵³ But, while steamboat owners and operators objected to being regulated, Burke offers little evidence for the proposition that they, most Americans, or members of Congress believed that such regulation was a sharp break with past constitutional understandings.²⁵⁴

246. Steam boilers were also used, of course, in factories and in railroad locomotives. However, in neither of these contexts was the loss of life from a single explosion so dramatic as when a boiler burst on a steamship. The high stakes in individual steamship explosions excited public concern and generated the first large-scale government effort to compile accident statistics in the United States. Arwen Mohun, *On the Frontier of The Empire of Chance: Statistics, Accidents, and Risk in Industrializing America*, 18 *SCI. IN CONTEXT* 337, 342 (2005).

247. 42 *ANNALS OF CONG.* 2694, 2707, 2708, 2765 (1824).

248. For example, explaining his opposition to the continued operations of the Second Bank of the United States, Congressman Ebenezer Sage of New York said, “It is capable of raising too high a pressure for the safety of those who may come within the sphere of its action.” See *REMINI, supra* note 19, at 65 (quoting Sage).

249. *CONG. GLOBE*, 23d Cong., 1st Sess. 7 (1833).

250. *CONG. GLOBE*, 24th Cong., 2d Sess. 29 (1836); *CONG. GLOBE*, 25th Cong., 2d Sess. 7-9 (1837).

251. See Act of July 7, 1838, ch. 191, 5 Stat. 304; Burke, *supra* note 244, at 15.

252. *CURRIE, supra* note 28, at 124-125.

253. Burke, *supra* note 244, at 3.

254. For example, Burke cites a report made by Secretary of the Treasury Samuel D. Ingham, who had made an inquiry among owners and masters of steamboats concerning the causes

Burke’s primary evidence of resistance based on constitutional uncertainty comes from the 1832 report of a select committee to consider a proposed steamboat inspection bill.²⁵⁵ That report began with the observation that while the committee found that the Constitution gave Congress the power to regulate commerce, it did not find authority for Congress to prescribe how vehicles of conveyance in interstate commerce should be constructed. But this objection was quickly passed over. The vast majority of the report was devoted to the scientific data that had come into the committee’s hands and to suggesting the type of bill that might prudently be enacted given that information. The committee’s skepticism of any regulation is quite evident, but that skepticism seems to have been based largely on prudential concerns. It doubted that Congress had sufficient knowledge to specify the details of steamboat construction and questioned the effectiveness of the methods so far proposed for controlling the conduct of the masters and engineers of steam vessels.

Yet the committee then proposed legislation that seemed to contradict all of its skepticism. Its bill included a licensing requirement for all steamboats and required that steam boilers be hydrostatically tested at least every three months at three times the pressure that the boiler was permitted to carry. The proposal would have required engineers to keep the pump running when their vessels were stopped to maintain the necessary supply of water to the boilers; contained requirements for lifeboats and firefighting equipment; and created

of steamboat explosions. According to Burke, Ingham reported that the owners and masters had been reluctant to cooperate with his inquiry and that his investigators were told “repeatedly that the problem was purely individual, a matter beyond the government’s right to interfere.” Burke, *supra* note 244, at 10–11. An inspection of the Secretary’s letter reveals, however, that while he reported noncooperation, there is no mention of a claim that the government was without power to intervene. See SAMUEL D. INGHAM, SEC’Y OF THE TREASURY, A REPORT ON THE SUBJECT OF STEAM BOILERS, H.R. DOC. NO. 21-131 (2d Sess. 1831). Following President Jackson’s suggestion that legislation be enacted, Burke reports that Senator Daniel Webster proposed a study of the problem by the Committee on Naval Affairs. Burke, *supra* note 244, at 12. According to Burke, Thomas Hart Benton immediately objected that the matter should be properly before the Judiciary Committee because the private waters of the states were involved and an interference with state sovereignty might result. However, it is far from clear from Benton’s statements exactly what sort of objection he was raising. Statements appear in CONG. GLOBE, 23d Cong., 1st Sess. 49 (1833). Benton’s amendment to Webster’s proposal was defeated by a Senate vote. See *id.* It is true that the Bill that ultimately emerged from the Naval Affairs Committee failed to pass the Senate, see *id.* at 442, but there is no specific evidence that its failure reflected, as Burke asserts, that “Benton’s attitude prevailed in the session,” Burke, *supra* note 244, at 12.

255. SELECT COMM. TO THE HOUSE OF REPRESENTATIVES, STEAMBOATS: EXPLOSIONS IN STEAM BOILERS IN BOATS, H.R. REP. NO. 22-478 (1st Sess. 1832).

rules of the road to avoid collisions. Perhaps because the committee refused to champion its own bill, nothing ever came of these proposals.

When major legislation to regulate steamboats was passed in 1838, and again in 1852,²⁵⁶ arguments about the federal government's power to enact the regulatory scheme were noticeably absent. This is perhaps not too surprising. The Commerce Clause jurisprudence during this period largely concerned the permissibility of state legislation that affected interstate commerce.²⁵⁷ It had been conceded since *Gibbons v. Ogden*²⁵⁸ that the commerce power included the regulation of navigation. The questions of moment in the reported cases seemed to be (1) whether that regulatory power was exclusive and (2) the validity of legislation adopted pursuant to the traditional police powers of the states, when interstate commerce was incidentally affected. According to Carl Swisher, the only issues raised about the constitutionality of the 1838 Act, or subsequent steamboat regulation statutes, concerned their applicability to ferries that operated wholly within the confines of a single state.²⁵⁹

Nevertheless, the steamboat regulation of the mid-nineteenth century was, as Burke asserts, the first instance of Congress using the interstate commerce power to closely regulate a specific industry.²⁶⁰ And even in the absence of significant constitutional debate surrounding the steamboat safety acts,²⁶¹ they

256. Act of Aug. 30, 1852, ch. 106, 10 Stat. 61.

257. See CARL B. SWISHER, *THE TANEY PERIOD: 1836-64*, in 5 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 357-422 (1974).

258. 22 U.S. (9 Wheat.) 1 (1824).

259. See SWISHER, *supra* note 257, at 403-04.

260. Several states had passed steamboat safety legislation, beginning with Alabama in 1826. See Act of Jan. 12, 1826, 1826 Ala. Laws 5. Louisiana followed suit eight years later, see Act of Mar. 6, 1834, 1834 La. Acts 55, and Kentucky enacted legislation a year before the 1838 federal statute, see Act of Feb. 23, 1837, 1837 Ky. Acts 348. But these statutes were ineffective, either because they contained little of substance or because they were inapplicable to most steamboat traffic which traveled interstate. See LOUIS C. HUNTER, *STEAMBOATS ON THE WESTERN RIVERS: AN ECONOMIC AND TECHNOLOGICAL HISTORY* 523-24 (1949). The Louisiana statute was the most sophisticated of the state legislative efforts. But attempts to apply it to steamboats whose journeys took them beyond the state's boundaries were rejected by the federal courts. See, e.g., *Halderman v. Beckwith*, 11 F. Cas. 172, 174-75 (D. Ohio 1847) (No. S. 907) (McLean, Circuit Justice) (holding that the Louisiana regulations could not be applied to a boat on a trip between New Orleans and Pittsburgh in which it would pass through the waters of ten states).

261. There was, of course, continued self-interested, industry opposition to the federal legislation and to the much more stringent approach to regulation taken in the 1852 statute. Congressional opponents again raised the banner of private property rights and individual liberty, but the vote was overwhelmingly in favor of increased federal controls. Burke, *supra* note 244, at 21.

were later used as constitutional precedent. The Windom Committee Report of 1874, which began the legislative process leading to the creation of the Interstate Commerce Commission, dealt at some length with the Commerce Clause question and referred to the Steamboat Safety Acts of 1838 and 1852 as evidence of Congress’s well-established power to adopt regulatory legislation governing all modes of interstate transportation.²⁶²

B. Regulatory Design

Steamboat regulation came in two major phases that established radically different regulatory regimes. The Steamboat Inspection Act of 1838²⁶³ was parasitic on a 1793 statute²⁶⁴ that required the enrollment of all U.S. vessels engaged in the coastal trade. The 1838 statute demanded that steam-powered vessels renew these previously undemanding coasting licenses after demonstrating that they had complied with the new statute’s safety regulations. Owners or masters of vessels were to make such proofs by presenting certificates of inspection to the collector or surveyor of the port that had issued their licenses. For our purposes, the interesting part of the 1838 Act involves how those inspection certificates were issued.

Under section 6 of the Act each owner or master of a steamboat was required to obtain an inspection of the vessel yearly and an inspection of its boilers once every six months. To get an inspection the master or owner petitioned a federal district judge to appoint one or more persons who were competent to make an inspection of steamboats and their boilers. Who might be a competent inspector was not further specified. And although they were required to take an oath to faithfully carry out the inspection duties contemplated by the statute, these “inspectors” were not in any sense full-time employees of the federal government. Inspectors, whoever they were, simply received a fee from the owner or master of the vessel—five dollars for the inspection of the boat for seaworthiness and five dollars for certifying that the

262. SELECT COMM. ON TRANSP.-ROUTES TO THE SEABOARD, REPORT, S. REP. NO. 43-307, at 79-92 (1874).

263. Act of July 7, 1838, ch. 191, 5 Stat. 304.

264. Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. Chief Justice John Marshall relied on this statute in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), to demonstrate that congressional legislation would invalidate New York’s grant of a steamboat monopoly even were it not the case that the Congress had exclusive jurisdiction over interstate commerce. *See id.* at 51-65. Marshall’s reading of that early licensing statute seems extravagant. While the statute did require enrollment of vessels and provided for forfeiture of the vessel and for other penalties were a license not obtained, a reading of the whole statute suggests that its only significant purpose was to ease the collection of duties and prevent avoidance of taxes.

boilers were fit for use. Seaworthiness and boiler fitness were left to the judgment of the inspectors with no further definition in the statute other than the requirement that steamboats carry life boats and fire-fighting equipment. The one “technology-based” standard in the Act was a requirement that the safety valves on steam engines be opened whenever the steamboat was not underway in order to keep down the steam pressure in the boiler.

Beyond these rudimentary inspection requirements, the 1838 statute relied on enhanced civil and criminal liability to promote steamboat safety. Masters and owners were required to employ competent and experienced engineers to run the vessels. Failure to do so would cause them to be liable for damages for any loss to property or person “occasioned by an explosion of the boiler or any derangement of the engine or machinery of any boat.”²⁶⁵ Failure to have a proper certificate and license would subject the owner, master, or captain of a steamboat to a fine of five hundred dollars which could be collected by an *in rem* action against the vessel.²⁶⁶ More dramatically, if captains, engineers, or pilots caused loss of life because of any misconduct, negligence, or inattention, they were subject to prosecution for manslaughter. In all actions for injuries arising to persons or property from the bursting of a steamboat boiler, the collapse of a flue, or any injurious escape of steam, the simple fact of failure of the steam engine was made *prima facie* evidence of negligence. As was customary in many early statutes, the penalties specified for various violations might be sued for by an informer, who was entitled to half the recovery upon a successful prosecution.

The 1838 Act was very far from a modern regulatory statute. There was no “agency” charged with enforcement of the regulations or with authority to further specify the vague statutory standards. Inspectors were part-timers, appointed by district judges, and might or might not be qualified to carry out their duties. The requirements for yearly and half-yearly inspections were a move in the direction of *ex ante* or preventative safety regulation. But the statute relied heavily on traditional, nonadministrative deterrence strategies—enhanced common law civil liability and penalties for specified misconduct.

These strategies failed. Death, injury, and property loss from bursting boilers continued to plague steamboat travel, and by 1848 Congress was seriously considering further legislation. In December of that year, Edmund Burke, the Commissioner of Patents, reported to the Senate concerning his

265. Act of July 7, 1838, ch. 191, § 6, 5 Stat. 304, 305.

266. *Id.* § 2, 5 Stat. at 304.

investigations into the extent, causes, and prevention of explosions in steam boilers used either in boats or in railroads.²⁶⁷

In requesting a report from the Commissioner of Patents, Congress had envisioned a technological solution. Indeed, it asked Burke to report, not on whether the safety laws should be modified, but on whether any amendments to the patent laws might be advisable. Burke’s report was not encouraging. On the first page of the report he concluded “the undersigned has no hesitation in expressing his belief that no modifications of the patent laws would have any tendency to lessen the evils which it is the object of the proposed legislation to mitigate.”²⁶⁸ Moreover, after an exhaustive survey of the various devices that had been developed to warn operators of impending explosions, or to prevent them through some mechanical device that would relieve a boiler of excessive pressure, Burke concluded that there was no fail-safe technological fix. In Burke’s understated prose, “The source of danger, in the opinion of the undersigned, is to be looked for elsewhere than in the imperfection of the engine or its appendages, and the legislative remedy ought to be applied in a different quarter.”²⁶⁹

Burke then related the objections to the 1838 steamboat safety legislation that he had collected in his survey of Collectors of Customs and others.²⁷⁰ First, the district judges were poor candidates for the appointment of steamboat inspectors. They often resided far from the ports and knew little of the people who applied to be inspectors. Second, the 1838 act imagined that the same person could inspect a boat for general seaworthiness and a boiler for soundness. But persons having the requisite knowledge of both boat construction and steam propulsion were virtually nonexistent. Captains of vessels could be relied upon to seek out inspectors least qualified to inspect the aspects of their steamboats that were most problematic. Indeed, because the boats covered substantial distances they could often choose inspectors from numerous districts, presumably always preferring the most lenient. Competition among inspectors for the five dollar fees further exacerbated this regulatory race to the bottom.

267. REPORT OF THE COMMISSIONER OF PATENTS TO THE SENATE OF THE UNITED STATES, ON THE SUBJECT OF STEAMBOILER EXPLOSIONS, S. EXEC. DOC. NO. 30-18 (1848) [hereinafter BURKE’S REPORT]. Because his information on railroads was too scanty to provide any reliable conclusion, Burke limited his report to steamboat accidents.

268. *Id.* at 1. Indeed, by 1848 over four hundred such safety devices had been patented. See HUNTER, *supra* note 260, at 535-36.

269. BURKE’S REPORT, *supra* note 267, at 25.

270. *Id.* at 25-29.

The requirement of the 1838 legislation that owners and captains employ competent engineers had turned out to be completely ineffective. Indeed, in Burke's view, the single most useful action that might be taken was to professionalize the status of the steamboat engineer. He urged the development of a required course of training for engineers followed by governmental licensing after a strict examination.²⁷¹ This was the system used to certify physicians for the Army and the Navy medical corps, and as Burke noted drolly, incompetent physicians killed their patients at retail, incompetent steamboat engineers killed passengers wholesale.

According to Burke's informants, not only had the system of inspection become little more than a useless tax on steamboat operators,²⁷² the penalties in the Act were equally dysfunctional. Juries simply would not convict masters or engineers of manslaughter when they were guilty at most of simple negligence.²⁷³ And the provisions making any escape of steam from a boiler presumptively the result of negligence were tantamount to the imposition of absolute liability. Burke reported that, "The severity of this feature of the law is said to have driven many worthy and enterprising steamboat proprietors from the business and left it in hands less responsible."²⁷⁴ Finally, Congress's attempt to regulate the conduct of operators directly by requiring the opening of safety valves whenever the vessel was not underway may have backfired. Under certain circumstances it appeared that opening the valve manually, rather than by the build up of pressure in the boiler, might precipitate an explosion rather than prevent one.²⁷⁵

271. A similar recommendation for improvement of the 1838 legislation had been made four years earlier by an association of steamboat engineers. A SUPPLEMENT TO THE PETITION TO THE PRACTICAL STEAM ENGINEERS AND OTHERS OF THE CITY OF CINCINNATI, TO THE CONGRESS OF THE UNITED STATES, H.R. DOC. NO. 28-68, at 9-10 (1844).

272. Steamboat owners and operators were outraged that they were being regulated when the safety of steamboats was constantly improving and the loss of life and property from the wreckage or sinking of sailing vessels was incomparably greater than that involved in the steamboat traffic. MEMORIAL OF SUNDRY PROPRIETORS AND MANAGERS OF AMERICAN STEAM VESSELS ON THE IMPOLICY AND INJUSTICE OF CERTAIN ENACTMENTS IN THE LAW RELATING TO STEAMBOATS, AND ASKING TO BE RESTORED TO THE RIGHTS AND PRIVILEGES WHICH BELONG TO OTHER CITIZENS ENGAGED IN NAVIGATION, H.R. DOC. NO. 26-158, at 26 (1840).

273. According to Patent Commissioner Burke, only eighteen federal prosecutions were brought under the 1838 Act during its first decade. Of these, eight resulted in acquittals or dismissals, one was undecided, and of the nine which resulted in convictions, six defendants had their penalties remitted in whole or in part. BURKE'S REPORT, *supra* note 267, at 52-53.

274. *Id.* at 29.

275. Congress had made at least one other boner in the 1838 statute. It had required that iron rods or chains be used to link the rudders of steamboats to their tillers or wheels. The idea was to avoid the loss of control from the breakage or burning of the usual attachment

Burke's report leaves little doubt that the 1838 legislation was not working. But beyond professionalizing and licensing of engineers, Burke was not a fan of more complex federal regulation. He believed that enhanced civil liability, recoverable both in personam and in rem,²⁷⁶ combined with the increasingly stringent safety requirements that were being imposed by those who insured steam vessels,²⁷⁷ would be the best course of legislative action. But agitation for reform remained intense,²⁷⁸ and Burke's recommendations for strengthening traditional deterrence remedies were not to be the future of federal steamboat safety regulation. In 1852, Congress amended the three-page, thirteen-section statute that it had passed in 1838 with a bill containing forty-three sections and running fourteen pages in the statutes at large.²⁷⁹ Federal safety regulation was about to take on entirely new forms.

Although Congress may have made missteps in requiring specific equipment or specific conduct in the 1838 Act, knowledgeable students of the causes of boiler explosions had long agreed on a number of important design and performance requirements to reduce the incidence of injury, death, and property damage from steamship travel.²⁸⁰ The 1852 statute reflected much of this scientific consensus.²⁸¹ It required that boilers be constructed from suitable

material, hemp rope. However, the rod or chain system proved to be so detrimental to the maneuverability of the vessels that Congress removed this requirement in 1843 and authorized courts before whom prosecutions had been begun to dismiss the indictments if the defendants had failed to comply because of an honest apprehension that rod or chain systems could not be used safely. *See* Act of Mar. 3, 1843, ch. 191, § 4, 5 Stat. 626.

276. Commissioner Burke's call for exemplary damages was not necessarily a "do nothing" proposal. He suggested that two basic rules of civil liability be altered with respect to steamboat accidents: First, Burke would have permitted recovery by the heirs of deceased passengers for wrongful death, an action that might or might not have been available under the laws of all states. Second, Burke wanted to "pierce the corporate veil" and hold the shareholders in any steamboat corporation severally liable for any damage award against the company. These two changes might well have substantially increased the deterrent effect of civil liability for steamboat accidents.
277. Burke's reliance on insurance regulation may have been misplaced. According to Hunter, by 1842 insurance underwriters had ceased writing insurance for steamboats where the cause of the loss was a boiler explosion. HUNTER, *supra* note 260, at 365.
278. Burke, *supra* note 244, at 19.
279. *See* Act of Aug. 30, 1852, ch. 106, 10 Stat. 61.
280. *See supra* text accompanying notes 110-116 (explaining the development of the scientific basis for the 1852 Act).
281. Many of the technological provisions of the 1852 statute had been recommended by the Senate Commerce Committee twelve years before the passage of the 1852 statute. COMM. ON COMMERCE, REPORT TO ACCOMPANY BILL S. NO. 247, S. REP. NO. 26-241, at 6-12 (1st Sess. 1840). As that Committee stated:

quality iron plates of a specified thickness in relation to their size, and that they be stamped with the manufacturer's sign and the grade of iron employed. Builders had to employ boiler feed water pipes of a minimum required size and to install engines such that no part of their heated surface was less than eighteen inches from any flammable material. The statute demanded that boats be equipped with specific safety equipment in the form of fire fighting pumps, metal life boats, and effective life preservers. The legislation specified the maximum operating load of boiler pressure and required that boilers be hydrostatically tested at 1.5 times their permitted operating pressure.²⁸² Engines were to have two safety valves, one enclosed in a locked steel grate, and any tampering with the safety equipment was punishable by fine and imprisonment.

More importantly for our purposes, the administrative provisions of the 1852 Steamboat Safety Act contained significant innovations that moved safety regulation toward its more modern forms. Most notably, implementation of the statute was put in charge of a Board of Supervising Inspectors. Individually these inspectors were in charge of nine licensing districts. Along with the judge of the district court and the Collector (or other chief officer) of the relevant customs district, each Supervising Inspector appointed and supervised separate local inspectors of hulls and of boilers. Unlike local inspectors under the 1838 statute, these new inspectors were paid a fixed annual compensation, and all fees for inspections were paid to the Collector of Customs for deposit in the Treasury.²⁸³

The local inspectors of hulls and boilers not only inspected and certified vessels and boilers, acting as a local board for each customs district, but they also jointly licensed engineers and pilots of all steamers carrying passengers and granted special licenses for the carriage of flammable or explosive materials. As a board they were further authorized to hear complaints concerning the negligence or incompetence of engineers or pilots and to withdraw their licenses. In carrying out these duties local inspectors were

The only practicable mode of reaching these causes of disaster, is by means of a compulsory, rigid, scrutinizing inspection of the hull, boiler, engine, and all the equipments [sic] of steamvessels, made by competent and sworn officers; not nominal and formal merely, as it too often the case under the present law, but an actual and faithful inspection.

Id. at 6.

282. Act of Aug. 30, 1852, ch. 106, § 9, 10 Stat. 61, 64.

283. This movement from fee and commission-based compensation to salary official might be viewed as part of the general movement in the late antebellum period toward a more professionalized and bureaucratized civil service.

empowered to compel the attendance of witnesses at hearings and to take testimony under oath.

Congress attempted to guard against lax inspection by specifying in great detail the aspects of the steamboat, its equipment, and particularly its boilers, that inspectors were to examine. The statute also prescribed a certificate of approval that was to be filled out by each inspection board if it approved the vessel for carriage of passengers. The inspectors were then required to go before someone competent by law to administer oaths and swear to the truth of everything that they had put into the certificate, presumably on pain of a perjury prosecution for false swearing.

Although many of the provisions of the statute were quite specific, local inspectors nevertheless had considerable discretion. They were authorized to adopt any means that they thought necessary to test the sufficiency of a steamboat or of its equipment. While the statute instructed inspectors to allow boilers to have a working pressure of three-quarters of their tested pressure, they were permitted to reduce the working pressure of the boiler below that rating if in their judgment, stated specifically in their certificate, the construction or materials used in a boiler made the normal working pressure imprudent. Moreover, the inspectors were allowed to waive any of the rules in the statute concerning boiler requirements if their application would be unjust and the inspectors determined that variance from the rules could be accomplished with safety. Indeed, the inspector of hulls, who examined the overall seaworthiness of the vessel and determined that it carried all the required safety and life saving equipment, acted under a statutory provision that demanded merely that the inspector be satisfied that the vessel was “suitable for the service in which she is to be employed.”²⁸⁴

Operating as a local board for the licensing of pilots and engineers, the two local inspectors had similarly broad discretion. Congress did not take Commissioner of Patents Burke’s advice to prescribe a required course of study and a strict examination for the licensing of engineers and pilots. Instead the 1852 statute merely instructed the inspectors to license engineers annually “if, upon full consideration, they are satisfied that [an applicant’s] character, habits of life, knowledge, and experience in the duties of an engineer, are all such as to authorize the belief that the applicant is a suitable and safe person to be entrusted with the powers and duties of such a station.”²⁸⁵ Inspectors were to license pilots if after diligent inquiry the inspectors found that the applicant

^{284.} § 9, 10 Stat. at 64.

^{285.} *Id.* § 9, 10 Stat. at 67.

“possesses the requisite skill, and is trustworthy and faithful.”²⁸⁶ Hence, while the 1852 Act attempted to avoid the lax inspection and race to the bottom problems of the 1838 statute, Congress found itself, as usual, incapable of legislating with a specificity that would exclude substantial discretion on the part of implementing officers. Some means would have to be found to monitor performance and ensure uniformity and consistency.

That system of control was lodged in the Supervising Inspectors. They exercised general administrative supervision of the local inspectors in their respective districts and heard appeals from their decisions. Local inspectors who denied or revoked a vessel’s certificate or who denied or revoked an engineer or pilot’s license were required to state their reasons for those actions in writing. A disappointed owner, pilot or engineer was then given a *de novo* appeal to the Supervising Inspector for the district.

The Supervising Inspectors acting as a body were also given rulemaking authority. In the words of the statute, the Supervising Inspectors were required to meet at least once each year for “joint consultation and the establishment of rules and regulations for their own conduct and that of the several boards of inspectors within the districts.”²⁸⁷ They were also given the authority to adopt rules concerning the safety precautions to be observed by steam vessels when passing each other, the beginnings of the now elaborate and detailed collision regulations (COLREGS) known to all mariners.²⁸⁸ These navigation rules were required to be furnished to each licensed vessel and the vessels were then required to post them in conspicuous places.²⁸⁹

Congress seemed keenly aware that information was the key both to enforcement and to sound regulation. Licensed engineers and pilots were required to report any known defect or imperfection in their vessels at the earliest opportunity, or risk losing their licenses. Moreover, the Supervising Inspectors were charged with the responsibility of collecting information on a continuous basis concerning all aspects of steamboat construction, equipment, and navigation. These reports were to be synthesized by the Secretary of the Treasury and presented to Congress, together with recommendations concerning further legislation that the Secretary thought proper for the “better security of the lives of persons on board steam vessels.”²⁹⁰

286. *Id.*

287. *Id.* § 18, 10 Stat. at 70.

288. The current rules can be viewed at <http://www.navcen.uscg.gov/mwv/navrules/navulres.htm>.

289. § 29, 10 Stat. at 72.

290. *Id.* § 40, 10 Stat. at 75.

Although the local inspectors made reports to the district collector of customs, and the Supervising Inspectors to the Secretary of the Treasury, the implementation of the Steamboat Safety Act of 1852 was only loosely situated within the Treasury Department. The statute gave the Secretary of the Treasury no authority to supervise or to make rules for what came to be known as the Steamboat Inspection Service. Supervising inspectors were appointed by the President and confirmed by the Senate, and the local inspectors were appointed by the strange triumvirate of a district court judge, a customs collector, and a supervising inspector (subject, however, to the approval of the Secretary of the Treasury).²⁹¹ All rulemaking and adjudicatory authority rested with the inspectors—either the local boards or the supervising inspectors.

To be sure, the supervising inspectors were presumably removable by the President at will. In that sense they were not so independent as those later creations we commonly call “independent agencies.” But in virtually all other respects the Board-dominated regulatory regime constructed by the 1852 Steamboat Safety Act was an autonomous bureaucratic enterprise—one designed to apply expert knowledge to the task of promoting steamboat safety. Indeed, the Steamboat Inspection Service combined the multimember structure, single-industry focus and licensing/adjudication features of Progressive and New Deal regulatory commissions, with the rulemaking capacities of later health and safety regulators like OSHA, NHTSA, and EPA.

Unlike its 1838 predecessor, the 1852 statute relied upon administrative remedies rather than common law or criminal sanctions. The statute’s design and performance requirements, along with its inspection and licensing provisions, emphasized preventative regulatory controls rather than incentive-based deterrents. The primary threat to regulated parties was now failure to obtain (or loss of) a license—either to put or keep a steamboat in service or to serve as a pilot or engineer. Inspectors were given the power to inspect without notice, and their investigatory powers were backed by authority to call and swear witnesses in hearings to determine the existence of negligence or misconduct. To avoid the problem of “board shopping,” inspectors in one district were prohibited from modifying any order made in another district that required a vessel to make repairs or modifications.

Along with these administrative enforcement provisions came administrative remedies. So far as I have been able to ascertain, this is the first statute at the national level to require written reasons for an administrative

291. The approval of the Secretary of the Treasury may have been inserted because of constitutional scruples. Custom collectors and supervising inspectors are not officers contemplated to have appointing power with respect to “inferior officers” pursuant to U.S. CONST. art. II, § 2.

decision. And while not unique (administrative appeals had existed for decades in customs collection), the 1852 Steamboat Statute created an explicit hierarchy of adjudicatory jurisdictions when permitting *de novo* appeals to Supervising Inspectors from the decisions of local boards.²⁹² In a nod toward expertise, the Act functionally differentiated boiler inspection from the other aspects of a vessel's seaworthiness. But lacking established engineering or marine architecture professions, Congress could do little to ensure competence beyond dividing inspection responsibilities. In the words of the statute, inspectors of hulls were required to be knowledgeable in "the strength, seaworthiness, and other qualities of the hulls of steamers and their equipment, deemed essential to safety of life, when such vessels are employed in the carriage of passengers."²⁹³ Inspectors of boilers were to be persons who would "be able to form a reliable opinion of the quality of the material, the strength, form, workmanship, and suitability of such boilers and machinery to be employed in the carriage of passengers, without hazard to life, from imperfections . . . of any part of such apparatus for steaming."²⁹⁴

The Act seems to have contemplated that both local and supervising inspectors would be, or had been, involved in the steamboat business in some way. Otherwise where would they obtain the requisite knowledge and experience?²⁹⁵ The 1852 statute, therefore, disqualified them from involvement

292. Administrative appeals were also a prominent feature of the reform of the patent system in 1836. See Act of July 4 1836, ch. 357, 5 Stat. 117. But rather than having hierarchical appeals within the same agency, appeals from the Commissioner of Patents were to be made to a Board composed of three outsiders appointed for that purpose by the Secretary of State. See *id.* § 7, 5 Stat. at 119-120.

293. *Id.* § 9, 10 Stat. at 63.

294. *Id.* § 9, 10 Stat. at 64.

295. Information concerning some of the original supervising inspectors of steamboats can be found in old newspaper accounts and the Congressional Globe. John Shallcross, the Supervising Inspector for Louisville and first President of the board of Supervising Inspectors was a steamboat captain and former inspector of hulls for the Board of Underwriters in Memphis, Tennessee. MEMPHIS DAILY AVALANCHE, Feb. 26, 1869, at 3. William Burnett, the Supervising Inspector for Boston, was apparently both an inventor and a steamboat captain or pilot. He was awarded a patent for improved arrangement of fusible plugs or disks for steamboats. DAILY GLOBE (Wash., D.C.), Mar. 8, 1854, at Supp. 1. He was also indicted for manslaughter in the drowning death of fifteen passengers resulting from the racing of the steamboat *Swallow* on the Hudson River on April 7, 1845. WKLY. HERALD (New York, N.Y.), Apr. 12, 1845, at 113; *The Pilot of the Swallow*, BALT. SUN, Apr. 21, 1845, at 1. He was acquitted for reasons that do not appear from the news reports, and he seems to have been viewed as a hero. *The Case of the Swallow*, DAILY EVENING TRANSCRIPT (Boston), Apr. 15, 1846, at 2. Davis Embree, the Supervising Inspector for Cincinnati is referred to as "Captain Davis Embree, Supervising Inspector" by the NEW ALBANY DAILY LEDGER (Ind.), July 19, 1858, at 3, and Benjamin Crawford, the Supervising Inspector for Pittsburgh,

in any case where they might have a conflict of interest.²⁹⁶ And, although the compensation for Supervising Inspectors, and for local inspectors in some of the larger and busier ports, was substantial, the statute did not require (and probably did not contemplate) that inspectors devote their full attention to their public duties.

Nevertheless, by 1852 the promotion of steamboat safety was no longer in the hands of episodically appointed, ambiguously qualified, fee-seeking inspectors or the generalized judgment of judges and juries. Congress had decided to build an expert regulatory agency, one that reflected the increasing application of scientific method to both public and private pursuits in the mid-nineteenth century.

C. Administration

1. A Fast Start

The Board of Supervising Inspectors began to implement the statute almost as soon as its members were appointed and confirmed.²⁹⁷ It held its first annual meeting in Cincinnati in 1853. But even before that conclave the Board had held three other meetings at Washington, New York, and Pittsburgh, two before the effective date of the statute. Although Congress had crafted relatively specific provisions, the Supervising Inspectors immediately discovered gaps, vague provisions, and opportunities for inconsistent application. Rules and regulations came forth in a steady stream.

At its first meeting at Washington, D.C., on October 27, 1852, the Board immediately elected officers, adopted some procedural rules for its own governance, and appointed two committees—one for the consideration of Rules and Regulations for the Government of the Local Boards of Inspectors, the other to prepare Rules and Regulations for the Pilots and Masters and to prevent collisions.²⁹⁸ By November 2, the Board had approved all the necessary

describes himself as a “practical steam engineer” in a memorial sent to Congress on behalf of the Pittsburgh Association of Engineers recommending passage of the 1852 Steamboat Act. S. MISC. DOC. NO. 32-84 (1852).

²⁹⁶ Act of Aug. 30, 1852, ch. 106, § 22, 10 Stat. 61, 71.

²⁹⁷ The first seven members of the Board of Supervising Inspectors of Steamboats were confirmed by the Senate on September 4, 1852. See *Confirmation of Steamboat Inspectors*, STATE GAZETTE (Trenton), Sept. 6, 1852, at 2.

²⁹⁸ BUREAU MARINE INSP. & NAVIG., 1 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 4 (Oct 27, 1852) (Baltimore, James Lucas 1853) [hereinafter WASHINGTON SPECIAL MEETING].

forms to be used for certificates and licenses required to be issued under the statute and had adopted initial rules on pilotage and inspections.²⁹⁹ It also plugged a gaping hole in the statute. Oddly enough the 1852 Act had provided for nine Supervising Inspectors but had left their respective districts to be determined by the Board itself.³⁰⁰ A committee composed of Supervising Inspectors representing the Atlantic Coast, the Great Lakes, and the Mississippi Valley recommended boundaries for nine districts, along with the assignment of a resident Supervising Inspector for each. The report was unanimously accepted.³⁰¹

The only hesitation the Board showed in adopting needed rules was to inquire of the Attorney General, through the Secretary of the Treasury, whether it had the authority to establish a rule to guide local board determinations of the number of passengers that steam ships were allowed to carry pursuant to the ninth and tenth sections of the statute.³⁰² Two days later the Attorney General instructed the Board that, because local inspectors were compelled by the law to certify the number of passengers that steamers were allowed to carry, it was surely prudent, if not legally required, that the Board adopt a rule to assure uniformity of local inspectors' decisions.³⁰³ Two committees were then appointed, one for the Lakes and the Atlantic Coast, the other for the western rivers. These committees were delegated the authority to adopt rules concerning the number of passengers that steamers would be allowed to carry for their respective districts. These rules would be controlling until the next meeting of the Board of Supervising Inspectors could approve them.³⁰⁴

The Board considered a number of other matters. Chief among them was insuring that the Secretary of the Treasury exercised the authority granted to him under the statute in ways that would facilitate the Board's operations. The Secretary, for example, was given the responsibility of providing testing instruments to local inspectors for determining the safe operating pressure of boilers. But there was no reason to expect the Secretary to be knowledgeable about these matters. The Board, therefore, determined the type of hydrostatic pump that should be employed and wrote to the Secretary "to suggest that the

299. *Id.* at 5, 8-11.

300. Act of Aug. 30, 1852, ch. 106, § 18, 10 Stat. 61, 70.

301. WASHINGTON SPECIAL MEETING, *supra* note 298, at 5-7.

302. *Id.* at 5.

303. *Id.* at 7-8.

304. *Id.* at 12.

manufacture of them be put under contract at your earliest convenience.”³⁰⁵ The latter moved with dispatch. Only two days later the Board recorded a letter from the acting Secretary of the Navy informing it that the pumps would be manufactured at the Navy yard in Washington, D.C.³⁰⁶

The Board met again two months later,³⁰⁷ to adopt additional rules governing the activities of the local boards of inspectors and amendments to the rules previously adopted for pilotage. Hence, by the time the 1852 statute went into effect on January 1, 1853, the Board of Supervising Inspectors had put in place a substantial set of regulations to govern the licensing activities of the local boards and to regulate navigation by steamship pilots. But, as might be expected, experience in administering the statute would quickly reveal a host of additional problems.

Because there was a “want of uniformity” in different districts concerning the standards for licensing pilots, at its next meeting, in Pittsburgh, the Board required that pilots not only obtain a license from a local board at either extremity of their route, but also an endorsement or approval from every local board in the districts through which their boats passed.³⁰⁸ The Pittsburgh meeting addressed a host of other matters, ranging from the relationship of the 1838 and 1852 acts, to control of investigations into violations of the 1852 statute,³⁰⁹ to necessary reports from local boards,³¹⁰ to amendment of the performance requirements for life preservers.³¹¹

305. *Id.*

306. *Id.* at 14. The Secretary of the Treasury had other duties as well. On November 4, the Board instructed its secretary to call the attention of the Secretary of the Treasury to his other duties under the statute, including the crucial matter of adopting rules for the mode of stamping boiler plates. For it was the Board’s view that information on that matter should be “given to the manufacturers at as early a date as practicable.” *Id.* at 14-15. Here the Secretary was not so quick. These instructions, styled “Notice to the Manufacturers of Boiler Iron” were not provided until February 10, 1853, a month and ten days after the 1852 statute took effect. This notice is printed in a document titled Supplement: Containing Form of Oath Prescribed by Congress August 6, 1861; also – circulars issued from time to time from the Treasury Department for the information of Supervising Inspectors, at 134-35 [hereinafter Circular Supplement].

307. BUREAU MARINE INSP. & NAVIG., 1 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899 at 18-20 (Dec. 8, 1852) (Baltimore, James Lucas 1853) [hereinafter NEW YORK SPECIAL MEETING].

308. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899 at 26-27 (Aug. 2, 1853) (Washington, Gideon & Co. 1859).

309. *Id.* at 28.

310. *Id.* at 31-32.

311. *Id.* at 25.

In a substantial number of cases the Board imposed requirements that went well beyond the explicit demands of the 1852 statute. For example, local boards were told to require that each stateroom in a passenger vessel contain a printed notice informing passengers where life preservers were stored and the manner of using them.³¹² The Board also adopted much more specific regulations than were contained in the statute concerning the relationship between the diameter of boilers and their authorized working pressures.³¹³ It instructed local inspectors to require that any boat using wood as fuel install sheet-iron spark arresters that would prevent sparks from the furnace being driven back alongside the boilers.³¹⁴ The means of escape from the main or lower deck to the upper deck that was required by the 1852 statute was directed by regulation to be constructed “abaft the wheel, or near the stern of the boat.”³¹⁵

There was some initial leniency in applying the 1852 statute, but not much. Responding to petitions from steamboat owners, Congress authorized any inspector of steamers to delay the operation of its statute for ninety days where a steamer was found deficient with respect to the requirements of the Act, provided that the inspector found that those deficiencies were not caused by any fault or neglect of the owner or master.³¹⁶ According to Louis C. Hunter,

[S]teamboatmen quickly learned that the careless old days were gone when each steamboat owner was the undisputed master of his property Notices soon began to appear in the newspapers of the suspension and revocation of officers’ licenses, of trials of the officers involved in accidents, and of the refusal to grant licenses to steamboats.³¹⁷

Ten months after the effective date of the Steamboat Safety Act of 1852 the Board of Supervising Inspectors convened its first annual meeting in

312. *Id.* at 29.

313. *Id.* at 30.

314. *Id.* at 32.

315. *Id.* The rules on space requirements for passengers provide another example of the Board’s willingness to flex its regulatory muscles. As the “Report of Committee in regard to Space for Passengers on Steam Vessels” makes clear, NEW YORK SPECIAL MEETING, *supra* note 307, at 22-23, these rules were not simply a specification of the numbers of passengers to be carried. They, instead, detailed the amount of square footage to be allowed to each passenger on different types of vessels and in different types of cabins or on deck, the size of berths, and how “passengers” should be computed. Local inspectors were also enjoined “to examine and see that proper means for ventilation are provided in all those parts of steamers occupied by passengers.” *Id.* at 23.

316. Act of Jan. 7, 1853, ch. 106, 10 Stat. 261.

317. HUNTER, *supra* note 260, at 539.

Cincinnati.³¹⁸ As at its earlier meetings, the Board received reports and petitions, amended its rules and adopted new ones, and gave interpretations and instructions for the guidance of both the local boards and the affected public. It also submitted its first annual report on the workings of the statute to the Secretary of the Treasury.

Although the information was not so complete as they would have liked, the Supervising Inspectors were confident that “the operation of the law has been highly beneficial and has in a great degree attained the object for which the law was established, viz: greater safety to the lives of passengers.”³¹⁹ Accidents and loss of life seemed to be declining rapidly as compared with the period prior to the law’s enactment. Moreover, those who had initially opposed the law—owners, captains, engineers, and pilots—were rapidly being converted to its virtues. In the Board’s words “many of those formerly arrayed in the ranks of its enemies are now numbered amongst its strongest friends.”³²⁰

The Board also took comfort from the fact that insurance companies were using the inspection statute as a basis for making decisions concerning the insurability of steamers. According to the report, “Insurance Companies are far more ready to take risks upon those Steamers which have been inspected under the law, than upon others.”³²¹ Finally, “[t]he beneficial effect of the law is also shown in the returning confidence of the travelling public in this mode of conveyance.”³²²

The Board’s report to the Secretary of the Treasury summarized the experience in each supervisory district for the prior year.³²³ In case after case the Supervising Inspectors and their local board counterparts found that various requirements of the statute had prevented accidents and reduced or eliminated loss of life where accidents occurred. All in all, the data since the enactment of the statute showed that explosions were occurring at one-fifth the prior annual rate, leading to a 75 percent reduction in loss of life and an over 90 percent decrease in property losses. While often intimating that this improvement resulted from the effects of the statute and its implementation, the Board concluded, “whether this is to be attributed solely to the operation of the law,

318. BUREAU MARINE INSP. & NAVIG., 1 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 36 (Nov. 5, 1853) (Baltimore, James Lucas) [hereinafter 1853 ANNUAL REPORT].

319. *Id.* at 53.

320. *Id.* at 64.

321. *Id.* at 65.

322. *Id.*

323. *Id.* at 57-63.

or to fortuitous circumstances, we will not express an opinion but leave each one to judge for himself.”³²⁴ Whatever its effects on safety, there was no doubt that enforcement of the statute was proceeding apace. Hundreds of steam vessels had been inspected and thousands of pilots, engineers, and assistant engineers licensed.³²⁵

The Board of Supervising Inspectors did not, of course, find that the statute was perfect. Less than a year after the Act went into effect, the Board began to suggest needed amendments. Commerce and navigation were increasing on the west coast and the Board saw a need for a “Supervising Inspector for the Pacific.”³²⁶ More crucially, the Board thought that exempt classes of steamers—ferry boats, freight boats, tug boats, and the like—should be brought within the statute. These vessels were now subject only to the notoriously ineffective 1838 statute. Their exemption from the pilotage rules and licensing requirements of the 1852 Act might well be contributing to the number of collisions that had occurred between exempt vessels and passenger steamers.³²⁷ And, in the Board’s opinion, Congress should pass a law requiring all vessels to carry lights, “as it is known that the absence of such a law has caused loss of life and the destruction of property by collisions which might have been avoided had lights been carried on the vessels, &c., referred to.”³²⁸ Finally, the pay for local boards was inadequate, indeed “in some cases so small as to render it impractical to obtain or retain competent persons to discharge the duties required.”³²⁹

As is often the case, licensing promoted the professionalization of the licensees, who then sought to influence the licensing scheme itself. An Association of Engineers in Cincinnati recommended that the local boards should grant or refuse licenses to engineers based on the examinations of the Societies of Engineers that had formed in major port cities. The Board’s response to this petition was presented as an interpretation of the current legislation, but it also served as an argument against change. As the Board saw the matter:

The rights of Engineers and others are fully secured, while they have open to them the opportunity of presenting for consideration all

324. *Id.* at 64.

325. *Id.* at 55.

326. *Id.* at 68.

327. *Id.* at 67-69.

328. *Id.* at 70.

329. *Id.*

evidence for or against an applicant, whether verbally, in writing, or under oath.

But the province of judging of the weight and force of that evidence must be and remain in the Inspectors; they cannot transfer this power to others; they must be satisfied with the proofs which the applicant produces in support of his claim, and from the examination he may have undergone³³⁰

On March 8, 1853, the *Baltimore Sun* reported what it said was the first disciplinary decision of a local board under the new steamboat law.³³¹ The inspectors at Cincinnati were reported to have made a thorough investigation of all the facts concerning a recent collision on the Ohio between the steamers the *Fall City* and the *Pittsburgh*. The sworn evidence revealed that the engineers and pilots had struggled to avoid a collision in foggy conditions, but that they had not followed the rules and regulations for running in fog that had been adopted by the Board of Supervising Inspectors at their first meeting in Washington, D.C. Because the pilots had not consistently rung their bells and blown their whistles at intervals of no more than two minutes when running in the fog, they had their licenses suspended. The suspensions were short, but the local board noted that it was lenient only because the rules were new and imperfectly understood. In future cases it would exact more rigorous penalties.³³²

Publication of the new rules and regulations and the notoriety of enforcement actions were virtually guaranteed by the newspapers' avid interest in steamboat accidents and the operation of the 1852 Act. Perusal of the newspapers of the period reveals constant references to actions either of the Supervising Inspectors or of local boards.³³³ And the local and supervising

330. *Id.* at 71-72. There is some question whether the Supervising Inspectors managed to prevent the capture of the licensing scheme by some of those who were required to be licensed. In his *Life on the Mississippi*, Mark Twain describes how the Pilots' Benevolent Association managed over time to monopolize the pilotage trade for its membership. Moreover, when all licensed pilots were members of the Association, it had effective control over the licensing of new pilots. In Twain's words: "By the United States law no man could become a pilot unless two duly licensed pilots signed his application, and now there was nobody outside of the association competent to sign. Consequently the making of pilots was at an end." MARK TWAIN, *LIFE ON THE MISSISSIPPI* 118 (Dillon Press 1967) (1883).

331. *First Decision Under the New Steamboat Law*, 32 *BALT. SUN*, Mar. 18, 1853, at 1.

332. The pilot regulations were reported in the *Baltimore Sun*. See *Regulations for Steamboat Navigation*, 31 *BALT. SUN*, Nov. 17, 1852, at 1.

333. These newspapers are made available online at <http://infoweb.newsbank.com/iw-search/we/HISTARCHIVE>. See e.g., *Important to the Owners of Steamboats*, MILWAUKEE

boards did more than inspect, license, enforce, and issue regulations; they also provided advice. Entrepreneurs were constantly touting one or another safety device as effective in preventing steamboat accidents, fires, or explosions. The Board of Supervising Inspectors investigated many of these claims and publicized their findings.

During the first few months of the implementation of the 1852 statute, only a relatively small number of boilers were found defective; licenses refused, suspended, or revoked; or steamers reported for prosecution for violations.³³⁴ The Supervising Inspectors were at pains to point out that the modest number of sanctions was largely the result of their cautious application of the statute at this early stage. Violations were reported to the U.S. Attorney only when they continued after being detected and the owner notified.³³⁵ And rather than outright refusal of licenses to engineers and pilots, local boards often found it possible to grant them a license for a lower grade of activity.³³⁶ Finally, when revoking or suspending licenses the Board reported that local boards had been cautious in “giving the party ample notice of the charges against him, and an opportunity either to disprove them, or present in defence, such palliating circumstances or occurrences, as should be properly considered in fixing upon or waiving the penalty.”³³⁷ Although the statute provided no administrative adjudicatory process, custom and notions of fundamental fairness seem to have filled the gap.

2. *Executive and Congressional Relations*

As previously noted, the whole steamboat regulatory apparatus was nominally a revision of the licensing scheme for domestic vessels that had begun as a revenue measure in the early days of the Republic.³³⁸ Hence, while local boards of inspectors were supervised by the Supervising Inspector in their region, they also provided reports to the Collector of the revenue district where they operated. The Collectors and the Secretary of the Treasury also participated in the appointment of local inspectors, and the Supervising

SENTINEL, Jan 9, 1857, at 2 (“The attention of the owners of Steam Passenger Vessels is called to the following resolution, adopted by the Board of Supervising Inspectors”); *Steamboat Inspection*, TRENTON STATE GAZETTE, Jan. 31, 1854, at 2 (“The Supervising Inspectors of Steamboats have made a report of their doings”).

334. See 1853 ANNUAL REPORT, *supra* note 318, at 55.

335. *Id.* at 56.

336. *Id.*

337. *Id.*

338. See *supra* Part III.

Inspectors provided an annual report on the implementation of the statute to the Secretary of the Treasury.

In the early years, there is evidence that the Secretary of the Treasury intended to exercise independent supervisory authority over the Board. Treasury Special Agent William Gouge³³⁹ first appeared at the Special Meeting of the Board of Supervising Inspectors at Washington in 1854. He was invited to sit with the Board to obtain such information as the Secretary of the Treasury required.³⁴⁰ Gouge was once again present at the annual meeting in Detroit in 1854 and at the annual meeting in St. Louis in 1855.³⁴¹ Two years into the implementation of the Act the Board seemed to have gained the Treasury's confidence. From 1855 forward, the proceedings of Annual and Special Meetings of the Board of Supervising Inspectors reveal almost no contact with the Secretary's office.

To be sure there were things that the Board needed from the Secretary. It will be recalled that at its first meeting the Board called upon the Secretary to adopt certain regulations that were in his charge under the 1852 Act.³⁴² In 1857 the Board again called upon the Secretary to urge him to revise his regulations concerning the stamping of boiler iron.³⁴³ And the Board often complained to the Secretary in its annual report that there was much fraudulent stamping of cast-iron for boilers, an offense that had no power to prevent by inspection.

The Board was also beholden to the Secretary of the Treasury concerning its budget and accounts, and had to rely on the Secretary to authorize funds for special projects. For example, the 1852 statute provided no authority for the Board to finance experiments necessary to produce sound regulations. The Board had to go hat in hand to the Secretary. In 1858, it requested funds to conduct tests and experiments concerning the means of deploying life boats from steamers and for the testing of materials that might be used as fire

339. For a description of Gouge's career, see *supra* note 158.

340. BUREAU MARINE INSP. & NAVIG., 2 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 78 (Apr. 7, 1854) (1854).

341. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 98 (Oct. 6, 1854) (Washington, Gideon & Co. 1859); *id.* at 4 (Oct. 10, 1855).

342. See *supra* note 306.

343. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 56 (Oct. 15, 1857) (Baltimore, James Lucas & Son 1859).

retardants.³⁴⁴ The latter funds were granted, leading to some important findings concerning the ineffectiveness of so-called fire-retardant paints.³⁴⁵

There is little evidence, however, that the Secretary of the Treasury exercised much control or influence over the Board during the Jacksonian period. For example, an inventor named Reeder, having twice failed to convince the Board of the efficacy of his “patent safety guard” managed, through influential friends, to get the Secretary of the Treasury to request a report on his device by the Board of Supervising Inspectors. The Board was not impressed. It responded with a report from its Committee on Machines explaining that the device would not work as claimed.³⁴⁶ And when the Secretary of the Treasury requested that the Board consider realigning their districts to ensure more effective implementation of the law, the Board declined. It explained to the Secretary that the complaints that he had received of unequal and lax enforcement were unfounded, as a prior Board investigation had demonstrated, and that the proper remedy was the creation of a tenth Supervising Inspector for the Pacific Region—a remedy that was already before the Congress.³⁴⁷

In short, the Board of Supervising Inspectors of Steamboats was in the Treasury but not of it. Like the U.S. Marshals and the Patent Office, which were lodged in the State Department, the Board had been provided a home of convenience in a department whose basic mission was quite different from its own.

Moreover, the Board had independent relationships with the relevant committees of Congress. In 1854 it appointed a committee to confer with the Commerce Committees of the House and Senate concerning its 1853 proposals for amendments to its statute.³⁴⁸ In that same year, the Board appointed another committee to confer with both commerce committees to explain issues related to implementing the fusible alloys requirements of § 9 of the 1852 Act, and the Senate Commerce Committee requested the Board’s views on whether

344. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 29, 41-43 (Oct. 14, 1858) (Washington, Gideon & Co. 1859).

345. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 32, 34 (Nov. 15, 1859) (Washington, Gideon & Co. 1859).

346. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 73-77 (Oct. 14, 1858) (Washington, Gideon & Co. 1859).

347. BUREAU MARINE INSP. & NAVIG., 4 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 12-14 (Oct. 15, 1860) (Baltimore, James Lucas & S. 1860).

348. BUREAU MARINE INSP. & NAVIG., 2 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 78 (Apr. 7, 1854) (1854).

Congress should purchase “Evans’ patent safety guard” for use on government steamboats.³⁴⁹

Indeed, the Board devoted the whole of its special meeting in Washington in 1856 to little more than lobbying Congress concerning its proposed revisions to the 1852 statute. A committee of the Board drafted amendatory legislation containing twenty-eight sections and rivaling in bulk the 1852 statute itself.³⁵⁰ The Board and its committees then held meetings with relevant congressional committees to explain its proposals. The Board also actively opposed legislation that it thought ill-advised. It commented unfavorably, for example, on a petition to Congress from the residents of Paducah, Kentucky, seeking to have a local board established there.³⁵¹ And, at the request of the House Commerce Committee, the Board prepared a substantial report on the subject of the means of removing snags from the Mississippi River.³⁵² There is no indication in the Board’s records that any of these matters were discussed with or cleared through the Treasury.

Independent relationships with the Congress did not necessarily produce results. The Board’s annual reports up through 1860 repeatedly lament that, notwithstanding favorable reports from the committees of jurisdiction, Congress had never acted on its proposals.³⁵³ As the country approached an ever more inevitable and apocalyptic civil war, Congress doubtless had other things on its mind.

On the other hand, these legislative activities reflect two practices of some moment: First, Congress obviously saw no impropriety in dealing with the Board of Supervising Inspectors as an independent entity. It might only be able to request opinions of the Attorney General and obtain funds through the Secretary of the Treasury, but it could deal with Congress directly. Second, when Congress had questions that fell within the Boards’ jurisdiction, it was prepared to view it as the expert body whose advice should be sought, if not always taken.

349. *Id.* at 95.

350. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 27-36 (Apr. 1, 1856) (Baltimore, James Lucas & Son 1859).

351. *Id.* at 12-13.

352. *Id.* at 19-25.

353. Some of the Board’s recommendations seem to have passed the House in 1860, but were not taken up by the Senate. CONG. GLOBE, 36th Cong., 1st Sess. 2177-79 (1860).

3. *Organization and Process*

Reading through the reports of the annual and special meetings of the Board of Supervising Inspectors from 1852 through 1860 the movement from informal to standardized, indeed bureaucratic, processes is obvious. The Board's business involved preeminently the adoption of rules for the guidance of local inspectors and for pilots and the preparation of its annual report to the Secretary of the Treasury. But it received memorials and petitions from interested parties and adopted resolutions that were more in the form of interpretations or advice than formal rules. In the early years, problems that were identified by petitions or by the annual reports of the local boards were referred to ad hoc committees or dealt with by the Board as a committee of the whole. By 1858 this process was inadequate. The Board established separate standing committees on the annual report, regulations, pilot rules for both the eastern and western waters, lifesaving apparatus, machinery, and fire apparatus.³⁵⁴ Thereafter issues that arose were routinely referred to the appropriate committee for recommended action.

Over time the Board also demanded more detailed and standardized reports from the local boards, and its annual report to the Secretary of the Treasury took on a formulaic character. As data were accumulated, the annual reports also increasingly emphasized statistics on the licensing and enforcement activities of the local Boards, steamship accidents, lives lost, and property damage.

Beyond overseeing the activities of the local boards, the Board of Supervising Inspectors' principal statutory function was the adoption of rules. And following its early inquiry of the Attorney General concerning its authority to make rules limiting the number of passengers carried on steamers, the Board moved forward with apparent confidence. By 1857 it had a substantial inventory of rules, both for the guidance of local inspectors and for pilots. At its annual meeting that year it adopted a complete revision and restatement of the pilot rules, including a special set of additional rules for rivers discharging into the Gulf of Mexico.³⁵⁵

Indeed that meeting saw the adoption of so many additional rules that the Board felt compelled to explain its approach in its Annual Report to the Secretary of the Treasury. The Board admitted that it had been uncertain of its

354. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 4-5 (Oct. 14, 1858) (Washington, Gideon & Co. 1859).

355. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 6-15, 19-20 (Oct. 15, 1857) (Washington, Gideon & Co. 1859).

authority to make particular rules from time to time. But, when in doubt, its guiding purpose had been to carry out the provisions of the Act “according to the true intent and meaning thereof.”³⁵⁶ The Board also assured the Secretary that it made changes in its rules only where demonstrably necessary in order to avoid “confusion, and perhaps disaster.”³⁵⁷ Nevertheless, the time for codification had arrived. In 1858 the Board charged its Committee on Regulations to compile an index of all of its prior rules and resolutions in order to make them more easily available.³⁵⁸ That compilation would be composed of both “hard law”—that is, regulations—and “soft law”—that is, recommendations, interpretations, and explanations. This was necessary because the Board often acted by a resolution that merely called upon local boards to recommend certain practices or to be particularly attentive to some aspect of inspections or licensing.³⁵⁹ The Board also issued interpretations of its own rules,³⁶⁰ and documents that it called “circulars” that explained the rules in greater detail than were contained in the regulations themselves.³⁶¹

Rule drafting was done by ad hoc and then the standing committees of the Board. Publication occurred incidentally in the interested press, but also by distribution of the rules to all potentially affected parties. In 1857, for example, the Board ordered 4000 copies of its new Pilot Rules and Rules on Signal Lights printed for distribution to all steamship pilots.³⁶² It also set aside a day for the Supervising Inspector to individually sign all 4000 copies. Without an official gazette for the publication of administrative rules, apparently the signatures of the Board’s members were thought necessary to authenticate these communications.

Although the Board held no hearings on its proposed rules, it often described its rules as responding to petitions or complaints from outside parties and sometimes invited outsiders with special interest or competence to

356. *Id.* at 34.

357. *Id.* at 37.

358. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 34 (Oct. 14, 1858) (Washington, Gideon & Co. 1859).

359. *See, e.g.*, BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 28-29 (Nov. 7, 1859) (Washington, Gideon & Co. 1859).

360. *See, e.g.*, BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 103 (Oct. 1, 1854) (Washington, Gideon & Co. 1859).

361. *See, e.g.*, Explanatory of Pilot Rules and Signal Lights, *appended to* 1858 ANNUAL REPORT.

362. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 37 (Oct. 15, 1857) (Baltimore, James Lucas & Son 1859).

meet with the Board concerning particular issues.³⁶³ And while much of the Board's information came from its own investigations and the experience and reports of the local boards and inspectors, by 1858 it was setting aside some time at its annual meeting to hear orally from petitioners.³⁶⁴

The Board was generally attentive to explaining the basis and purpose for any new rule or amendment. These explanations appeared both in the preamble to resolutions spread upon the minutes of its proceedings and in its annual reports to the Secretary of the Treasury, which often elaborated the necessity for and rationale for new regulations. These explanations may be rather like the "concise statements of basis and purpose" that the drafts of § 553 of the Administrative Procedure Act had in mind in 1946.³⁶⁵ But, because no one in the 1850s would have imagined judicial review of the Board's rulemaking activities, these explanatory statements did not metastasize into the book-length treatises that one now often finds in the Federal Register. The Board was merely engaging in the politically prudent activity of explaining itself to its formal superior officer, Congress, and the public at large.

The other major quasi-rulemaking activity of the Board was the evaluation of inventions and techniques that were pressed upon it by either public-spirited or proprietary petitioners. The annual proceedings are replete with reports on matters such as Evans' patent safety guard,³⁶⁶ a patented life boat and an apparatus for extinguishing fires on steamships,³⁶⁷ a patented detachable safety deck saloon cabin, Hoyt's Watergate and Allen's Steam Gauge,³⁶⁸ or Miller's Safety Steamboiler, or Stubblefield's Steam Alarm Water Gauge.³⁶⁹ The Board sometimes found the gadgets useful and recommended them, and sometimes useless and to be avoided. It made clear, however, that its acceptance of a

363. See, e.g., BUREAU MARINE INSP. & NAVIG., 2 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 85-90 (Apr. 7, 1854) (1854) (considering the problem of the protection of safety valves from the effect of rust on iron, based on studies and conversations with one Professor Smith).

364. See, e.g., BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 15 (Oct. 14, 1858) (Washington, Gideon & Co. 1859).

365. 5 U.S.C. § 553 (2000).

366. BUREAU MARINE INSP. & NAVIG., 2 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 81, 85 (Apr. 7, 1854) (1854).

367. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 8-10 (Oct. 10, 1855) (Washington, Gideon & Co. 1859).

368. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 20-21, 27-29 (Oct. 15, 1857) (Washington, Gideon & Co. 1859).

369. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 14 (Oct. 14, 1858) (Washington, Gideon & Co. 1859).

particular device as a useful safety mechanism should not exclude any alternatives that also performed effectively.³⁷⁰ The Board seems to have had a clear preference for performance versus design regulations and tried to avoid either prejudging patentability or providing a regulatory monopoly.

On the other hand if a design failed to work, the Board banned its approval by local inspectors. The Board, for example, banned the approval of any boiler where the fusible alloys required by the statute to be used in its construction could come in contact with direct pressure from the steam.³⁷¹ It also prohibited the approval of inflatable life preservers,³⁷² or life preservers constructed of tin, other metals subject to oxidation, or filled with cork dust or cork cuttings.³⁷³

Whereas the Board of Supervising Inspectors was engaged primarily in rulemaking and general advice giving, the local boards' responsibilities were for licensing and enforcement. Every annual report contains a summary of all accidents occurring during that year in every supervisory district, a discussion of the local board's investigation into the causes of those accidents, and a description of the enforcement actions taken where vessels, pilots, or engineers were found to be at fault. But the Board of Supervising Inspectors provided almost no specification of how local boards should operate in connection with their enforcement activities, investigations or licensing functions.

There were a few exceptions. The Supervising Board instructed the local examiners that a valid prior certificate held by a pilot or engineer was to be made *prima facie* evidence of entitlement to a renewal.³⁷⁴ It also made regulations concerning the effects and duration of local boards' suspensions and revocations of licenses.³⁷⁵ But these exceptions proved a rule. We can learn very little from the Annual Reports of the Supervising Inspectors concerning how local boards exercised their authority. The statute gave them authority to hold hearings and swear witnesses, but the Supervising Inspectors did not seek to regulate their procedures.

As early as 1855, the Annual Report of the Board of Supervising Inspectors reported that enforcement was easier and contested cases were constantly

370. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 29 (Oct. 15, 1857) (Washington, Gideon & Co. 1859).

371. BUREAU MARINE INSP. & NAVIG., 2 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 85-90 (Apr. 7, 1854) (1854).

372. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 7-8 (Oct. 10, 1855) (Washington, Gideon & Co. 1859).

373. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 16, 25-26 (Oct. 15, 1857) (Washington, Gideon & Co. 1859).

374. *Id.* at 18-19.

375. *Id.* at 24-25.

decreasing because the courts had now decided many doubtful questions.³⁷⁶ Standing alone this might suggest significant judicial involvement in the enforcement of the statute. But there is little other evidence to support that inference. The reports of federal cases for this period reveal some reasonably generous constructions of the statute by federal courts.³⁷⁷ Indeed, the reported cases are sparse and four years later the Board complained about the tardiness of action by U.S. Attorneys in pressing prosecutions for violation of the statute.³⁷⁸ If the Act were having beneficial effects, these were more likely to flow from the high level of administrative inspections and investigations.

4. Results

The new regulatory system did, indeed, seem to be having the desired effects. The passage of the steamboat safety legislation had been driven in significant part by public attention to the available statistics on steamboat accidents and explosions. Congress had printed 10,000 copies of its 1838 report on the causes of steamboat accidents, obviously anticipating significant interest in the public at large.³⁷⁹ Based on the reports that they had by regulation required of local boards, the Supervising Inspectors larded their annual reports with statistics on the number of accidents, their causes, lives lost, and property destroyed.³⁸⁰

These data were publicized by an always-interested press. In 1857, for example, under a headline reading "Interesting Statistics," the *Baltimore Sun*

376. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 13 (Oct. 10, 1855). Unfortunately the Report provides no details or even identification of the judicial decisions it praises.

377. See, e.g., *United States v. Bougher*, 24 F. Cas. 1205 (C.C.D. Ohio 1854) (No. 14,627) (holding that no expressed statutory authorization was required for the United States to bring an action in debt to recover fines under the Statute even though the statute did not explicitly authorize this form of enforcement); *United States v. The Thomas Swan*, 28 F. Cas. 86 (D.C.S.C. 1856) (No. 16,480) (holding that a local inspector would not be barred from testifying in an enforcement action as an "interested person" merely because he was a named party in the enforcement action).

378. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 67 (Nov. 7, 1859) (Washington, Gideon & Co. 1859).

379. Mohun, *supra* note 246, at 343. The congressional report was U.S. CONGRESS, STEAM-ENGINES: LETTER FROM THE SECRETARY OF THE TREASURY, H.R. DOC. NO. 25-21 (1838).

380. The accident statistics included the Supervising Inspectors' reports for 1853-1863 are summarized in HUNTER, *supra* note 260, at 541.

summarized the data from the most recent Supervising Inspectors' Report.³⁸¹ The news was encouraging:

By an examination of these statements we find that for five years prior to the passage of the steamboat act we have accounts of the loss of 1,571 lives, and for the five years since said passage, the total loss of life on the western rivers is 315, leaving a difference of 1,226 lives.³⁸²

The supervising inspectors had reported inspecting 1122 steamers during 1856 as well as examining and licensing over 2500 pilots and nearly 3000 engineers. The total number of passengers carried by licensed steamers during the period topped 3.6 million. Three hundred and fifteen deaths out of a total passenger carriage of 3.6 million suggests that steamers had become a relatively safe mode of transport. And, the decrease in lives lost between the period before and the period after implementation of the Steamboat Safety Act was impressive – deaths had fallen by a factor of five.

The problem with these comparative numbers was that the "before the act" figures were compiled from newspaper reports, which were almost certainly exaggerated. Fatalities reported in the newspapers in the late 1850s were nearly twice as large as the number compiled from the reports of the local inspectors investigating the accidents.³⁸³ Nevertheless, the implementation of the Steamboat Safety Act was almost certainly having a salutary effect. Reductions in accidents and lives lost were occurring in the face of significant increases in steamboat tonnage in use and in passengers carried. Louis Hunter concluded that, "The reports of the supervising inspectors contain ample evidence of the industry and intelligence with which the Act of 1852 was administered."³⁸⁴ Hunter here probably has reference to the practice of the Board of Supervising Inspectors when reporting annually on the experience in the various supervisory districts. The Board routinely, and perhaps optimistically, ascribed the avoidance of near accidents, the extinguishing of steamboat fires, and the prevention of loss of life to passengers after accidents, to the effects of the 1852 statute, its regulations, and the inspections, licensing, and enforcement activities taken pursuant to it.

381. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 32-33 (Nov. 7, 1859) (Washington, Gideon & Co. 1859).

382. SEC'Y OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY, ON THE STATE OF THE FINANCES, S. EXEC. DOC. NO. 35-1 (1st Sess. 1857); *see also Interesting Statistics*, 42 BALT. SUN, Dec. 30, 1857, at 4.

383. HUNTER, *supra* note 260, at 540.

384. *Id.* at 542.

Thousands of inspections and hundreds of specific orders, both for repairs and replacements and for the suspension and revocation of licenses, focused the minds of the steamboat operators on safety. Indeed, in report after report, the Supervising Inspectors noted that the owners of steamers not covered by the statute were requesting inspections because it had been demonstrated to be in their own interest.³⁸⁵ There were even requests for inspections of locomotives and land steam engines, and some companies running exempt steamships declined to employ engineers who had not been licensed pursuant to the 1852 Act.³⁸⁶ Although boiler explosions would remain a problem in steamboat travel for many years, the move from general deterrence through civil and criminal penalties to specific requirements, administered by a vigorous and increasingly knowledgeable agency, seems to have been a success.³⁸⁷

5. *Science, Technology, and Steamboat Regulation*

An idealized model of the relationship between science, technology, and public policy might go something like this: scientific discoveries often lead to useful technological applications. Government policy supports and encourages the generation of new scientific knowledge and the development of useful technologies. It also responds to scientific and technological innovation by regulating new products and processes when necessary to limit their harmful side effects.

This idealized vision hardly describes the world as it is. Technological progress often precedes scientific understanding. Humans were using levers and wheels in rudimentary machinery long before there were mathematical formulae for calculating mechanical advantage. Selective breeding of domestic

385. This begins as early as BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 13 (Oct. 10, 1855) (Washington, Gideon & Co. 1859). See also BUREAU MARINE INSP. & NAVIG., 4 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899 at 15-16 (Oct. 15, 1860) (Baltimore, James Lucas 1860).

386. BUREAU MARINE INSP. & NAVIG., 3 STEAMBOAT INSP. SERV., PROC. BD. SUPERVISING INSP. STEAM VESSELS 1852-1899, at 32 (Oct. 10, 1855) (Washington, Gideon & Co. 1859).

387. A recent and unpublished paper finds, using sophisticated econometric methods and a new data set on steamboat travel, that the 1852 act improved safety. Richard N. Langlois, David J. Denault, & Samson M. Kimenyi, *Bursting Boilers and the Federal Power Redux: The Evolution of Safety on the Western Rivers* (May 1994) (unpublished manuscript), available at <http://econpapers.repec.org/paper/wpawuwpeh/9503002.htm>. But all credit should not be assigned to the new regulatory regime. The new data suggest that the Act merely accelerated a safety trend that was fairly constant throughout the period 1830-1869.

animals to produce superior livestock preceded the mapping of the genome by thousands of years. Contemporary examples of technology preceding scientific understanding abound. We spend billions of dollars clinically testing the effects of new drugs because our understanding of genetics and biochemistry is much too limited to allow accurate prediction of how new biological or chemical entities will affect the human body. Much, perhaps most, technological progress is the result of incremental adjustments to existing methods, not the abstract application of new scientific learning to previously perceived needs.

Similarly, public policy may retard, ignore, distort, or imagine science, almost as often as it supports it or uses good science to develop effective, cost-beneficial, regulatory policy. While the administration holding office as these words are written has a particularly spotty record on matters scientific,³⁸⁸ policymaking has never been only a search for scientific truth.³⁸⁹ The regulation of steamboats in the mid-nineteenth century in the United States provides a classic example of this uneasy relationship between science, technology, and public policy. For the Jacksonian period witnessed not only a series of major technological innovations, but also a dramatic upsurge in the general interest in science—or what was then called “natural philosophy.”³⁹⁰

388. For example, President Bush’s directive concerning federal funding for stem cell research takes a position on moral grounds that directly conflicts with applicable statutory requirements. Yaniv Heled, *On Presidents, Agencies and the Stem Cells Between Them*, 60 ADMIN. L. REV. 65, 87-116 (2008). A number of actions of this type have led to substantial criticism, some of it hyperbolic. See, e.g., Robert F. Kennedy, Jr., *The Junk Science of George W. Bush*, NATION, Mar. 8, 2004, at 11, available at <http://www.thenation.com/doc/20040308/kennedy> (arguing that the Bush Administration is “engaged in a campaign to suppress science that is arguably unmatched in the Western world since the Inquisition”).

389. A discussion of this problem and citation to some of the more prominent literature can be found in Jerry L. Mashaw, *Law and Engineering: In Search of the Law-Science Problem*, LAW & CONTEMP. PROBS., Autumn 2003, at 135.

390. For a general review of science in this period, see GEORGE H. DANIELS, *AMERICAN SCIENCE IN THE AGE OF JACKSON* (1968). An increasing reliance on scientific expertise is also evidenced in the reforms in the Patent Office and its procedures during the Jacksonian period. Prior to 1836 the Patent Office was a mere registration service. The Patent Clerk in the State Department had no authority to deny a patent on any ground other than failure to meet the formal requirements of registration. The question of whether the patent owner should have been granted an exclusive right to exploit his invention would be determined in a subsequent action for patent infringement in the courts. After 1836, however, a new patent office was established with a Commissioner of Patents who was authorized to issue patents only on a finding that a new invention or discovery was actually new and was “sufficiently useful and important” to be issued a patent. Act of July 4, 1836, ch. 357, § 7, 5 Stat. 117, 119-20. It is perhaps not surprising that it was this new Commissioner of Patents who was

By the time the first major boiler explosion occurred on the steamboat *Washington* in 1816, steam technology development was well in advance of scientific understanding. While steam power had been used in the United States since the middle of the eighteenth century,³⁹¹ engineers had only a sketchy idea of how their steam engines actually worked. According to Robert Bruce:

Antebellum inventors were no more inclined to scientize than they were to professionalize. Most being devisers of mechanisms, they carried on no experimental research to derive new principles or generalizations. Instead they used well-known mechanical principles and counted it success when their models worked as envisioned.³⁹²

And when machines based on their models failed, as bursting boilers did so dramatically, they could only guess at the reasons.

As the editor of the *Journal of the Franklin Institute* put it in January of 1829: “With respect to the cause of such explosions, there is not, by any means, a concurrence of opinion, even among scientific men.”³⁹³ Many apparently believed that the problem was negligent operation. This theory was dealt a severe blow when the steamboat *New Haven* exploded in 1830 in circumstances that could not be attributed to negligent operation, or to any other cause that had previously been postulated. Professor Benjamin Silliman of Yale, the founder of one of the chief scientific journals of the age, wrote that the “painful conclusion is forced upon us, that explosions of steam boilers are produced by the energy of the power and by the weakness of the materials.”³⁹⁴

But why did some explode while others did not? Alexander Dallas Bache³⁹⁵ hypothesized that, contrary to popular wisdom, the safety valves on steam

charged with the task of evaluating the effectiveness of the 1838 Steamboat legislation. On the development of the patent system in this period, see Duffy, *supra* note 52, at 1124-29.

391. 2 LOUIS C. HUNTER, A HISTORY OF INDUSTRIAL POWER IN THE UNITED STATES, 1780-1930: STEAM POWER (1985).

392. ROBERT V. BRUCE, THE LAUNCHING OF MODERN AMERICAN SCIENCE, 1846-1876, at 155 (1987). In this regard they were no different from their predecessors. The Archimedes Project at the Max Planck Institute for the History of Science in Berlin has found that in the ancient and medieval worlds as well, where mechanical devices are involved, “The practical use comes first, theory second.” Guy Gugliotta, *The Ancient Mechanics and How They Thought*, N.Y. TIMES, at F1 (Apr. 1, 2008).

393. *On Explosions in Steam Boilers*, 3 J. FRANKLIN INST. 70, 70 (1829).

394. Benjamin Silliman, *Safety of Steam Boats*, 6 J. FRANKLIN INST. 323, 353 (1830).

395. Alexander Dallas Bache was one of the leading scientific lights of the Jacksonian era. He was a professor at the University of Pennsylvania, the editor of the *Journal of the Franklin Institute*, a pioneering head of the United States Coast Survey, and the leader of the

boilers might actually cause boiler explosions.³⁹⁶ Bache's hypothesis was based on an analogy to another conjecture, that is, that adding water to a hot boiler increased rather than decreased the pressure in the boiler and caused explosions. Others thought that the explosions resulted from the decomposition of water inside a boiler into its component elements.³⁹⁷

Although it had been founded for quite different purposes,³⁹⁸ the managers of the Franklin Institute decided to pursue serious research on the causes of steam boiler explosion.³⁹⁹ Three months earlier Congress had requested that Treasury Secretary Louis McLane collect information and report his views concerning what regulations the Congress might adopt to guard against the dangers from bursting steamboat boilers.⁴⁰⁰ McLane happened to read a newspaper account of the Franklin Institute's proposed actions and wrote to suggest a cooperative effort, including the possibility of appropriating federal funds to support the Institute's experiments. Bache, who headed the Franklin Institute's committee of inquiry, responded with a proposed set of experiments and a budget of \$1500.⁴⁰¹ The appropriation was approved in October, and the

movement to establish the National Academy of Sciences. On Bache's career, see HUGH RICHARD SLOTTEN, *PATRONAGE, PRACTICE, AND THE CULTURE OF AMERICAN SCIENCE: ALEXANDER DALLAS BACHE AND THE U.S. COAST SURVEY* (1994).

396. A.D. Bache, *Safety Apparatus for Steam Boats, Being a Combination of the Fusible Metal Disk with the Common Safety Valve*, 7 J. FRANKLIN INST. 217, 217 (1831).

397. This theory is described in ALFRED GUTHRIE, *MEMORIAL OF ALFRED GUTHRIE, A PRACTICAL ENGINEER*, S. MISC. DOC. NO. 32-32, at 9 (1852).

398. The initial aims of the Franklin Institute, founded in 1824, were (1) to provide instruction to working men in the principles of science; and (2) to improve the status of artisans in a democratic society. Membership was open to all, and the early membership included a broad group of professions, from ale brewers to plasterers to plumbers to blacksmiths and druggists. The Institute provided lectures for its members and the general public, held exhibitions on new inventions, reported grants of new invention patents, and created a library of books related to science and the useful arts. It also founded, in 1837, the *Journal of the Franklin Institute* to diffuse information on any subject connected with the useful arts. For a brief history of the early years of the Franklin Institute, see SYDNEY L. WRIGHT, *THE STORY OF THE FRANKLIN INSTITUTE* (1938).

399. Board of Managers, *Proceedings Relating to the Explosion of Steam Boilers*, 10 J. FRANKLIN INST. 33 (1830).

400. H.R. 14, 21st Cong. (1st Sess. 1829).

401. On the events leading up to the joint government/Institute project, see BRUCE SINCLAIR, *PHILADELPHIA'S PHILOSOPHER MECHANICS: A HISTORY OF THE FRANKLIN INSTITUTE, 1824-1865*, at 176-77 (1974).

first partnership between the federal government and scientific institution was launched.⁴⁰²

The Institute set out to determine “the truth or falsity of the various causes assigned for the explosions of steam-boilers, with a view to the remedies either proposed, or which may be consequent upon the result of the investigation.”⁴⁰³ Its committee developed twelve specific research projects and meticulously documented the specifications of the various devices used in its experiments and the experimental methods employed.⁴⁰⁴ These investigations disproved many of the standard hypotheses concerning the causes of steam boiler explosions, including all of those previously mentioned. Perhaps most importantly, the Committee’s report demonstrated conclusively that “*the most violent explosions might occur without a sudden increase of pressure within a boiler.*”⁴⁰⁵

And, although the Board of Managers of the Franklin Institute had entered upon its investigations with considerable skepticism about adopting federal legislation,⁴⁰⁶ Bache’s general report offered Congress a twenty section bill which contained all the technological provisions that would eventually find their way into the 1852 legislation.⁴⁰⁷

Here, of course, science met politics. Congress was not stimulated to act by the Franklin Institute’s report and proposed legislation, but by the spectacular

402. The federal government had, of course, supported substantial cartographic and natural history projects. Thomas Jefferson’s support of the Lewis and Clark Expedition, and the naval cruise that mapped the South Pacific and discovered Antarctica during the Van Buren Administration, are major examples. But these enterprises were not aimed at policy development.

403. *Report of Experiments Made by the Committee of the Franklin Institute of Pennsylvania, on the Explosions of Steam-Boilers, at the Request of the Treasury Department of the United States*, 17 J. FRANKLIN INST. 1 (1836).

404. The report was published serially in the January-May issues of the Franklin Institute. See 17 J. FRANKLIN INST. 1, 73, 145, 217, 289 (1836).

405. *Id.* at 225. To make its report more useful for Congress, Bache wrote a general report of forty-eight pages that translated the scientific findings into policy recommendations. This was followed by a more technical, 247-page report that contained all of the Committee’s specific findings, equations, and calculations. See R. JOHN BROCKMANN, EXPLODING STEAMBOATS, SENATE DEBATES AND TECHNICAL REPORTS 62 tbl. 1 (2002).

406. Although the managers of the Institute believed that “there must be a power in the community lodged somewhere to protect the people at large against any evil of serious and frequent recurrence,” they also believed “that such power is to be used with extreme caution, and only when the evil is great, and the remedy certain of success.” Board of Managers, *Proceedings Relating to the Explosion of Steam Boilers*, 10 J. FRANKLIN INST. 33, 34 (1830).

407. See *A Bill for the Regulation of the Boilers and Engines of Vessels Propelled in the Whole or in Part by Steam*, 18 J. FRANKLIN INST. 369 (1836).

boiler explosions that occurred in 1837 and early 1838.⁴⁰⁸ And when Congress acted it omitted virtually all of the Franklin Institute's technical suggestions. The Institute's proposed bill would have required that boilers be hydrostatically tested at three times their normal operating pressure, that only certain metals be used in boiler construction, and that the metal plate be of a required minimum thickness, to mention but the bill's most important technological provisions. By contrast, inspectors under the 1838 legislation were merely instructed to find that boilers were "fit for use." A Congress that had been resisting steamboat regulation since the 1820s would not bring itself to adopt technologically sound legislation until 16 years after the Franklin Institute studies had demonstrated quite conclusively what needed to be done.

Even when it adopted its more comprehensive regulations in 1852, Congress failed to include a considerable portion of its science advisor's advice in its legislation. The statute reduced the recommended hydrostatic testing pressure by half on the basis of no discernable scientific evidence, and instructed inspectors merely to determine that a boiler was "well made of good and suitable material"⁴⁰⁹ and that pipes exposed to heat were "of proper dimensions."⁴¹⁰

The path-breaking experiments of the Franklin Institute almost certainly had some impact.⁴¹¹ But the 1852 legislation was technologically less sophisticated than French regulations that had been in effect since 1823, and which were well known in the United States.⁴¹² Congress was no more persuaded by scientific understanding alone in the mid-nineteenth century than it is in the first decade of the twenty-first.

The conclusion is almost inescapable that the real improvements in the effectiveness of the 1852 over the 1838 regulatory legislation lay in the 1852 Act's administrative provisions. A permanent cadre of inspectors, armed with licensing power and with rulemaking authority to fill in the holes inevitably

408. See *supra* note 246 and accompanying text.

409. Act of Aug. 30, 1852, ch. 106, § 9, 10 Stat. 61, 64.

410. *Id.*

411. BROCKMANN, *supra* note 405, at 81, 84, denies that the influence was at all substantial. But Patent Commissioner Burke's report to Congress in 1848 recognized that the institute's 1836 report had answered many of the important questions necessary to understand the causes of boiler explosions. Burke's Report, *supra* note 267, at 5-7.

412. The important French ordinances, and the circulars and instruction that implemented them, were all translated and reprinted in the *Journal of the Franklin Institute*. See 7 J. FRANKLIN INST. 272, 323, 399 (1831); 8 J. FRANKLIN INST. 33 (1831); 10 J. FRANKLIN INST. 105, 181 (1832). And the Dutch and Belgian regulations, along with the French, were before the Senate Commerce Committee in 1840. S. DOC. NO. 26-241, at 1 (1840).

left by the congressional legislation, could make a difference. Year by year, based on the testimony of experts, the experience of the local boards, and their own investigations, the Board of Supervising Inspectors of Steamboats learned what worked and what did not. This knowledge was impounded into regulations, recommendations, and advice, including much advice that went unheeded by a Congress preoccupied by other matters. Although little-known to twenty-first-century administrative lawyers, the 1852 Steamboat Safety Act anticipated the organizational form, the practical operation, and the congressional politics of much modern health and safety regulation.

IV. POLITICAL AND LEGAL CONTROL OF ADMINISTRATION

As the preceding three Parts amply illustrate, much, if not most, oversight and control of Jacksonian administrative action originated within bureaus and departments. The Treasury regulated its relationships with state banks and with the sub-Treasuries by contract and circular, largely unaided (and occasionally derailed) by congressional legislation. Amos Kendall, and other bureau heads, reformed administration in their respective departments by reorganization, instructions, and new routines. Congress assisted or ratified these efforts where new legislative authorization was required and sometimes provided explicit checks and balances within departments, but departmental effectiveness was dependant primarily upon leadership and systems within the administration. The Board of Supervising Inspectors of Steamboats seized upon its authority to assure consistency in the operation of local inspections and licensing to generate an elaborate set of regulations and reporting requirements that both energized and controlled administration in the federal government's first independent foray into health and safety regulation.⁴¹³

Yet, while this "internal law of administration"⁴¹⁴ formed the lifeblood of administrative law in the Jacksonian era, administrative law also developed through adjustments in the relationship between administrators and elected office holders and through litigation contesting the legality of administrative action. The crucial developments concerning the relationship of the President to administration have been recounted. The struggle between Andrew Jackson and Congress over the removal power reinforced the President's position in a

413. The federal government had early used its enforcement powers in aid of state quarantine regulation. See Act of May 27, 1796, ch. 31, 1 Stat. 474.

414. For one scholar close to the development of administrative law in the nineteenth century, the category of "internal administrative law" was a major organizing principle for the field. See BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 1-61 (1903).

continuing contest between the executive and legislative branches for authority over administration in which there are many truces, but no ultimate victories.

This shift in legal consciousness between the period of Jeffersonian Republican ascendancy and the Jacksonian era is reflected in the contrasting tone of opinions by active and respected Attorneys General. In 1823 Attorney General Wirt advised President Monroe that the President’s role was to give “general superintendence” to those to whom Congress had assigned executive duties because

it could never have been the intention of the constitution . . . that he should in person execute the laws himself. . . . [W]ere the President to perform [a statutory duty assigned to another], he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.⁴¹⁵

When advising President Pierce on similar matters, Attorney General Cushing did not disagree with Wirt directly, but also expressed his opinion that “no Head of Department can lawfully perform an *official* act against the will of the President.” In Cushing’s view a contrary position would allow Congress to “so divide and transfer the executive power as utterly to subvert the Government.” Cushing recognized that all the ordinary business of administration was normally placed under the authority of a department, not the President. But for him this meant simply that those actions “may be performed by [the department head], without the special direction or appearance of the President.”⁴¹⁶ Cushing’s view, colored surely by his own frustrations at being an officer without departmental subordinates, did not necessarily reflect practice. As noted previously, Congress was often the dominant force in the political direction of administration throughout the nineteenth century.

A. Congress and Administration

By the time that Andrew Jackson took office as President, Congress had already institutionalized itself in ways that promoted oversight of administration. It had begun to exercise its investigatory powers to publicize and correct administrative malfeasance, and it had put in place a number of reporting requirements that kept Congress systematically informed about administrative operations, particularly the use of public revenue.⁴¹⁷ These

⁴¹⁵. 1 Op. Att’y Gen. 624, 625 (1823).

⁴¹⁶. 7 Op. Att’y Gen. 453, 469-71 (1855).

⁴¹⁷. See the discussion in Mashaw, *supra* note 37, at 1723-25, and authorities therein cited.

trends continued in the period 1829-1860. The House and Senate investigations into customs collections and the Post Office were just two examples of a multitude of inquiries throughout the Jacksonian era. These investigations were often fueled by partisan motives, and the recurrent clashes between congressional Whigs and Democratic presidents produced partisan stalemates that often prevented congressional investigations from producing useful legislation. They turned up important information nevertheless.⁴¹⁸ Congress also added to the substantial list of reports that executive departments were required to make to the legislative branch concerning their activities and expenditures.⁴¹⁹

Perhaps the most important general development in administrative-congressional relations in this period was the growing recognition that the knowledge necessary for effective policymaking now resided with the administrators of the various governmental departments. Although Jeffersonian Republicans feared, and had often resisted, departmental influence on congressional decision making, by 1834 Congress recognized that much of its business depended on reports and information from executive agencies.⁴²⁰ In 1850, for example, Senator Jefferson Davis conceded that it would be unwise to legislate on technical matters without the advice of the relevant administrators. Speaking of the Patent Office he said, "I think it would not detract from the Senate, but be acting the part of prudence, to go to those who have special information before legislating upon such subjects."⁴²¹ Indeed, Congress often depended upon the departments to draft major legislation. The statute reorganizing the General Land Office was drafted by Commissioner Ethan A. Brown,⁴²² and the bill reorganizing the Navy Department was written by Navy Secretary Upschur.⁴²³ This might occur even when a department did not exist. The bill providing for the Department of the Interior, for example, was drafted by the Treasury at the request of the Ways and Means Committee.⁴²⁴ And, as previously noted, when Congress wanted advice

418. WHITE, *supra* note 2, at 149.

419. The list of reports made to the Congress as of 1834 appears at H.R. DOC. NO. 23-1 (1834). Additional reports were added by Act of Aug. 26, 1842, ch. 202, § 20, 5 Stat. 523, 527; Act of July 21, 1840, ch. 99, § 9, 6 Stat. 813, 815; Act of Mar. 3, 1849, ch. 110, § 6, 9 Stat. 398, 399; and Act of Mar. 3, 1858, ch. 97, § 2, 10 Stat. 189, 209.

420. XLVII NILES WKLY REG., Dec. 13, 1834, at 233.

421. 2 JEFFERSON DAVIS, HIS LETTERS, PAPERS AND SPEECHES 5 (1923).

422. S. DOC. NO. 24-216, at 1-2 (1836).

423. H.R. DOC. NO. 27-167, at 1-2 (1842).

424. CONG. GLOBE, 30th Cong., 2d Sess. 514 (1849)

concerning reform of the 1838 Steamboat Safety Act, it turned to one of the few “scientific” officers of the government, the Commissioner of Patents.⁴²⁵

As the Jeffersonian Republicans had feared, this dependence on administrative information could stymie as well as promote the accomplishment of congressional purposes. Congress was, as always, suspicious that administrators were wasting government money. But if it was to cut back on administrative expenditures without damage to the public service, Congress needed to know how—information that might be obtained only from the administrators themselves. In 1842 a Select Committee on Retrenchment headed by Representative Thomas W. Gilmer lamented that in its quest for suggestions from the departments on how to save money, it had failed to secure any information “favorable to a general or systematic reform.”⁴²⁶ The Committee was probably not surprised. Congress still held the reins that guided administration through the provision of legal authority and fiscal resources. But its operating practices increasingly recognized the emergence of an administrative state: one that operated with sufficient informational advantages that Congress should be guided by administrators when considering how to structure the latter’s legislative instructions.

Summing up his review of congressional–administrative relations in the Jacksonian era, Leonard White concluded:

Congress was active and useful in performing its proper function of inquiry and supervision of the administrative machine. From time to time it enacted constructive legislation, and it must be agreed that many of its restrictive laws were designed to remedy errors or faults that came to public attention. On the whole, however, the record of Congress in the field of administration was a record characterized by delay, indifference, partisanship, and reluctance to provide the resources for effective work.⁴²⁷

B. Judicial Review of Administrative Action

By 1832 two basic approaches to judicial review of administrative action had emerged. The first was a “common law” style of review in determining suits for damages against public officers or in weighing defenses in criminal prosecutions. Here the court, and often a jury, tried questions of law and fact

^{425.} See *supra* note 267 and accompanying text.

^{426.} H.R. REP. NO. 27-741, at 1 (1842).

^{427.} WHITE, *supra* note 2, at 161-62.

de novo. Prior administrative determinations were given no deference. Indeed because local juries generally participated in these cases, local resistance to the implementation of national law could easily derail execution of congressional statutes and intimidate federal officers, who were personally liable should the jury find their actions unwarranted in either law or fact. The alternative approach, almost a direct opposite, treated administrative determinations as the judgments of coordinate tribunals, which were subject to review and revision only for fraud or lack of jurisdiction.⁴²⁸

Did these trends persist in the Jacksonian era? There is no straightforward answer to that question and the legal literature is divided. Nathan Isaacs characterizes this period as one of “judicial abdication.”⁴²⁹ Ann Woolhandler broadly agrees.⁴³⁰ The Taney Court took Jacksonian democratic theory seriously, including the old Jeffersonian notion that the separation of powers implied that one branch could not interfere with another by directly invalidating its actions. On these accounts the Jackson/Taney era was one of judicial retreat to “jurisdictional” or “res judicata” review that left executive power relatively uninhibited by judicial controls.

Frederic P. Lee sees matters quite differently.⁴³¹ Relying principally on *United States v. Ritchie*⁴³² and *Kendall v. United States ex rel. Stokes*,⁴³³ Lee characterizes the decisions of the Jacksonian period as laying the groundwork for modern versions of judicial review for legal error and for factual or judgmental arbitrariness. In Lee’s words, “Today on the foundation of the history making but long forgotten *Kendall* case, reinforced by the supplementary principles developed in the statutory review *de novo* under the *Ritchie* case . . . there has been built the present structure of judicial control of executive or administrative action.”⁴³⁴

There is much to be said for both of these positions, but in my view they both sometimes overinterpret the evidence. Supreme Court opinions during

428. On judicial review through 1829, see Mashaw, *supra* note 37, at 1674-96, 1725-36. For an instructive review of judicial review in the nineteenth century that explains these two approaches as a “de novo model” and a “res judicata model” of review, see Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

429. Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 YALE L.J. 781, 791-95 (1921).

430. Woolhandler, *supra* note 428, at 215-16.

431. Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287 (1948).

432. 58 U.S. (17 How.) 525 (1854).

433. 37 U.S. (12 Pet.) 524 (1838).

434. Lee, *supra* note 431, at 308-09 (citation omitted).

this period often feature broad language renouncing judicial interference with executive discretion, and they also evidence attempts to provide federal officials with some protection from common law suits for damages. On the other hand, the Supreme Court’s mandamus jurisprudence makes good on the promise of *Marbury v. Madison* in ways that that decision clearly did not, and its most creative efforts to protect federal officers from damage actions were rejected by Congress. Moreover, while the *Ritchie* case creates a potential slippery slope, at the bottom of which lies review for error or unreasonableness, the Supreme Court consistently rejected any notion that it could exercise appellate review over administrative action and strongly implied that attempts by Congress to authorize it to do so would be unconstitutional. A more nuanced evaluation of the case law seems to be required.

We should begin with Frederic Lee’s “long forgotten” case of *Kendall v. United States*. Whatever the validity of Lee’s historiography, the *Kendall* opinion was both notorious and widely discussed when issued. The case arose out of Amos Kendall’s campaign to stamp out corruption in the Post Office. Kendall disallowed payment of a claim by the firm of Stockton and Stokes, one of the major contract carriers and stagecoach operators between Washington, Baltimore, and Philadelphia. Kendall apparently believed that the Stockton and Stokes claim was based on one of those lowball and then “improved” bids that had undermined competitive bidding for mail carriage. He was then outraged when an intermediary promised a carriage and a pair of horses to his wife if the Stockton and Stokes claim were allowed.⁴³⁵

Stockton and Stokes repaired to Congress and succeeded in getting an Act passed that directed the Solicitor of the Treasury to determine the legitimacy of the claim and the Postmaster General to honor the Solicitor’s determination.⁴³⁶ The Solicitor not only confirmed the validity of Stockton and Stokes’ charges, he gave them an additional award of nearly \$40,000 for a six-month period that had not been included in the original claim. Kendall refused to honor the additional award. Stockton and Stokes then went to President Jackson, who declined to arbitrate the dispute between the Solicitor of the Treasury and the Postmaster General and referred the matter to Congress “as the best expounder of the intent and meaning of their own law.”⁴³⁷ The Senate Judiciary Committee responded that the statute gave Kendall no authority to revise the Treasury solicitor’s determination—whatever the Solicitor said was due should be paid. Kendall still refused to pay. Stockton and Stokes got a writ of

435. KENDALL, *supra* note 208, at 351–52.

436. Act of July 2, 1836, ch. 284, 6 Stat. 665.

437. SWISHER, *supra* note 257, at 160.

mandamus from the Circuit Court of the District of Columbia ordering Kendall to make payment, which was duly appealed to the Supreme Court of the United States.

Kendall had two basic arguments on appeal. The first directly attacked *Marbury's* dictum that mandamus would lie against an executive official to carry out a statutory duty. According to Attorney General Butler's argument, Kendall might be liable in a private action for damages and, perhaps, to criminal prosecution and/or impeachment. But Butler emphatically denied "the power of the judiciary to interfere in advance, and to instruct the executive officer how to act for the benefit of an individual."⁴³⁸ Kendall's second argument was more technical; that is, that Congress had never conferred jurisdiction on federal courts to grant a writ of mandamus.

Butler failed to convince the Court of either argument. His claim that an executive department head's actions could be directed only by the President, not by the judiciary, was flatly rejected. Whatever authority the President might have to direct an exercise of discretion by a subordinate, the President had no power to direct action that flew in the face of a clear command of a statute. In the Court's words, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; a novel construction of the constitution, and is entirely inadmissible."⁴³⁹ In the Court's view the statute simply instructed the Postmaster General to credit whatever amount the Solicitor of the Treasury decided to the account of Stockton and Stokes. Kendall's task was purely ministerial and therefore subject to direction by a writ of mandamus. The Court went on to hold, three Justices dissenting, that the Circuit Court for the District of Columbia had succeeded to the common law jurisdiction of the courts of general jurisdiction in Maryland from which the district's territory had been ceded. Because it was a court of general jurisdiction, that court, unlike the other federal district or circuit courts, had the power to issue prerogative writs without a specific act of Congress confirming its authority.⁴⁴⁰

Kendall's resounding reaffirmation of Marshall's position in *Marbury v. Madison* in some sense justifies Frederick Lee's claim that *Kendall* provided a

438. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 600 (1838).

439. *Id.* at 525.

440. As an additional argument, the Court noted that the powers of the Circuit Court for the District of Columbia were conferred at a time when the Circuit Courts of the United States, briefly, had the power to issue mandamus. The subsequent repeal of the Judiciary Act of 1801, 2 Stat. 89, repealed by Act of Mar. 8, 1802, 2 Stat. 132, in no way affected the jurisdiction that had been previously conferred by statutes on the Circuit Court of the District of Columbia. See 37 U.S. at 550.

sturdy foundation for the development of subsequent and broadened judicial review of administrative action. After all, the dividing line between discretionary and ministerial acts was hardly a bright one. Indeed Kendall had argued that, whatever the determination of the Solicitor of the Treasury, he still had the responsibility to determine whether the Solicitor’s decision overstepped the bounds of his authority under the congressional statute. He was bound to pay on the basis of a valid determination by the Solicitor, but he believed that he also had the responsibility to determine whether the whole of the Solicitor’s decision was indeed valid. And surely that sort of determination was not “ministerial.”

The argument could easily go the other way as well. It would be quite easy to find that an otherwise “discretionary” decision based on a clear error of law, perhaps even a clear mistake of fact, was plainly unauthorized. Because an official has no authority to act outside of his authority, such a decision would make up no part of his official discretion. And it would be a mere ministerial function to carry out the law as correctly interpreted—or so the argument might go in the hands of courts motivated to expand their control of executive action.

But that was not the Taney Court, as was evidenced by its other major mandamus decision, *Decatur v. Paulding*.⁴⁴¹ The case arose because of a congressional blunder and the greed of Mrs. Stephen Decatur, widow of the famed Commodore. Fearing the failure of a general bill to provide a pension for the widows and the orphans of men who had died in the country’s service, Mrs. Decatur’s friends in Congress had secured a special act granting her a half-pay pension for five years. But the general pension bill also passed. Mrs. Decatur filed for pensions under both, but was told by the then Secretary of the Navy that she could collect only under the general statute. Having received that pension she applied again for payment under the special act. When a new Secretary, Paulding, also declined, Mrs. Decatur applied to the Circuit Court of the District of Columbia for a mandamus to force him to pay. The Circuit Court refused to issue the writ and the Supreme Court affirmed.⁴⁴²

The situation was awkward. The widow Decatur was applying for a pension under a statute which granted it to her by name. Distinguishing this case from the situation in *Kendall v. Stokes*, or indeed in *Marbury v. Madison*, was not going to be easy. But Chief Justice Taney was up to the task. And, his statement of why the Secretary’s duties were discretionary rather than ministerial suggested that he could find discretion virtually anytime an officer

441. 39 U.S. (14 Pet.) 497 (1840).

442. *Id.* at 498-99, 517.

was required to think about whether what he was asked to do was actually authorized. In Taney's words:

The case before us illustrates these principles [that is, those set forward in *Kendall*], and shows the difference between executive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the Secretary was obliged to determine whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only, or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment, in deciding whether the half-pay allowed to her was to be calculated by the pay proper, or the pay and emoluments of an officer of the Commodore's rank. And after all this was done, he must have inquired into the condition of the Navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it; and if not money enough, how it was to be apportioned among the parties entitled. A resolution of Congress, requiring the exercises of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the Secretary.⁴⁴³

This was a wonderfully expansive view of the Secretary's discretion under a statute that the Court itself described as providing a pension to a named individual for a specific term of years.⁴⁴⁴ Moreover, the statute provided that payments be back-dated to the date of the death of Commodore Decatur, that they be made at the level of half-pay of a Post Captain, and that the arrearages in the pension be invested by the Secretary of the Treasury in trust for Mrs. Decatur's use.⁴⁴⁵

Justice Baldwin disagreed in an opinion that further illustrated the slipperiness of the discretionary/ministerial distinction. According to Baldwin *neither* statute gave the Secretary any discretion in the matter of paying pensions. The pension was an entitlement established by law. If by a fair construction of either statute the widow was entitled to a payment, then the acts to be performed by the Secretary of the Navy were the purely ministerial ones of seeing that her name was inscribed on the pension rolls and that

443. *Id.* at 515-16.

444. *Id.* at 498.

445. *Id.*

periodic payments were made.⁴⁴⁶ On Baldwin’s view it seems the “fair construction” of the statute, and whether the widow’s claim was clearly within the terms of that construction, would be for the court to which she had applied for a writ of mandamus to decide. Mandamus could thus be made to serve the purpose of an appeal, or at least a writ of error.

For Taney anytime an officer had to consider the construction of the statute and whether the facts before him fit within it, his action was discretionary and the courts had no jurisdiction to control his actions by mandamus or otherwise. For Baldwin, apparently, any clear error of law or fact would justify judicial correction pursuant to a mandamus petition.

All of this was too much for Mr. Justice Catron. Looking at the disagreement between Taney and Baldwin, Catron concluded:

Any sensible distinction applicable to all cases, it is impossible to lay down, as I think; such are the refinements, and mere verbal distinctions, as to leave an almost unlimited discretion to the Court. How easily the doctrine may be pushed and widened to any extent, this case furnishes an excellent illustration.⁴⁴⁷

The mistake, in Catron’s view, was to believe that the Circuit Court of the District of Columbia had the power to coerce the secretary of a department who acted not only pursuant to his own judgment, but, as in this case, on the advice of the President and the Attorney General. For Catron, such a situation was subversive both of democracy and of the accountability for the handling of public funds that the Constitution’s separation of powers was meant to protect. For Mr. Justice Catron the situation was not only unconstitutional, it was dangerous:

Is the country known, that submits the administration of its finances to the Courts of justice, or permits them to control the operations of the treasury? . . . [F]or nearly forty years this fearful claim to power has never been exerted, nor was it supposed to exist; but now that it is assumed, we are struck with the peculiar impropriety of the Circuit Court of this District becoming the front of opposition to the executive administration.⁴⁴⁸

⁴⁴⁶. *Id.* at 515.

⁴⁴⁷. *Id.* at 518.

⁴⁴⁸. *Id.* at 522.

Mr. Justice Catron need not have been so alarmed. Subsequent decisions of the Supreme Court made clear that the *Kendall* case should never be read except in conjunction with *Decatur v. Paulding*. The *National Intelligencer* had described the *Kendall* case “as a beacon to mark to demagogues in office, for all future time, the point at which their presumption in tyrannous despotism will be rebuked and effectively stayed.”⁴⁴⁹ *Kendall* may well have been a bright beacon, but *Decatur v. Paulding* and subsequent cases⁴⁵⁰ made clear that its light shone in a very narrow arc.

Under Taney’s leadership, the Court also tried to provide some protection for officers who were sued for damages at common law. The possibilities for harassment of conscientious officials through damage actions were well-known and were richly illustrated once again in the events following the Court’s decision in *Kendall v. United States*. Having obtained their supplementary payment, Stockton and Stokes went back to the Circuit Court of the District of Columbia to collect damages from Kendall himself for his delay in paying the money that was owed. A jury, which according to Kendall was composed of eleven Whigs and one Democrat,⁴⁵¹ awarded Stockton and Stokes eleven thousand dollars in damages. Kendall could not pay and avoided going to jail only by the passage of a special statute, promoted by ex-President Jackson and Mr. Justice Catron, that prohibited imprisonment for debt in the District of Columbia for any person who had an appeal pending with respect to a judgment against him.⁴⁵²

Kendall won in the Supreme Court.⁴⁵³ Writing for the majority, Chief Justice Taney stated,

We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment

449. WASH. NAT’L INTELLIGENCE SERV., Mar. 13, 1838.

450. See, e.g., *United States ex rel. Tucker v. Seaman*, 58 U.S. (17 How.) 225 (1854); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1854); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 129 (1849); *Brashear v. Mason*, 47 U.S. (6 How.) 92 (1848); see also 4 WILLIAM WAIT, A TREATISE UPON SOME OF THE GENERAL PRINCIPLES OF THE LAW 366-67 (1878) (reaffirming that where any discretion is vested in the head of a department concerning the action sought to be enforced by mandamus the remedy will be denied and that the instances in which the remedy is available are rare).

451. KENDALL, *supra* note 208, at 355.

452. On Kendall’s difficulties and the political machinations to keep him out of prison, see SWISHER, *supra* note 257, at 165-66.

453. *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845).

and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment.⁴⁵⁴

This was decidedly odd. Revenue officers had been held liable repeatedly for erroneous levies or erroneous seizures of goods and vessels with no showing of bad faith or malice.⁴⁵⁵ Moreover, as Justice McLane pointed out in his dissent, good faith could be a protection only where the official was exercising a discretion conferred by statute. But *Kendall v. United States*, if it stood for anything, stood for the proposition that Amos Kendall had no discretion concerning the payment to Stockton and Stokes once the Solicitor of the Treasury had acted. Justice Taney's majority opinion in *Kendall v. Stokes* may have been fair to the Amos Kendalls of the federal establishment, but it was attempting to work a dramatic change in the law under the guise of settled doctrine.⁴⁵⁶

In the same year, Justice Daniel tried even harder in *Cary v. Curtis*.⁴⁵⁷ As a part of the reforms following the massive embezzlements by Collector Swartwout of the New York Customs House, Congress required that Collectors immediately pay over all funds received to the Treasury of the United States, whether or not those funds were paid under protest or a suit was pending for their recovery. This was prudent legislation. Holding onto

454. *Id.* at 97-98.

455. *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836), for example, clearly stated that a Treasury official is personally liable to an action to recover excess duties paid, even if acting in good faith and under instructions from the Treasury, provided the taxpayer has informed him at the time of payment that he is paying under protest.

456. Chief Justice Taney's ruling on immunity was to a significant degree mere dictum. After disposing of that issue in a couple of paragraphs, the Chief Justice went on to find that the respondent could not recover because of its failure to make a claim for interest on the past due payment when it brought its prior mandamus action against Kendall. 44 U.S. at 99-102. Of course, had the plaintiff company done that in the mandamus action it would have jeopardized the issuance of mandamus. The Solicitor of the Treasury had ordered Kendall to pay the amount that he considered due, but had not included an instruction to pay interest on it.

In any event, there may have been a narrower ground on which Kendall could have escaped liability. While Justice Taney clearly misstated the law concerning most officials' liability for common law damages, officials like Kendall, who were heads of departments, were exempt from such liability, save for bad faith or malice, under English law. In his 1897 treatise, Professor Goodnow seems to have believed that a similar rule should apply in the United States and explains *Kendall v. Stokes* on that ground. 2 FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY* 165-66 (1897).

457. 44 U.S. (3 How.) 236 (1845).

funds paid under protest, or allegedly paid under protest, had greatly facilitated Swartwout's embezzlement schemes. But Daniels was concerned that, if Collectors were unable to retain funds where there was a dispute, they would then have to pay out of their own pockets if judgment went against them. (This concern, of course, admits what Taney had denied in *Kendall v. Stokes*, that is, that Collectors could be legally responsible even if acting in good faith.) He, therefore, construed the federal statute as intending to eliminate the Collectors' personal responsibility for funds improperly collected.⁴⁵⁸

Mr. Justice Story was appalled.⁴⁵⁹ Any suit against the Secretary of the Treasury for return of funds improperly paid was barred by sovereign immunity. If the Collector was not personally responsible, the taxpayer had no remedy whatsoever, save an appeal to the Secretary for an exercise of executive discretion. Story could not imagine that the Constitution presumed that the executive officers of the government could be made the final arbiters of a private citizen's tax liability. And, he saw no reason to imagine that Congress, in a statute designed merely to protect the Treasury from theft by its collectors, intended to eliminate the standard remedies of the common law against officers who made erroneous tax collections.

Story was clearly correct about congressional intent. Congress quickly enacted a statute reconfirming the taxpayer's right to maintain

any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury, touching the same, according to the due course of law.⁴⁶⁰

The Taney Court nevertheless made narrow inroads on the liability of Collectors for improper collection of customs duties where the duties were based upon the Collector's appraisal of the value of the imported goods. The revenue statutes provided that an objecting party could demand a second appraisal made by private parties, one to be appointed by the Collector and the other by the protesting taxpayer. In a pair of cases, *Rankin v. Hoyt*⁴⁶¹ and *Bartlett v. Kane*,⁴⁶² the Supreme Court eliminated any action against a Collector based on a claim of a faulty initial appraisal. The majority opinions argued, this time persuasively, that allowing a jury to redo the appraisal was tantamount to

458. *Id.* at 242-46.

459. *Id.* at 252-54.

460. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.

461. 45 U.S. (4 How.) 327 (1846).

462. 57 U.S. (16 How.) 263 (1853).

destroying the scheme of review that Congress had established. The taxpayer should not be allowed to avoid the procedure established by Congress for revision of the collector’s appraisal by going to court. And having been given a second appraisal remedy by statute, there was no reason to presume that Congress intended that the taxpayer could have a third bite at the apple by taking the Collector before a jury.

As was his want, Justice Taney’s dicta elevated these narrow rulings into general principles of judicial deference to executive power. In his words,

It is a general principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter. . . . The interference of the courts with the performance the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them.⁴⁶³

In so doing, Taney seemed, as in *Kendall v. Stokes*, to be attempting to import into the jurisprudence on the personal responsibility of officers, limitations on liability that were derived from the quite separate jurisprudence on the reach of the writ of mandamus.

Professor Woolhandler is surely correct that the Taney Court was both partial to executive power and inclined to treat judgments of executive officers as those of a concurrent tribunal whose judgments might be upset only for fraud or lack of jurisdiction. In *United States v. Ferreira*, for example, the United States appealed the determination of a district judge for the northern district of Florida concerning compensation for injuries suffered by a former Spanish citizen due to the operations of the American Army in Florida.⁴⁶⁴ The claim was before the district judge under an 1823 Statute which authorized the territorial, and subsequently the federal district, judge to make determinations on Spanish claims which were then to be transmitted to Secretary of the Treasury for payment—if the Secretary agreed that the judgment was just and equitable. Given this process, the Supreme Court decided that the actions of territorial or district judges were not being taken in their judicial capacities, but as claims commissioners for the Treasury Department. And, because the judges were not acting as courts, there was no jurisdiction in the Supreme Court to hear an appeal from their determinations.

463. *Id.* at 263, 272 (citing *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 522 (1840)).

464. *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851).

The Court was not disturbed by the fact that this gave the Secretary of the Treasury final authority over what was, in essence, a statutory damage action. In the opinion's words:

Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. . . . [The Secretary's decision] cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.⁴⁶⁵

The suggestion in *Ferreira* that Congress could provide for an appeal from the Secretary's decision seems to concede what was at issue in *United States v. Ritchie*,⁴⁶⁶ one of the cases on which Frederick Lee premised his conclusion that the Taney Court paved the way for modern forms of judicial review of administrative action. But the *Ritchie* decision belies that concession. There Congress had indeed provided an appeal from the decisions of a special commission to settle land claims in the state of California. It was objected that the law prescribing an appeal from the commissioners to a federal district court was unconstitutional because the Board of Commissioners was not a court and could not therefore be vested with any of the judicial power conferred upon the federal government. It followed, according to this objection, that for the district court to take an appeal from the Board would be for that court to exercise a nonjudicial jurisdiction.

The Supreme Court upheld the statute, but in a decision that seemed to presume that congressional provision of a true appeal would indeed have been unconstitutional. To get around this problem the Court treated the suit in the district court as a de novo or original proceeding. The Court was not deterred by the plain language of the statute: "The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding."⁴⁶⁷ Because the district court was allowed to take additional evidence under the statute, the Court concluded that the provision in the Act for the removal of the transcript, papers and evidence of the Board of Commissioners to the district court was "but a mode of providing for the

465. *Id.* at 47.

466. *United States v. Ritchie*, 58 U.S. (17 How.) 525 (1854).

467. *Id.* at 534.

institution of the suit in that court.”⁴⁶⁸ This fiction saved the statute, but it seemed to undermine the Taney Court’s program of preserving executive authority in the face of claims for judicial adjudication. It is hard to see how a *de novo* redetermination of land claims by the district courts was less destructive of the statutory scheme of administrative adjudication in *Ritchie* than a trial court’s redetermination of customs appraisals was thought to be in *Rankin v. Hoyt* or *Bartlett v. Kane*.⁴⁶⁹

From the perspective of another hundred years of judicial review of administrative action, it is not that surprising that Frederick Lee could find in *United States v. Ritchie* the seeds of modern judicial practice. Busy federal courts might easily retreat from that case’s promise of a *de novo* proceeding by limiting the opportunity to produce evidence in court that might have been produced before the commissioners, by treating the commissioners’ determinations of fact as *prima facie* correct, and so on. But there is no suggestion of these developments in *Ritchie* itself. Moreover, the implication in the opinion that appeals to federal courts from administrative adjudicators would violate the Constitution certainly gives them no encouragement. Indeed that suggestion seems to have reflected nineteenth-century conventional understandings. In the earliest treatise on American administrative law, Bruce Wyman discusses *Ritchie* and *United States v. Ferreira* as standing for the proposition that it would be unconstitutional for Congress to provide an appeal to the federal courts from an adjudication by any non-Article III tribunal.⁴⁷⁰ And he condemns a then-recent case, *United States v. Duell*⁴⁷¹ which permitted an appeal to the Court of Appeals of the District of Columbia from decisions of the Commissioner of Patents.⁴⁷²

468. *Id.*

469. See *supra* notes notes 459-460 and accompanying text.

470. BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 75-80 (1903).

471. 172 U.S. 576 (1899).

472. WYMAN, *supra* note 470, at 82-85. Wyman thought that statute clearly unconstitutional because it made an executive department subordinate to a separate and independent branch of the government—the judiciary. For a scholar like Wyman, writing at the turn of the twentieth century, an appeal from an administrative determination to a court was conceptually confused. It allowed the “external administrative law” that had been developed in courts to assure that administration acted within its defined legal jurisdiction to interfere with the “internal administrative law” that should be governed wholly by the constitutional and statutory discretion conferred upon members of the executive branch. Wyman’s position was supported by Caleb Cushing in 6 Op. Att’y Gen. 326, 344-46 (1854).

There are some hints of modern practice in other decisions of the Taney Court. In *Wilkes v. Dinsman*,⁴⁷³ for example, the Court articulates a standard of malice in a common law action for damages against an officer that is suggestive of contemporary notions of qualified official immunity. But the whole context of *Wilkes* is decidedly “unmodern.” The action was by a seaman against a naval commander for detaining him beyond his formal period of enlistment and using corporal punishment to keep him in line. Today the Supreme Court views it as axiomatic that military personnel may not sue each other concerning actions connected to military service, even if the cause of action seems to fall within the waiver of immunity provided by the Federal Tort Claims Act.⁴⁷⁴ Moreover, the malice standard articulated in *Wilkes* should probably not be viewed as an embryonic version of qualified immunity. An allegation of malice was necessary to state a claim in that case because the superior officer clearly had statutory authority to detain and punish, provided he did it for proper motives.

There is also the peculiar case of *Walker v. Smith*.⁴⁷⁵ There the plaintiff sought an injunction to prevent the General Land Office from issuing certain land scrip to another party having an adverse claim. One might have thought that this attempt to control the judgment of an executive adjudicator directly would have called forth the citation of all the mandamus precedents and a quick finding that the determination of the rights of adverse parties to interests in public land was a discretionary function not subject to judicial control. Instead there was no mention of the mandamus jurisprudence, and the Court decided the case on the merits. Mr. Justice Grier, writing for the Court, says cryptically,

Whether, after the Land Office have issued the scrip to a claimant, another person alleging fraud or misrepresentation, and claiming himself to be the ‘proprietor’ intended by the act, might not obtain the interference of the courts, to obtain a transfer of the scrip to himself, is a question not presented in this case.⁴⁷⁶

473. 48 U.S. (7 How.) 89 (1849).

474. *United States v. Johnson*, 481 U.S. 681 (1987). It is possible that the Court in *Wilkes* was influenced by popular sentiment concerning naval discipline. Flogging aboard naval vessels had become an issue and there were many calls for its elimination following the publication of Richard Henry Dana’s popular novel *Two Years Before the Mast*. RICHARD HENRY DANA, *TWO YEARS BEFORE THE MAST* (Random House 1936) (1840); see PETERSON, *supra* note 12, at 154 (suggesting this context for the *Wilkes* decision).

475. *Walker v. Smith*, 62 U.S. (21 How.) 579 (1858).

476. *Id.* at 581.

But why not? Was Grier inviting suits for injunction as a means for avoiding the limitations of mandamus? If so, contemporary lawyers missed the party. Injunction did not become a standard means for reviewing administrative action for decades after the decision in *Walker v. Smith*.⁴⁷⁷

What then to make of judicial review during the Jacksonian era? In many ways it seems as confused and conflicted as the political history of the period. The Court redeemed Marshall's promise of mandamus review in *Marbury v. Madison* and then immediately limited it to an almost vanishing category of purely ministerial actions. The Court was clearly troubled by the continuing possibilities of harassment of federal officers by common law actions but failed to develop an immunity defense out of common law materials. And it had its wrists slapped by the Congress when it tried to graft one onto a statute that was obviously adopted for a different purpose.

Yet one might see in these cases a general theme which permeated "The Democracy" as understood by Jacksonians. The Taney Court, in particular, was clearly committed to the protecting executive action from judicial interference. For Jacksonian Democrats this was not a formula for tyranny or despotism, as the *National Intelligencer* had implied in its praise for *Kendall v. United States*. Quite the opposite. Deference to executive discretion followed from an understanding of electoral democracy in which the President was the most authentic representative of the people. As Mr. Justice Catron opined in *Decatur v. Paulding*, in his ringing denunciation of judicial review of executive action by the circuit court for the District of Columbia: "The Court is wholly irresponsible to the people for its acts; it is unknown to them; the judges hold appointments of an ordinary judicial character; and are accidentally exercising jurisdiction over the territory where the treasury and public officers are located."⁴⁷⁸ For such a body to have the power to overturn the considered judgment of an executive officer was undemocratic.

477. One explanation for the slow development of the injunction remedy against administrative agencies is that this form of review was dependent upon the development of a common law of equity jurisprudence. That development could only occur through the exercise of the general federal question jurisdiction of the federal courts, a jurisdiction that was not provided until 1875. For the development of this argument, see John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121-30 (1998). Another explanation is that, while circuit courts had general power to issue injunctions, injunctions as equitable remedies were available only for a limited category of injuries. One of those was real property cases, which of course covers *Walker v. Smith*. For a statement of the late nineteenth-century reach of equitable remedies like injunction, see GOODNOW, *supra* note 456, at 209.

478. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 522 (1840).

But like all political ideologies, Jacksonian democracy had countercurrents that might lead to different conclusions. If democratizing office meant separating offices from officers, then there is much to be said for Mr. Justice Taney's fledgling attempts to protect officers when sued in their individual capacities. If they did not own the office, and were required to exercise their duties for the benefit of the public, it was surely more appropriate for the public to bear the burdens of error, at least where the officer had behaved reasonably. The continued almost strict liability of officers for damages was thus in tension with the Jacksonians' insistence that an officer had no claim to exercise governmental power except as an agent of the people.⁴⁷⁹

V. ADMINISTRATIVE LAW IN "THE DEMOCRACY"

Administrators operate within three overlapping systems of accountability: political accountability to elected executives and legislatures; administrative accountability to hierarchical superiors in the administration; and legal accountability to courts. Each of these systems both builds administrative capacity and binds or controls administration. The legislature provides the legal and fiscal resources for administrative action, while simultaneously limiting the scope of those resources and overseeing administrative implementation. Department heads and bureau chiefs seek to control subordinates, but also to provide leadership and managerial resources that energize administration. And while courts are largely called upon to constrain administrative excess, they also protect administrators from improper political pressures—and by demanding performance according to law, courts may leverage administrative requests for authority, personnel, and budgets.

The particular and interactive operation of these accountability regimes in building and binding the administrative state defines the scope and character of administrative law for any particular era. How should we understand the administrative law of Jacksonian America? Not an easy question. As we have remarked more than once, this was a dynamic period marked by cross-cutting and contradictory developments in American governance. Nevertheless, there are significant ways in which the American administrative state of 1860 was different from that of 1829.

479. Contemporary remedies jurisprudence has hardly avoided inconsistencies similar to those evident in the Jacksonian period. Holding officers personally liable while insisting they had no private claim to their offices is surely no more incoherent than the *Ex parte Young* position that state officials must be sued in their individual capacities on claims in which their responsibility is explicitly premised on their being state actors. See *Ex parte Young*, 209 U.S. 123 (1907).

A. *The Legal Accountability System*

We need not revisit the examination of judicial review provided in the preceding section in any detail. With no appellate-style review,⁴⁸⁰ limited mandamus jurisdiction, and a relatively undeveloped jurisprudence on the reach of injunction, litigants had precious little recourse to the courts against officials *in their official capacities*. To take but one example, engineers or pilots prosecuted for fines or penalties under the steamboat regulatory system might well have raised objections to the legality of the local boards’ rulings in their criminal prosecutions. But the central enforcement mechanisms in that statute were administrative—suspension, revocation, or denial of licenses. And while applicants and license holders had the opportunity for a *de novo* appeal to a Supervising Inspector, there is no suggestion that they would have any legal recourse outside of the steamboat service itself.⁴⁸¹

Administrative decisions respecting the licenses of steamboats, or of engineers and pilots, were hardly unique instances of administrative adjudication in the early republic. Administrative hearings and appeals were common in the collection of revenue, the decision of private claims to public lands, the awarding of veterans’ pensions, and the decision of petitions for relief under special relief statutes.⁴⁸² Yet the first case to question whether any of these administrative adjudicatory processes were “due process of law” was not decided by the Supreme Court until 1855. And that case, *Murray’s Lessee v. Hoboken Land and Improvement Co.*,⁴⁸³ makes reasonably clear that the judiciary

480. Save as provided specifically by statute in the case of patent appeals. See *supra* text accompanying note 51.

481. Professor Goodnow offers an interesting speculation about why appellate style review developed in England with respect to administrative officials, but not in the United States. According to Goodnow, English justices of the peace attained a level of independence that made them effectively judicial officers while retaining most of their administrative jurisdiction. The English courts, therefore, permitted appeals from justice of the peace determinations whether they were “judicial” or “administrative” in character. In the case of the United States, the justices of the peace never attained the same administrative jurisdiction because of the appointment early in United States history of other officers for purely administrative purposes. GOODNOW, *supra* note 456, at 197-99. In this way, Goodnow argues, “We have lost an important part of the English administrative jurisdiction.” *Id.* at 199. Goodnow laments this loss of jurisdiction at the state level, but then argues that judicial control of administrative action at the federal level is considerably less necessary because administrative control is so strong through internal appeal processes. *Id.* at 213.

482. See Mashaw, *supra* note 21, at 1285, 1341; Mashaw, *supra* note 37, at 1717-19, 1727-34.

483. 59 U.S. (18 How.) 272 (1855).

did not intend to play a significant role in restructuring administrative adjudicatory processes.

The case arose out of the notorious embezzlement of federal funds by Samuel Swartwout. After he absconded to England the Solicitor of the Treasury attempted to recoup some of the government's funds by levying on Swartwout's property by distress warrant, as was authorized by an act of 1820.⁴⁸⁴ Swartwout's lands were seized and sold, and the question in *Murray's Lessee* was whether the sale had passed good title. The plaintiff in this action of ejectment argued that the distress warrant seizure and sale was invalid because that process violated Article III, which put the judicial power in the federal courts, and the Due Process Clause of the Fifth Amendment to the Constitution. For most purposes Mr. Justice Curtis's opinion for the Court treated these two legal claims as synonymous. "The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry," that is, whether the proceedings authorized by the Act "deprive[d] the party, against whom the warrant issues, of his liberty and property, without due process of law."⁴⁸⁵ While Curtis recognized that Congress could not make any process due process "by its mere will,"⁴⁸⁶ Curtis, for a unanimous court, viewed the question as one to be settled by looking at the "settled usages and modes of proceeding"⁴⁸⁷ that had been used in England before the immigration of the colonists to America and that had been "acted on by them after the settlement of this country."⁴⁸⁸

From that perspective this was an easy case. Curtis found that summary methods for collecting from public officers stretched back for centuries and were ubiquitous in the laws of the colonies and the several states.⁴⁸⁹ The Court showed no inclination to burrow deeply into the adequacy of this process or its exact conformity to the various historic methods that had preceded it. It then went on to dispatch the notion that the determination of all claims that *might* be put before the Article III judiciary were *required* to be put there. While the Court admitted that extrajudicial remedies authorized to be taken by private parties were always subject to de novo redetermination by a court of law, this was not true of "a public agent, who acts pursuant to the command of a legal

484. Act of May 15, 1820, ch. 107, § 33, 3 Stat. 592.

485. 59 U.S. at 275 (internal quotation marks omitted).

486. *Id.* at 276.

487. *Id.* at 277.

488. *Id.*

489. *Id.* at 277-80.

precept, [and] can justify his act by the production of such precept.”⁴⁹⁰ In this latter case Congress is free to make the question of whether the officer’s actions were justified the subject of judicial cognizance or not at its election. For this proposition the Court cited the practice in public lands disputes where “[i]t has been repeatedly decided in this class of cases, that upon their trial of the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.”⁴⁹¹

In short, while *Murray’s Lessee* leaves open the possibility that the Court might step in to upset unusual processes of administrative adjudication, Congress could confer judicial jurisdiction to oversee these administrative determinations in such form as it might see fit, unless, of course, the conferral of that jurisdiction gave the Court nonjudicial business. Because the statute at issue in *Murray’s Lessee* provided judicial jurisdiction to test the validity of the Solicitor’s action under the distress warrant in a de novo proceeding in a district court, the problem of appeals that was at issue in *United States v. Richie* was not presented.⁴⁹²

To be sure, disappointed engineers and pilots might have sought to recover from the local inspectors for loss of income, thereby challenging the legality of the inspectors’ determinations. But I can find no reported cases (or any suggestion that such cases existed) in which inspectors were sued in their individual capacities. This may well be because there was no cognate tort that covered refusal, suspension, or revocation of a license. On the other hand, common law actions permitted enraged or malicious plaintiffs to hound conscientious officials like Amos Kendall to the very door of the poorhouse or debtors’ prison. Chief Justice Taney seems to have understood that personal liability for error was too strong a technique of legal accountability, but it was broadly consistent with Jacksonian democratic ideology. Officers were ordinary citizens who should be responsible, like anyone else, when their errors caused damage to their fellow citizens. Others, like Justice Baldwin, recognized that mandamus, at least as deployed by the Taney Court, was too weak. But the courts seemed to be waiting for Congress to remedy this situation, while simultaneously doubting the constitutionality of congressional provision of appeals from administrative determinations.

Because appeals from administrative determinations were generally not available, the form of substantive review most familiar to contemporary administrative lawyers, review for reasonableness, was conspicuously absent.

490. *Id.* at 283.

491. *Id.* at 284.

492. *Id.*

To be sure, Chief Justice Taney's attempt to introduce this idea in the context of suits against officers was not unique. Chief Justice Marshall had earlier explored a similar, and similarly unsuccessful, line of argument in *Otis v. Watkins*.⁴⁹³ And, as early as 1789, Congress had given a "reasonable cause" defense to customs officials who seized property for fraud or the nonpayment of customs duties.⁴⁹⁴ But these were small inroads on the dominant formalist view represented by the jurisprudence on mandamus jurisdiction and damage suits against officers. That jurisprudence maintained that discretion was unreviewable where direct control of an officer's action was sought and that correctness was the standard for judging an officer's judgments in an action for damages.

The contributions of the Jacksonian era to modern administrative law are thus to be found largely in the understandings that are reflected in the perennial competition between congresses and presidents for political control of administration, and in the internal rules, practices, and systems of the administrative agencies and departments themselves. Not much administrative law that reflects our contemporary understandings was to be found in the courts. Because that is where administrative lawyers tend to look for it, we have conventionally taken the view that none existed.

Focusing on judicial review is not, of course, just the routine and myopic approach of a legal culture fixated on case law. The jurisprudence generated through judicial review of administrative action enunciates general principles and is almost necessarily transsubstantive. It creates, therefore, an "administrative law" that is recognizably distinct from "labor law" or "environmental law." Similar transsubstantive norms are created by framework statutes, like the Administrative Procedure Act or the National Environmental Policy Act, and from executive orders such as those that have incrementally established the regulatory review process at the Office of Management and Budget. And these too were in short supply in nineteenth-century America. But transsubstantive administrative law was, nevertheless, emerging in the Jacksonian period. It is to be found in the evolving practices that defined the relationships between Jacksonian administrators and their political principals, and in the increasingly common organizational and supervisory practices of administrative bureaus and departments—practices that came to be recognized as general principles of good administrative governance.

493. 13 U.S. (9 Cranch) 339, 356-58 (1815).

494. Act of July 31, 1789, ch. 5, § 27, 1 Stat. 29, 43.

B. *The Political Accountability System*

The most dramatic and obvious change in the political accountability system in the Jacksonian era was the way in which democratic control of administration was reimagined to fit a new electoral context. The Federalists, who had the dominant role in crafting the Constitution and establishing the basic structure of the administrative system, emphasized the need for presidential direction and control to give “energy” to administration. But this was not a position, as Jeffersonian Republicans tirelessly argued, that emphasized electoral democracy as the foundation of administrative legitimacy. And when the Jeffersonian Republicans took over in the “Revolution of 1800,” their idea of democratic legitimacy was the legitimacy of congressional control and direction of administration. Their practices belied their beliefs, at least so long as Thomas Jefferson was President, but the belief was that the presidency smacked of monarchy and was a threat to democracy. Democracy was institutionally represented by Congress, particularly the House of Representatives.

Under Jackson the position of the presidency was reimagined. Presidential control and direction of administration may be necessary for energy as the Federalists believed, but for Jacksonians it was necessary for democracy. The Jacksonians thus pioneered a form of “presidentialism” that is the direct ideological ancestor of certain contemporary ideas of presidential responsibility.⁴⁹⁵ During the Bank War, Jackson refought the battles over the removal power that were supposedly decided by the “decision of 1789.” But he fought them on the basis of a claim to democratic legitimacy rather than on Federalist grounds of efficacy or constitutional command.

“The Democracy” also transformed the idea of office. Long-term, quasi-property-holding incumbents gave way to partisan appointments that opened offices to a broader range of Americans. To some degree rotation in office increased presidential control of administration. The President was the head of the party that controlled the offices. But the operational reality was that local and congressional politics played a larger role in appointments than presidential prerogative. Democratic accountability in this partisan sense thus confused lines of authority and reattached federal office holding both to congressional and to local politics.

495. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (providing a description and defense of this form of administration in the contemporary administrative state).

Nevertheless, the change in the idea of office was profound. Offices became the people's offices in more than the theoretical sense that Jackson espoused in his inaugural address. As that ubiquitously cited commentator on American democracy, Alexis de Tocqueville, put the matter:

A public officer in the United States is uniformly civil, accessible to all the world, attentive to all requests, and obliging in his replies. I was pleased by these characteristics of a democratic government; and I was struck by the manly independence of the citizens, who respect the office more than the officer, and who are less attached to the emblems of authority than to the man who bears them.⁴⁹⁶

The democratic impulse also demanded the control of private power—particularly private power that had the capacity to interfere in electoral politics and that, through monopoly position could, in effect, make public policy. As has been noted, Jackson's curbing of the power of the Bank of the United States, somewhat ironically, demanded the building of public administrative capacities in the central government that Jacksonians generally opposed. There is an additional irony as well: the construction of the Independent or Sub-Treasury system, like the creation of the regulatory regime administered by the Board of Supervising Inspectors of Steamboats, signaled the emergence of an alternative ground for administrative legitimacy. In both cases Congress turned over specialized functions to specialists, whose legitimacy depended more on performance, knowledge, and neutrality than on electoral accountability. Indeed, the scale and complexity of administration tended to reduce political control by both the President and Congress even as both busily reasserted its necessity.

Congress became increasingly reliant upon bureaus and departments for information and legislative drafting. Moreover, while virtually all administrative operations, save the Court of Claims, were formally lodged in a department, the formal locations did not necessarily describe the degree to which department heads, subject to the direction of the President, had operational control of administrative functions. In the debates on the bill establishing the Interior Department, for example, Senator John M. Niles noted that the bureaus that would be included in the new department were already "substantially independent of the departments" to which they had been attached: "All the detail of the ordinary business of the bureau may be considered as independent of the department."⁴⁹⁷

496. DE TOCQUEVILLE, *supra* note 30, at 143.

497. CONG. GLOBE, 30th Cong., 2d Sess. 671 (1849).

In short, while presidents and congresses contested for political control over administration, both were beginning to lose power to administrators themselves. Scale, complexity, and the redefinition of office holding promoted functional differentiation of bureaus and politically neutral systems of administrative control. And as had long been true in military matters, policymaking on monetary, patent, and transportation safety issues was moving into the hands of administrators whose training or experience fitted them for the tasks at hand.

C. *The Administrative Accountability System*

To some degree the system of rotation in office undercut the development of administrative expertise. But as we have seen, rotation often left offices demanding expertise untouched. Something of a dual system emerged, one that permitted massive use of patronage in some areas of administration (the Post Office and large customs houses in particular), but that protected experienced officials elsewhere. Rotation also sometimes undermined the system of hierarchical controls in departments and bureaus that had been building steadily since the founding of the Republic.⁴⁹⁸

Political appointees with powerful constituencies occasionally thought that they were a law unto themselves. Jesse Hoyt, Samuel Swartwout’s successor as Collector of the Port of New York, for example, resisted compliance with the statute requiring that Collectors immediately pay over funds received to the Treasury of the United States.⁴⁹⁹ He wrote to the Controller of the Treasury, “I write now to say, peremptorily, that I will not pass the money I receive under protest to the credit of the United States until Congress makes provision for my protection.”⁵⁰⁰ Congress ultimately responded with a statute that explicitly conferred authoritative interpretive power on the Secretary of the Treasury:

And be it further enacted, That it shall be the duty of all collectors and other officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty shall arise as to the true construction or meaning of any part of such revenue laws, the decision

498. For a discussion of these matters in the Federalist and Jeffersonian periods, see Mashaw, *supra* note 21, at 1304-19; and Mashaw, *supra* note 37, at 1660-73.

499. The statute is examined in more detail in the discussion of *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845). See *supra* note 457 and accompanying text.

500. H.R. REP. NO. 25-313, at 121 (1839).

of the Secretary of the Treasury shall be conclusive and binding upon all such collectors and other officers of the customs.⁵⁰¹

But resistance like Hoyt's was not common. Moreover, as has been discussed, the democratization of the federal civil service generated a countervailing bureaucratization that emphasized functional differentiation of roles, checks and balances within departments, and inspections and audits to assure bureaucratic conformity.

Indeed the understanding of supervisory control reflected in Congress's 1842 statute on the authority of the Secretary of the Treasury may well have represented the core of what Jacksonians understood by the term "administrative law." Although that locution seems to appear almost nowhere other than in the writings of Attorney General Caleb Cushing,⁵⁰² Cushing uses the term as encompassing the regulatory and supervisory power of higher-level officers over subordinates. And it is probably no accident that when providing the rulemaking authority for the Supervising Inspectors of Steamboats in the 1852 Steamboat Act, Congress articulated their rulemaking responsibilities as premised on the need to assure consistent application of the Act by the local inspectors.

Consistency in the internal law of administration was also built upon precedent. It thus persisted through time as well as across the space of geographically dispersed officials. Writing to the Secretary of War in 1852, Attorney General Crittenden opined:

Adherence to established rules prevents the arbitrary action of the executive branches of the government, and produces certainty and equality, at least, in their administrations. I would never advise a

501. Act of Aug. 30, 1842, ch. 270, § 24, 5 Stat. 548, 566.

502. See *supra* note 57. It is not clear what else Cushing considered a part of "administrative law." He clearly was an early proponent of a version of the "unitary executive," a position he derived from his reading of the Constitution. He also viewed the queries of the Attorney General expounding the law to the President or heads of departments as a set of quasi-judicial pronouncements that should guide those officers save in extraordinary circumstances. And he urged the departments themselves to treat their settled practices as precedents that should be reconsidered only in the most exigent circumstances. On Cushing's career as Attorney General and his exposition of the position of the executive departments and their relations to the President, Congress, and the judiciary, see SISTER M. MICHAEL CATHERINE HODGSON, *CALEB CUSHING: ATTORNEY GENERAL OF THE UNITED STATES, 1853-1857*, at 101-140 (1955).

departure from them except where they appeared to me to be clearly wrong and in plain opposition to the public law, or its fair execution.⁵⁰³

A robust internal law of administration is always necessary to systemic legality. The oversight of elected officials and the courts of justice is episodic, and is generally motivated either by partisan political imperatives or the particularized grievances of private parties. Jacksonian America richly illustrated the limitations of external political and legal control of administration. For this was a period in which political controllers seemed more than routinely consumed by sectional divisions and by partisan and institutional competition, and in which administrative law in courts oscillated between timidity and *de novo* second-guessing of administrative action. Administrative supervision, by contrast, is continuous and systematic, or can be made so, as Amos Kendall demonstrated when he took the helm at the Post Office. The internal administrative law fashioned in response to the scale, complexity, and politicization of office holding in Jacksonian America was more than usually important to the building of a culture of administrative legality.

503. 5 Op. Att’y Gen. 562, 563 (1852). Prior Attorneys General had taken a similar view. *See, e.g.*, 2 Op. Att’y Gen. 220 (1829); 2 Op. Att’y Gen. 8 (1825).