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## Federal Administration and Administrative Law in the Gilded Age

**ABSTRACT.** The dominant story of America's so-called "Gilded Age" describes an era of private excess and public corruption. In a rapidly industrializing society, private capital, in league with venal politicians, ran roughshod over a national state apparatus incapable of responding to the emerging social and economic needs of the day. Only toward the end of this era, with the passage of the Interstate Commerce Act of 1887, did the national government begin to break free from a *laissez-faire* ideology that was antithetical to state building in virtually all of its forms. Indeed, on this conventional account, the American administrative state, and with it administrative law, only began to emerge in the early twentieth century. And both remained underdeveloped until the New Deal constitutional revolution.

There is much truth to this familiar narrative, but it is far from the whole truth. State capacities built steadily throughout the post-Reconstruction era. Congress created multiple new departments, bureaus, and programs, and federal civilian employment grew much more rapidly than population. Just as today, conflicts between political parties, the drama of electoral politics, and the vagaries of congressional lawmaking dominated the headlines. But the day-to-day activities of government were in the charge of administrative departments and bureaus. Operating under broad delegations of authority, administrators developed a rich internal law of administration that guided massive administrative adjudicatory activity and substantial regulatory action as well. Moreover, policy innovation at the legislative level depended heavily on the research and recommendations of existing administrative agencies. In short, if we look at legislative and administrative practice rather than at constitutional ideology or political rhetoric, we can see the emergence of a national administrative state and national administrative law before either had a name.

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## INTRODUCTION

According to historical convention,<sup>1</sup> federal administrative law emerged with the late nineteenth-century passage of the Interstate Commerce Act of 1887 (ICA).<sup>2</sup> The ICA initiated federal regulation, housed it in a novel administrative body, and elicited the first important judicial attempts to integrate national administrative governance into contemporaneous conceptions of the rule of law. When combined with the reforms of the Pendleton Civil Service Act of 1883,<sup>3</sup> the 1890 Sherman Antitrust Act,<sup>4</sup> the 1906 Pure Food and Drug Act,<sup>5</sup> and the 1914 Federal Trade Commission Act,<sup>6</sup> the late nineteenth and early twentieth centuries witnessed the gradual construction of a modest national administrative state, and with it a national administrative law.

Other students of American political development view even these events as leaving the national government largely in the hands of Congress, the courts, and political parties. For them, and for most twenty-first-century administrative lawyers, administrative law remains virtually invisible until the New Deal.<sup>7</sup> According to that familiar narrative, the plethora of New Deal agencies that were created in the 1930s and early 1940s finally broke the national government free from laissez-faire constitutionalism. But muscular national administration generated a backlash resulting in the explicitly transsubstantive (and now quasi-constitutional) federal Administrative Procedure Act (APA).<sup>8</sup> Here finally was administrative law worthy of the name. On this account federal administrative law is a twentieth-century creation and, perhaps, a mid-twentieth-century creation at that.

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1. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439 (2d ed. 1985) (“In hindsight, the development of administrative law seems mostly a contribution of the 20th century. . . . The creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis.”).
  2. Ch. 104, 24 Stat. 379.
  3. Ch. 27, 22 Stat. 403.
  4. Ch. 647, 26 Stat. 209.
  5. Ch. 3915, 34 Stat. 768.
  6. Ch. 311, 38 Stat. 717 (now codified at 15 U.S.C. §§ 41-51 (2006)).
  7. See MORTON KELLER, *AMERICA’S THREE REGIMES: A NEW POLITICAL HISTORY* (2007); THEODORE J. LOWI, *ARENAS OF POWER* (Norman K. Nicholson ed., 2009).
  8. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

This Article, and its three predecessors,<sup>9</sup> have a simple message. The standard history of the development of American administrative law is at best partial and in many respects incorrect. The national government of the United States was an administrative government from the very beginning of the Republic. Moreover, that administrative government then, as now, was both constituted and constrained by law. In short, America had a federal administrative law long before that field of law was either recognized or named.

In some sense this claim is trivially true. Neither Congress nor the Constitution's two executive officers could deliver the mail, collect taxes, distribute military pensions, manage the public debt, award invention patents, survey and sell public lands, or carry out the host of other functions that emerged from legislation passed in just the first few Federalist congresses.<sup>10</sup> And notwithstanding the early shift in political authority, from "big government" Federalists to "small government" Jeffersonian and Jacksonian Democrats, the ratio of national civilian administrative officials to national population increased steadily throughout the antebellum period.<sup>11</sup> Moreover, as administrative capacity grew, both Congress and administrative officials constantly reorganized and reformed the structure and practices of national administrative institutions.<sup>12</sup>

In addition, these early builders of national administration were required to answer the same questions that administrative lawyers ponder today. What is the appropriate relationship of administration to the elected branches of government? Under what legal requirements should administrative departments, bureaus, or commissions conduct their business? And what legal remedies should be available to persons who believe that administrative action has not been conducted according to law?

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9. Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568 (2008) [hereinafter Mashaw, *Administration and the Democracy*]; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006) [hereinafter Mashaw, *Recovering*]; Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636 (2007) [hereinafter Mashaw, *Reluctant Nationalists*].

10. Mashaw, *Recovering*, *supra* note 9, at 1276-1304.

11. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970* (1975).

12. On the changes in the administrative organization of the United States Government in the nineteenth and early twentieth centuries, see LLOYD MILTON SHORT, *THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES* (1923).

But, if this is true, why the conventional story of administrative law as a twentieth-century creation? Why has nineteenth-century administrative law remained invisible to us? A complete answer to that question is more than a little complicated. The short answer is straightforward: what we find depends upon who is looking, what we look for, and where we look for it. For lawyers, early administrative law remains invisible in part because we have been trained to look for it in judicial opinions and in transsubstantive statutes or executive orders that apply to all, or most, administrative institutions. This is administrative law, to be sure. But it is not all of it. And, from the founding to the very late nineteenth century, neither of these sources of law produced much, if anything, of enduring interest for the administrative lawyer. A search of these sources from 1787 to 1887 is destined to disappoint.

But what if we followed the lead of the 1941 Attorney General's Committee, whose research provided the background materials for drafting the APA?<sup>13</sup> When seeking models of sound administrative governance, they looked at the way legislation structured agency organization, at agency practice, at the norms that had grown up around similar functions across multiple agencies, and at the approaches taken by courts whose reviewing functions were provided in scattered sections of the U.S. Code. The APA was surely something more than a mere restatement of existing administrative law. Yet much of it was drawn from that law—a law internal to specific statutory regimes and particular agency practices. Common normative threads in those statutes and practices included uniformity and consistency in the application of law, notice and hearing on contested issues, transparency of agency structures and processes, protections against agency bias, division of functions within agencies, and internal checks and balances.

My project in this Article and its predecessors is to push that inquiry back over a century. My claim is that the administrative practices that the Attorney General's Committee uncovered in mid-twentieth-century American administrative governance did not burst on to the scene in the New Deal or in Progressive Era reforms. They can be found as well in the age that Mark Twain indelibly branded as "The Gilded Age": an age that has become for us almost synonymous with private excess and government corruption.

Making out this case cuts against the grain of received understandings. The Gilded Age was an age of massive change, but the national government's response to new needs and new demands can rightly be seen as anemic, torpid, and too often corrupt. Nor is the historiography of the period simply mistaken

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13. ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-10 (1941).

in its claims that American governmental, and particularly administrative, developments lagged behind when compared with either the new American social reality or administrative state developments abroad. Hence we must begin by remembering what post-Reconstruction and pre-Progressive America was like and the bases for our widely accepted vision of how it was governed. It is only against this background that a revised understanding of administration and administrative law begins to appear.

*A. A Nation Transformed*

Postbellum America witnessed the remaking of political, economic, social, and cultural life.<sup>14</sup> By war and constitutional amendment, national power triumphed over state prerogative, but with consequences that were hardly predictable given the war's ostensible aims or the content of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. Reconstruction failed to produce either a substantially reformed Southern political economy or equal citizenship for African Americans.<sup>15</sup> And judicial construction of the Civil War Amendments eviscerated their civil rights purposes while providing new constraints on public regulation of business.<sup>16</sup> The new nationalism that the North's victory had promised was, instead, put in the service of a national, capitalist market.<sup>17</sup>

The elimination of local barriers to commerce, new technologies, and the rapid development of the nation's physical and financial infrastructure

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14. The historical literature on this period is truly massive. Three early works in the History of American Life series provide a stimulating overview of historical developments along with bibliographical essays. ALLAN NEVINS, *THE EMERGENCE OF MODERN AMERICA 1865-1878* (1927); ARTHUR MEIER SCHLESINGER, *THE RISE OF THE CITY 1878-1898* (1933); IDA M. TARBELL, *THE NATIONALIZING OF BUSINESS 1878-1898* (1936).
  15. The classic modern treatment is ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988). See also MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869* (1974) (arguing that the limitations of Reconstruction were attributable to divisions in the Republican Party, not just resistance by Southerners, Democrats, and President Andrew Johnson).
  16. See, e.g., JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865-1900*, at 109-91 (2007).
  17. RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877* (1990); LEONARD P. CURRY, *BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS* (1968) (arguing that national policy moved in this direction even as the war was being fought).

transformed the economy.<sup>18</sup> This was an age in which inventors like Alexander Graham Bell and Thomas Alva Edison became national heroes,<sup>19</sup> and Americans were recognized as masters in the application of technology to enterprise.<sup>20</sup> Reacting to the exhibits in Machinery Hall at the 1876 Centennial Exhibition near Philadelphia, novelist and commentator William Dean Howells concluded that it was in engineering that “the national genius most freely speaks; by and by the inspired marbles, the breathing canvases . . . for the present America is voluble in the strong metals and their infinite uses.”<sup>21</sup>

Tremendous expansions in railroad transportation drove industrial development.<sup>22</sup> The railroads’ demands for capital, labor, and materials stimulated the economy. Their capacity to move people and products cheaply buoyed other markets and spurred the development of territories underserved by earlier transportation revolutions in steamships and canals. American railroads conquered time as well as space. To produce a coherent and transparent national railroad timetable the railroads created unified time zones. Local time disappeared.

Although the evolution of the American economy away from its agrarian past toward its industrial future had begun much earlier,<sup>23</sup> the decades

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18. See THOMAS C. COCHRAN & WILLIAM MILLER, *THE AGE OF ENTERPRISE: A SOCIAL HISTORY OF INDUSTRIAL AMERICA* (1942); CARL N. DEGLER, *THE AGE OF THE ECONOMIC REVOLUTION, 1876-1900* (David M. Potter & Carl N. Degler eds., 1967); ROBERT HIGGS, *THE TRANSFORMATION OF THE AMERICAN ECONOMY, 1865-1914: AN ESSAY IN INTERPRETATION* (Ralph L. Andreano ed., 1971).
  19. For standard biographies, see ROBERT V. BRUCE, *BELL: ALEXANDER GRAHAM BELL AND THE CONQUEST OF SOLITUDE* (1973); and ROBERT CONOT, *A STREAK OF LUCK* (1979).
  20. See, e.g., SIEGFRIED GIEDION, *MECHANIZATION TAKES COMMAND: A CONTRIBUTION TO ANONYMOUS HISTORY* (1948); JOHN W. OLIVER, *HISTORY OF AMERICAN TECHNOLOGY* (1956).
  21. W.D. Howells, *A Sennight of the Centennial*, *ATLANTIC MONTHLY*, July 1876, at 92, 96.
  22. On railroad development in this period, see ROBERT WILLIAM FOGEL, *RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY* (1964); *THE RAILROADS: PIONEERS IN MODERN MANAGEMENT* (Alfred D. Chandler ed., 1979); and GEORGE ROGERS TAYLOR & IRENE D. NEU, *THE AMERICAN RAILROAD NETWORK, 1861-1890* (1956).
  23. See, e.g., DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848* (2007); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* (1991). Richard Hofstadter argues that the notion of the self-sufficient farm family as the backbone of the nation was a myth by the time of Tocqueville’s travels. RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 23-93 (1955). Farmers grew cash crops and speculated in farm land; they were in commerce as much as in agriculture, and by 1840 the mass exodus of young men from the farm to urban areas had already begun. *Id.* According to Hofstadter, Populism in what he calls “The Age of Reform” was spurred more by the collapse of a speculative bubble in farm lands than by the plight of

following the Civil War were characterized by massive growth in the size, and a revolution in the organization, of industrial enterprises.<sup>24</sup> Consolidation brought to the fore men like John D. Rockefeller in oil, Andrew Carnegie in steel, Pierpont Morgan in finance, and James Duke in tobacco.<sup>25</sup> As the association of a few prominent names with massive enterprises suggests, postbellum economic development in America produced massive fortunes and dramatic changes in the concentration of wealth. In 1840, there were perhaps twenty millionaires in the United States; by 1910 there were probably twenty in the U.S. Senate. Indeed, by 1893 the Census Bureau estimated that 9% of the families in America owned 71% of the wealth.<sup>26</sup> The new American rich were objects both of fascination and resentment.<sup>27</sup> Their luxurious lifestyles generated tastes for conspicuous consumption among the rising middle classes. Their aggressive, not to mention monopolistic, business practices stimulated the Populist and Progressive political movements. The Gilded Age merged with the "Age of Reform,"<sup>28</sup> whose early accomplishments included the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890.

Industrial revolution in America is commonly associated with three other developments that changed the social and political, as well as the economic,

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farmers. *Id.* Populism's vision of an agrarian America was completely out of date before the movement began. *Id.*

24. On these general developments, see ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); GEORGE HEBERTON EVANS, JR., *BUSINESS INCORPORATION IN THE UNITED STATES, 1800-1943* (1948); and EDWARD C. KIRKLAND, *INDUSTRY COMES OF AGE: BUSINESS, LABOR, AND PUBLIC POLICY, 1860-1897* (1961).
25. On the careers of these titans of industry, see, for example, CASS CANFIELD, *THE INCREDIBLE PIERPONT MORGAN: FINANCIER AND ART COLLECTOR* (1974); LOUIS M. HACKER, *THE WORLD OF ANDREW CARNEGIE: 1865-1901* (1968); ALLAN NEVINS, *STUDY IN POWER: JOHN D. ROCKEFELLER, INDUSTRIALIST AND PHILANTHROPIST* (1953); and JOHN K. WINKLER, *TOBACCO TYCOON: THE STORY OF JAMES BUCHANAN DUKE* (1942).
26. SIDNEY RATNER, *AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY* 136, 275 (1942); C.L. Merwin, Jr., *American Studies of the Distribution of Wealth and Income by Size*, in 3 CONFERENCE ON RESEARCH IN NAT'L INCOME & WEALTH, NAT'L BUREAU OF ECON. RESEARCH, *STUDIES IN INCOME AND WEALTH* 3, 6 (1939).
27. See, e.g., STEWART H. HOLBROOK, *THE AGE OF THE MOGULS* (Lewis Gannett ed., 1953); MATTHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS, 1861-1901* (1934).
28. The classic treatment is HOFSTADTER, *supra* note 23. Accord ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917* (Benjamin I. Page ed., 1999).

outlook of American citizens.<sup>29</sup> The first was massive immigration. The railroads famously imported Chinese workers to do the hard manual labor at low wages that many Americans rejected. But there were also huge inflows from Western Europe, particularly Ireland. The competition of steamship lines for customers, in combination with the promotional efforts of state agencies, the federal government, and industrialists eager for cheap labor encouraged a tidal wave of immigration already stimulated by European economic stagnation and the lure of opportunity in an America experiencing a full-throttled industrial revolution. Emma Lazarus's poem that adorns the pedestal of the Statue of Liberty idealizes the efforts from the 1860s through the 1880s to attract immigrants to America. As those lines suggest, the country welcomed immigrants, indeed sought them, but Lazarus's humanitarian emphasis reveals little of the complexity of their reception. Immigrants challenged the economic position of skilled workers, the political control of the Republican Party, and the moral authority of dominant protestant religious groups. Reaction was almost inevitable. The press lampooned immigrants' stereotypical attributes; nativist politicians demonized them. By overwhelming margins, Congress adopted America's first national legislation restricting immigration in 1885.<sup>30</sup>

The growth of organized labor paralleled, but hardly matched the growth and power of big business. As the mechanization of industry that had begun in the Jacksonian period accelerated in postbellum America, the plight of the American worker deepened. National industries demanded national unions to protect workers' interests, but internal cleavages in the union movement and a hostile legal environment inhibited effective organization. Strikes became more common and widespread, often attended by violence and police suppression of union activity. Although most union demands were for the humanization of capitalism—shorter hours, protections for women and children, and more healthful working conditions—union opponents dampened public enthusiasm

29. For a multidisciplinary treatment of how the changes in the basic ideas and ideals by which Americans lived were reshaped in this period, see ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* (1982).

30. On the course of immigration and assimilation in postbellum America, see THOMAS J. ARCHDEACON, *BECOMING AMERICAN: AN ETHNIC HISTORY* (1983); JACK CHEN, *THE CHINESE OF AMERICA* (1980); OSCAR HANDLIN, *RACE AND NATIONALITY IN AMERICAN LIFE* (1957); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1955); STUART CREIGHTON MILLER, *THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785-1882* (1969); and PHILIP TAYLOR, *THE DISTANT MAGNET: EUROPEAN EMIGRATION TO THE U.S.A.* (1971). Notwithstanding the lack of national immigration legislation, state regulation had persisted since the early days of the Republic. For a discussion of this early history, see GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19-43* (1996).

for the union movement by associating it with socialism, and even with revolution. Agitation for national legislative reform of working conditions was generally unsuccessful.<sup>31</sup>

Finally, as American industrialization attracted youth from the countryside and immigrants from abroad, it concentrated both the population and the ownership of the means of production. New cities appeared and old ones grew at remarkable rates. During the three decades immediately following the Civil War, urban population in the United States grew twice as fast as rural population, notwithstanding the vast settlement of the Western states that was occurring simultaneously. The problems created by rapid urbanization—overcrowding, poverty, poor health, and crime—are deeply familiar. Urbanization also accentuated the clash of cultures among immigrant groups and between them and native-born Americans. By 1890, in eighteen of the cities having a population greater than 100,000, immigrant adults outnumbered native adults. The title of Charles Loring Brace's 1872 book, *The Dangerous Classes of New York, and Twenty Years' Work Among Them*,<sup>32</sup> perhaps captured the general public perception of urban immigrant labor.

The failure of local city governments to respond to the needs of these populations provided fertile soil for the rise of the big-city political machine. Working long days at low wages, and crowded together in dilapidated tenements, the urban immigrant and lower classes needed help. The machine supplied assistance and jobs in return for loyalty, labor, and votes. Even where

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31. For a conventional starting point, see 4 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* (1965). Some other useful works include ROBERT V. BRUCE, *1877: YEAR OF VIOLENCE* (1959); JERRY M. COOPER, *THE ARMY AND CIVIL DISORDER: FEDERAL MILITARY INTERVENTION IN LABOR DISPUTES, 1877-1900* (1980); HENRY DAVID, *THE HISTORY OF THE HAYMARKET AFFAIR: A STUDY IN THE AMERICAN SOCIAL-REVOLUTIONARY AND LABOR MOVEMENTS* (2d ed. 1958); GERALD N. GROB, *WORKERS AND UTOPIA: A STUDY OF IDEOLOGICAL CONFLICT IN THE AMERICAN LABOR MOVEMENT 1865-1900* (1961); HERBERT G. GUTMAN, *WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA: ESSAYS IN AMERICAN WORKING-CLASS AND SOCIAL HISTORY* (1976); STUART BRUCE KAUFMAN, *SAMUEL GOMPERS AND THE ORIGINS OF THE AMERICAN FEDERATION OF LABOR 1848-1896* (1973); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925* (1987); MICHAEL NASH, *CONFLICT AND ACCOMMODATION: COAL MINERS, STEEL WORKERS, AND SOCIALISM, 1890-1920* (1982); PHILIP TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY* (1964); LLOYD ULMAN, *THE RISE OF THE NATIONAL TRADE UNION: THE DEVELOPMENT AND SIGNIFICANCE OF ITS STRUCTURE, GOVERNING INSTITUTIONS, AND ECONOMIC POLICIES* (1955); NORMAN J. WARE, *THE LABOR MOVEMENT IN THE UNITED STATES 1860-1895: A STUDY IN DEMOCRACY* (1929); SAMUEL YELLEN, *AMERICAN LABOR STRUGGLES* (1969); and IRWIN YELLOWITZ, *THE POSITION OF THE WORKER IN AMERICAN SOCIETY, 1865-1896* (1969).
  32. CHARLES LORING BRACE, *THE DANGEROUS CLASSES OF NEW YORK, AND TWENTY YEARS' WORK AMONG THEM* (1872).

reformers managed to beat the machines at the polls, as when the New York City reformers dethroned the Tweed Ring in the 1870s, their gains were largely limited to the elimination of massive corruption. Reforms aimed at alleviating the serious social and economic conditions of city residents did not gain traction until the 1890s and beyond.<sup>33</sup>

The rapaciousness of the industrialists and the corruption of city politics also infected the national government. Edwin L. Godkin, the editor of both *The Nation* and the *New York Evening Post*, sought to characterize the whole of society in the title of his article *Commercial Immorality and Political Corruption*.<sup>34</sup> Godkin's views were not unrepresentative of reform-minded Americans.<sup>35</sup> In describing the triumph of the completion of the transcontinental railroad, Representative George F. Hoar lamented, "I have seen our national triumph and exultation turned to bitterness and shame by the unanimous reports of three committees of Congress, two of the House and one here, that every step of that mighty enterprise had been taken in fraud."<sup>36</sup> Dorman B. Eaton, a New York reform leader, described the national political parties as "highly complicated organizations through which politicians are enabled to make themselves a great power for their own benefit and for coercing and baffling the people."<sup>37</sup> Henry Adams summed up the period's politics with his usual pith: "One might search the whole list of Congress, Judiciary, and Executive during the twenty-five years 1870-1895 and find little but damaged reputations."<sup>38</sup>

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33. On the rise of the city and its problem and politics, see WILLIAM A. BULLOUGH, *CITIES AND SCHOOLS IN THE GILDED AGE: THE EVOLUTION OF AN URBAN INSTITUTION* (1974); *THE CITY BOSS IN AMERICA: AN INTERPRETIVE READER* (Alexander B. Callow, Jr. ed., 1976); ALLEN F. DAVIS, *SPEARHEADS FOR REFORM: THE SOCIAL SETTLEMENTS AND THE PROGRESSIVE MOVEMENT, 1890-1914* (1967); LEO HERSHKOWITZ, *TWEED'S NEW YORK: ANOTHER LOOK* (1977); ROY LUBOVE, *THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890-1917* (1962); BLAKE MCKELVEY, *THE URBANIZATION OF AMERICA, 1860-1915* (1963); ARTHUR MEIER SCHLESINGER, *THE RISE OF THE CITY, 1878-1898*, (1933); VINCENT SCULLY, *AMERICAN ARCHITECTURE AND URBANISM* (1969); and SAM BASS WARNER, JR., *THE URBAN WILDERNESS: A HISTORY OF THE AMERICAN CITY* (1972).
  34. E.L. Godkin, *Commercial Immorality and Political Corruption*, 107 N. AM. REV. 248 (1868).
  35. JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE (1968).
  36. 1 GEORGE FRISBIE HOAR, *AUTOBIOGRAPHY OF SEVENTY YEARS* 308 (1903).
  37. Dorman B. Eaton, *Parties and Independents*, 144 N. AM. REV. 549, 550 (1887).
  38. SEAN DENNIS CASHMAN, *AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT* 214 (1984).

*B. Locating Public Administration and Administrative Law*

If the postbellum period in America is remembered positively, it is largely for the inventiveness and energy of the private sector. The railroad and the telegraph spanned the continent, and great industries and great cities seemed to spring up from almost nothing. Enormous wealth was created and the extravagance of the rich created a market for art and architecture that fueled what is now known as the American Renaissance.<sup>39</sup> Social movements for the rights of workers, farmers, and women urgently pressed state and national governments for reforms in both the political and economic systems. And while those movements gained responses at the state and local levels, Theodore Lowi asserts that “it would be impossible to gain any awareness or understanding at all of these social movements by studying the laws of the national government.”<sup>40</sup>

Lowi’s image is of a Congress largely devoted to patronage and plunder and of presidents, other than Lincoln, who are remembered, if at all, for being impeached or assassinated, or for heading magisterially corrupt administrations. The centralized American state that emerged from the Civil War with a muscular national administrative agenda—Reconstruction—abandoned those purposes for a laissez-faire state catering to Northern capitalists and to the separatist tendencies of a “redeemed” but unreconstructed South.<sup>41</sup> On this account one might look at the title of this Article and respond, “What administration? What administrative law?” Surely, as in the conventional historical account, interest in public administration and administrative law at the national level in the United States should begin near where this Article proposes to end, with the enactment of the Interstate Commerce Act, creating the Interstate Commerce Commission, or with its predecessor, the Civil Service Commission created by the Pendleton Civil Service Act of 1883.<sup>42</sup>

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39. See Richard Guy Wilson, *Architecture, Landscape, and City Planning*, in BROOKLYN MUSEUM, BROOKLYN INST. OF ARTS & SCIS., *THE AMERICAN RENAISSANCE 1876-1917*, at 74 (Brooklyn Inst. of Arts & Scis. ed., 1979).

40. LOWI, *supra* note 7, at 78.

41. See RICHARD FRANKLIN BENSEL, *YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877* (1990).

42. For analyses dating American administrative law and the American administrative state roughly to the ICC or the beginning of the twentieth century, see FRIEDMAN, *supra* note 1, at 439-66; HOFSTADTER, *supra* note 23, at 164; LOWI, *supra* note 7, at 77-78; STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982); CAMILLA STIVERS, *BUREAU MEN, SETTLEMENT WOMEN: CONSTRUCTING PUBLIC ADMINISTRATION IN THE PROGRESSIVE ERA*

There is surely something, perhaps much, to this view. The field of public administration was in some sense invented by Woodrow Wilson in an article published in the same year as the passage of the Interstate Commerce Act.<sup>43</sup> And there seems to have been nothing published on American administrative law, as such, until 1893. Moreover, the works of the pioneers in American administrative law, Ernst Freund and Frank Goodnow, often drew as much on European as American sources and, when treating American law, did not distinguish between state, local, and national developments.<sup>44</sup> Viewing public administration or American administrative law from the perspective of intellectual history, these fields do not exist until they are theorized as such by academics or practitioners in the late nineteenth or early twentieth centuries.

There are many other reasons why observers might believe that federal public administration and administrative law in the Gilded Age are unlikely subjects for sustained interest. One is the enduring myth of *laissez faire*. *Laissez faire* was, indeed, the defining creed of many postbellum intellectuals and reformers. However, they constantly lamented the government's failure to follow that creed's ideological dictates.<sup>45</sup> And as William Novak points out in a recent article,<sup>46</sup> that myth was already under attack in 1887. Novak quotes Albert Shaw's complaint that

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(2000); and DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* (1st ed. 1948). Alternatively, one might begin with the Civil War and Reconstruction eras that this Article largely omits. While worthy of its own separate treatment, the extensive military administration of that period makes it a misleading guide to the development of American domestic governance.

43. Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197 (1887).
44. For Ernst Freund's principal works, see ERNST FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY: A COMPARATIVE SURVEY* (1928); ERNST FREUND, *CASES ON ADMINISTRATIVE LAW SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS* (2d ed. 1928); and ERNST FREUND ET AL., *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923). For Frank Goodnow's major works, see FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY* (photo. reprint 1996) (1893) [hereinafter GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*]; FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905) [hereinafter GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW*]; and *SELECTED CASES ON AMERICAN ADMINISTRATIVE LAW: WITH PARTICULAR REFERENCE TO THE LAW OF OFFICERS AND EXTRAORDINARY LEGAL REMEDIES* (Frank J. Goodnow ed., 1906). The one early book that deals most prominently with national administrative law in the United States, BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* (1903), also appears in the early twentieth century.
45. See SPROAT, *supra* note 35.
46. William J. Novak, *The Myth of the "Weak" American State*, 113 *AM. HIST. REV.* 752 (2008).

The average American has an unequalled capacity for the entertainment of legal fictions and kindred delusions. He lives in one world of theory and another world of practice. . . . Never for a moment relinquishing their theory [of *laissez faire*], the people of the United States have assiduously pursued and cherished a practical policy utterly inconsistent with that theory, and have not perceived the discrepancy.<sup>47</sup>

Novak goes on to argue that the history of the American state has been hobbled by a concentration on the way in which American government checks and balances coercive power, without paying attention to the ways in which both policies and institutional arrangements create an infrastructure through which the state guides and shapes the economy and the society. But myths endure precisely because of their stereotypical quality, their ability to tap into some psychological truth that cements their hold on the imagination, not because they necessarily fit all the facts.

In a similar vein, “event-centered” histories of American political and institutional development tend to focus on major changes in the direction of government policy. From that perspective the creation of a new form of regulatory institution, the independent commission, can be interpreted as establishing law and legal control on a new footing—one that emphasizes political independence and technical expertise—the conventional hallmarks that distinguish administration from politics. This argument, of course, gives credence to the story that connects the origins of American administrative law to the creation of the Civil Service Commission and the ICC. Of course event-centered or “big bang” analysts may disagree about the size of the bang necessary to make a difference. For some the independent commission movement failed to mark a significant new direction in state development. Theodore Lowi and Morton Keller, for example, agree that the bang that created the American administrative state did not occur until the New Deal.<sup>48</sup>

How much bang is enough depends upon what sorts of effects the event chronicler is seeking. Lowi and Keller are primarily interested in changes in the shape of the politics that surround national policy. From their perspective the New Deal may be the appropriate turning point. On the other hand, as Dan Carpenter has shown, if one is interested in the degree to which administrative institutions gained autonomous policymaking authority, both the New Deal

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47. *Id.* at 753 (quoting Albert Shaw, *The American State and the American Man*, 51 CONTEMP. REV. 695, 696-97 (1887)).

48. See KELLER, *supra* note 7; LOWI, *supra* note 7.

and the Progressive Era big bang approaches miss much of the action—both before and after their respective bangs occurred.<sup>49</sup>

Finally, students of state building might insist that there is no fully developed administrative state until there is a fully developed bureaucratic apparatus. By “fully developed” I mean a bureaucracy built upon a career civil service that is trained specifically for public administration and that makes policy through the application of scientific knowledge, relatively free from political interference or control. From this perspective, “common law” countries like the United States and the United Kingdom are still underdeveloped administrative states, at least by comparison with countries like France or Japan. In those latter countries training for the public service is state-sponsored and specifically linked to government employment. These state-trained bureaucrats are expected to spend their careers in the public service, to move across subject matter domains, and to eventually occupy high policymaking positions. The “expertise” of the public servant in these systems is a function of the way in which the state itself trains and organizes the bureaucracy for public service. By contrast, in the United States and the United Kingdom, the substantive expertise of bureaucrats tends to be certified by independent universities and professional associations, not by state-sponsored institutions. And, of course, in the United States, policymaking is formally, and in recent years, increasingly, located in offices occupied by political appointees who are not careerists.<sup>50</sup> On this account, however much Americans rail against “bureaucrats,” conventional talk about the “American administrative state” misdescribes a polity that remains devoted to electoral politics, citizen and interest group participation in government, and decentralized exercise of political authority.

I take a rather different approach than any of those just rehearsed. My focus is on administration, not bureaucracy, major policy shifts, or the organization of politics. By administration I mean simply the development and implementation of law and policy by officials specifically charged with that responsibility, whether or not bureaucratized in a Weberian (or even more demanding) sense. Moreover, I am searching not for big bangs, but for the accretion and development of administrative jurisdiction and capacity, sometimes in legislation, but often in the initiatives and routines of administrators themselves. I am focusing, therefore, on practice, structure, and

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49. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATION, NETWORKS AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001).

50. On the differences between bureaucratic organizations that are state or society centered, see BERNARD S. SILBERMAN, *CAGES OF REASON: THE RISE OF RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES, AND GREAT BRITAIN* (1993).

policy, not on social movements, political rhetoric, or legal justification. As such, my inquiry tends to find transsubstantive ideas in the patterns of legislative and administrative action, not in the language of political debate, academic analysis, or legal doctrines generated by judicial review.

In order to see administrative law in an era that mostly denies its existence, my inquiry is structured around three very general issues of governmental organization. Following the lead of Frank Goodnow,<sup>51</sup> I see administrative officers as operating within three overlapping accountability regimes: political accountability to elected officials; hierarchical or managerial accountability to administrative superiors; and legal accountability to individuals and firms through judicial review. To repeat my earlier thesis: in all eras of American national history, much of our law has been both developed and applied by administrative officials. And in each period administrators have been subject to the three accountability regimes just outlined—regimes that both build and bind the administrative state.

The distinctive characteristics of administration and administrative law in particular periods depend upon the relative importance of these regimes in structuring and checking administrative discretion and the particular mechanisms that political, administrative, and legal actors deploy. Both the forms of and the balance among regimes shift over time. Indeed, it is the distinctive form and balance among these accountability regimes in the organization of nineteenth-century national administration that has made administrative law invisible. But in every era there is a law of administration. To ignore that “administrative law” prior to the Interstate Commerce Act, in what I now tend to think of as “the lost one hundred years of American administrative law,” is to ignore much of how American administrative institutions have been built, maintained, and constrained. And, in my view, it is to ignore the incremental and pragmatic processes by which American public law usually develops.

### C. *The Plan of This Study*

This Article treats the Gilded Age incarnation of each of these three accountability regimes in turn. Part I describes developments in the political control of administration in postbellum America and the emergence of the “apolitical” civil service ideal, partially embodied in the Pendleton Act of 1883. As in all periods of American history, political control of administration in this period features both organizational changes in the political branches and the

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51. See GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW*, *supra* note 44, at 371-72.

continuing struggle between presidents and congresses for dominance. The defining feature of this era might be said to be the migration of the provision of secure tenure in office from a congressional strategy to weaken presidential control over high-level administrators to an institutionalized protection for lower level officials that, in practical effect, constrained congressional power.

Part II looks at developments in judicial review. Prior to 1860 judicial review of administrative action by federal courts had, to modern eyes, a peculiar structure. Review by mandamus or injunction was extremely limited, and statutes providing for appeals to federal courts from administrative decisions were virtually nonexistent. If an officer had jurisdiction over the subject matter and statutory authority that permitted the exercise of any discretion, the courts would not interfere with his substantive judgments. Similarly, administrative procedures were deemed acceptable if they were provided by statute or legitimated by custom. On the other hand, officers sued as individuals for damages were in effect subjected to de novo review for any error of law or fact. Officially immunity had been somewhat precariously established for cabinet level officials, but lower level officers were protected only by a “reasonableness” defense in a few instances provided by statute.<sup>52</sup> And other suits involving “private rights,” but indirectly challenging prior official determinations, followed the forms of private actions that hardly acknowledged their “public law” implications. In the postbellum world this structure began to weaken, but it would take many years to morph into the almost directly contradictory structure that we know today—a public law system of direct, presumptive, appellate-style<sup>53</sup> review of official action and virtually universal absolute or qualified immunity for officials from damage suits related to their official functions.

Part III depicts the processes and structures of managerial or bureaucratic accountability. This is where nineteenth-century administrative law mostly developed. A feel for this “internal administrative law” will be provided through two case studies. The first is a study of mass administrative adjudication: the awarding of veterans’ pensions by the Bureau of Pensions in the Department of the Interior. In many ways the second half of the nineteenth century might be called an age of administrative adjudication. While we now think of mass administrative adjudication as an artifact of the mid-twentieth-

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52. For further elaboration, see Mashaw, *Administration and the Democracy*, *supra* note 9, at 1669-84.

53. On the development of the “appellate model” of judicial review in the early twentieth century, see Thomas W. Merrill, *The Origins of the Appellate Review Model of Administrative Law* (forthcoming), [http://www.law.yale.edu/documents/pdf/CompAdminLaw/Thomas\\_Merrill\\_compAdLaw\\_paper.pdf](http://www.law.yale.edu/documents/pdf/CompAdminLaw/Thomas_Merrill_compAdLaw_paper.pdf).

century welfare state, these practices in fact have a much longer history. Tens of thousands of claims were adjudicated, not just by the Court of Claims in suits against the United States, but also by the United States Patent Office, the Revenue and Accounting Officers in the Treasury's Division of the Comptroller, the district and general land offices of the Department of the Interior, and, as the case study will feature, the Bureau of Pensions. Notwithstanding the relatively casual attention to administrative procedure in both Congress and the courts, those charged with adjudicating these claims developed highly structured and often quite formal processes of decisionmaking. As we shall see, these processes were not entirely free from congressional or judicial oversight, but important substantive, and virtually all procedural, norms for administrative adjudication were constructed by the agencies themselves.

Similarly, we have come to think of the pre-ICC era as one that is quite free from administrative regulation at the national level. To be sure, by comparison with state and local regulation, national regulation was quite limited. But, it was hardly nonexistent. The major transportation safety issue of the mid-nineteenth century, passenger travel on steamships, had been addressed in a remarkably modern and comprehensive regulatory scheme of standard setting, licensing, inspections, and penalties prior to the Civil War.<sup>54</sup> Less comprehensive national regulation had been applied to other areas of waterborne commerce, ranging from seamen's contracts to infectious diseases to embargoes and nonimportation laws.<sup>55</sup> The federal government had long regulated trade with Indian tribes, perhaps a competitor with the Jeffersonian Embargo of 1807 to 1809 and the Fugitive Slave Laws of the 1850s, for the nineteenth century's most obvious regulatory failure. But, as the second case study will reveal, regulation could grow up in the interstices of apparently "nonregulatory" functions. During the period under study, the Post Office began, and for many years pursued, antifraud and antivice regulation that targeted lotteries, obscenity, and a range of commercial deceptive practices facilitated by the use of the mails. While violation of the postal statutes carried criminal penalties, the Post Office administratively interdicted banned articles and excluded violators from using the mails. This regulatory scheme was also adjudicatory in form, but not on the vast scale witnessed at the Pension Office. Nevertheless, Post Office regulation was broad in scope. Its antifraud activities occupied territory subsequently supervised by the Federal Trade Commission,

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54. For a description of the steamship travel issue, see Mashaw, *Administration and the Democracy*, *supra* note 9, at 1628-66.

55. See Mashaw, *Recovering*, *supra* note 9, at 1277; Mashaw, *Reluctant Nationalists*, *supra* note 9, at 1647-96.

the Securities and Exchange Commission, and the Food and Drug Administration.

Both case studies, one in benefits administration, the other in regulatory enforcement, illustrate the development of a substantial internal law of administrative adjudication. Moreover, the normative structure of that law, unlike the late nineteenth-century external law of judicial review, is deeply familiar to contemporary administrative lawyers. With scant direction from Congress, and none from the courts, agencies built systems of adjudication that featured transparent procedures and precedents, internal separation of functions, professionalization of adjudicatory personnel, safeguards against personal and political bias, and robust opportunities for documentary or oral hearings. From this perspective we might understand the so-called “rights revolution” of the 1960s and 1970s, in part, as a consolidation in constitutional doctrine of administrative practices that represent a continuous, but seldom acknowledged, administrative law tradition.

Part IV provides a summary of where administration and administrative law stood as America entered what has been called its “Age of Reform.” While reacting against the excesses of commerce and the failures of governance in the Gilded Age, the reformers of the late nineteenth and early twentieth centuries were also building on administrative structures, practices and legal understandings that are often obscured by attention to the postbellum Republic’s well-deserved reputation for corruption and vituperative political rhetoric. The coda concludes with a brief reflection on the jurisprudential status of the internal administrative law that this Article describes.

## I. POLITICAL CONTROL OF ADMINISTRATION

Discussions of political control of administration in the United States often feature parables of a tragic fall from constitutional grace. In one parable, historic democratic control of administration by Congress, through detailed statutory prescriptions and close control over administrative expenditures, has given way to an unaccountable bureaucracy exercising enormous policy discretion under vague statutory delegations of authority<sup>56</sup> while extracting

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56. These views are common both to some political scientists, *see, e.g.*, THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979), and to constitutional and administrative lawyers, *see, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993) (arguing for the resuscitation of the moribund nondelegation doctrine).

ever larger appropriations from a poorly informed and compliant Congress.<sup>57</sup> In the other, democratic control by the constitutionally ordained “unitary executive” has been undermined by the twentieth-century creation of multiple independent commissions and a host of organizational arrangements that diffuse authority and hamstring presidential direction of administrative discretion.<sup>58</sup> Both of these parables imagine a world that never was.

Presidents and congresses have undeniably struggled with each other over control of administration from the earliest days of the Republic. That battle still rages and remains as inconclusive in 2010 as it was in 1789. The only difference is that it now surfaces, at least occasionally, in the courts, whereas throughout the nineteenth century the contest was waged exclusively in Congress and the court of public opinion. The period under study here was no exception. The peculiar and paradoxical feature of the presidential-congressional struggle in the Gilded Age is that formal constriction of presidential power over appointments and removals in the Civil Service Act almost certainly did more to weaken congressional than presidential control of administration.

As we shall see, this period also provides a rich illustration of the weaknesses of both congressional-control and unitary-executive mythology. Gilded Age presidents were almost uniformly weak executives who ceded most of their patronage power to congressional delegations and local party elites. But while many federal officers may have been beholden to individual congressmen or party machines for their jobs, their authority was poorly circumscribed by either statutory specificity or congressional budgetary controls. Indeed, as we shall see, administrators sometimes pleaded in vain for more concrete statutory directions, confronted a Congress with virtually no capacity to evaluate their budget requests, and often drafted the legislation that provided their jurisdiction and the organization of their bureaus.

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57. The classic statement is in WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

58. The literature on the “unitary executive” debate is enormous. For an extended argument that the President has always had, and the Constitution demands, an unimpaired power of appointment, removal, and direction over federal officers, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). For classic critiques of the unitarian approach, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725 (1996); and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994).

*A. Appointments and Removals, Again*

The struggles over the President's power to remove federal officials, which began in the first Congress and marred Andrew Jackson's presidency, erupted with a vengeance after Andrew Johnson succeeded Abraham Lincoln. Johnson, a moderate Southerner who had provided sectional balance for the Republican ticket of 1864, attempted to continue Lincoln's generous Reconstruction policies. But Johnson faced a Congress dominated by radical Republicans who had quite different ideas.

In firm control of both houses of Congress following the election of 1866, congressional Republicans moved aggressively to prevent the President from undermining its Reconstruction policies. Congress prohibited the President (or the Secretary of War) from issuing Army orders or instructions save through the General of the Army, Ulysses Grant. The same statute established the Army's headquarters in Washington and prohibited the President from removing, suspending, or relieving Grant from command or assigning him to duty outside Washington without the Senate's consent.<sup>59</sup> With Reconstruction firmly under Grant's control, Congress then passed a new Reconstruction Act requiring a much more thoroughgoing reform of politics and governance in the Southern states before they could be readmitted to the Union.<sup>60</sup>

The radicals were hardly finished. Their Tenure of Office Act<sup>61</sup> required Senate approval for the removal of any officer appointed with the advice and consent of the Senate. The President could remove or suspend an officer when Congress was not in session only on specific grounds of misconduct. Any such suspension was required to be reported to the Senate within twenty days of the beginning of its next session. Should the Senate fail to agree that the removal was proper, the officer was to resume his duties. Johnson vetoed the bill on both constitutional and policy grounds. Johnson's veto was overridden, but he was not deterred. In an attempt to reclaim control over Reconstruction policy, Johnson removed Secretary of War Stanton, who had close ties to the congressional Republicans.<sup>62</sup> He also removed the more radical military governors in the South, replacing them with generals who shared his milder approach to Reconstruction.

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59. Act of Mar. 2, 1867, ch. 170, 14 Stat. 485.

60. Act of Mar. 23, 1867, ch. 6, 15 Stat. 2.

61. Act of Mar. 2, 1867, ch. 154, 14 Stat. 430.

62. Letter from Andrew Johnson, President of the U.S., to the Senate (Dec. 12, 1867), *reprinted in 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 3781 (James D. Richardson ed., 1897) [hereinafter *MESSAGES AND PAPERS*].

The battle between Johnson and the Congress then took on tragic-comic proportions.<sup>63</sup> The Senate rejected Johnson's reasons for removing Stanton, who resumed his office. Johnson then removed him again and appointed adjutant General Lorenzo Thomas as interim Secretary of War. Stanton declined to vacate his office and barricaded himself inside the War Department. The House responded with a Bill of Impeachment whose principle ground was violation of the Tenure of Office Act.

Johnson survived impeachment by one vote in the Senate. As Johnson's able counsel in the impeachment trial pointed out, not only was the Tenure of Office Act arguably unconstitutional, as written it did not apply to Johnson's removal of Stanton. The Act provided that cabinet members would hold office during the term of the President by whom they were appointed, and would be subject to removal only with the advice and consent of the Senate. Stanton had been appointed by Abraham Lincoln, not by Andrew Johnson, and Senator John Sherman, who authored that language and headed the conference committee on the bill, had informed the Senate that the Tenure of Office Act would not apply to Johnson should he remove any of Lincoln's cabinet appointees.<sup>64</sup> One third plus one members of the Senate were apparently convinced by one or the other, or perhaps both, of Johnson's arguments.

Even those who support a strong view of the "unitary executive," that is, that the Constitution gives the President the power to remove and control all policymaking subordinates in the executive branch, agree that the Tenure of Office Act and Johnson's impeachment significantly weakened the presidency during the Gilded Age.<sup>65</sup> To be sure, presidents resisted,<sup>66</sup> but Congress remained ascendant.<sup>67</sup> Its members tended to view this as the natural order of things. As John Sherman put it, "The Executive Department of a republic like ours should be subordinate to the legislative department. The President should obey and enforce the laws, leaving to the people the duty of correcting any errors committed by their representatives in Congress."<sup>68</sup> The post-Johnson

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63. For a brief but more complete description of the contest, see CALABRESI & YOO, *supra* note 58, at 179-87.

64. CONG. GLOBE, 39th Cong., 2d Sess. 1516 (1867).

65. CALABRESI & YOO, *supra* note 58, at 189, 218.

66. *See id.* at 189-216.

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

68. 1 JOHN SHERMAN, *RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET: AN AUTOBIOGRAPHY* 447 (1895).

subservience of the President to Congress was especially marked in relation to presidential appointments. President Grant reportedly said, with apparent equanimity, “The President very rarely appoints, he merely registers the appointments of members of Congress.”<sup>69</sup>

Not all presidents were so docile as Grant. His immediate successor, Rutherford B. Hayes, put the contest between the President and Congress over the control of administration on a different footing. Hayes was a civil service reformer who believed in appointments based on open competitive examinations and the elimination of civil servants’ participation in political activity beyond voting and public speaking. Indeed, he made the first substantial movements toward civil service reform by issuing executive orders to that effect.<sup>70</sup> Hayes seems to have understood that the establishment of the political authority of the President required the reduction of the political power of Congress. And, in a context where congressional appointment was the norm, moving a substantial number of government jobs “outside of politics” would weaken Congress, particularly the Senate, and empower the President.

The struggle between Congress and the President over appointments and removal and the struggle for civil service reform overlapped, but they were not the same battles. The former was fought largely on a constitutional plane emphasizing ideas of separation of powers and checks and balances. The latter was a movement to curb corruption in government and increase administrative competence.

### *B. The Path to Pendleton*

Were politics and history “rational,” the story of the development of civil service reform in the post-Civil War era might go something like this: the Civil War demonstrated the staying power of an industrial society when pitted against an agrarian one. The war made clear what the prescient already knew – the future belonged to industry and commerce, not to agriculture. Moreover, the farsighted might have understood that this new economy and its government could not be built on the foundations of the past. Rapid industrialization would challenge the government with new social and economic problems. Even a public service composed of honest but untrained backwoodsmen straight out of Jacksonian mythology would be inadequate to

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69. 2 JOHN RUSSELL YOUNG, *AROUND THE WORLD WITH GENERAL GRANT: A NARRATIVE OF THE VISIT OF GENERAL U.S. GRANT, EX-PRESIDENT OF THE UNITED STATES, TO VARIOUS COUNTRIES IN EUROPE, ASIA, AND AFRICA, IN 1877, 1878, 1879*, at 265 (1879).

70. Exec. Order (June 22, 1877), *in* 9 *MESSAGES AND PAPERS*, *supra* note 62, at 4402-03 (1877); Exec. Order (May 26, 1877), *in* 9 *MESSAGES AND PAPERS*, *supra* note 62, at 4402 (1877).

the task of twentieth-century governance. A spoils system that exalted partisan patronage and disparaged technical competence was not long for the new world.

But history and politics are seldom so straightforward. That civil service reform went hand in hand with rapid industrialization does not demonstrate that the latter caused, or even much influenced, the former. Civil service reform in the Gilded Age<sup>71</sup> was as much a moral crusade as a battle for technocratic competence.<sup>72</sup> The Grant Administration was corrupt on a scale never before witnessed in the United States, and its recurrent scandals were understood to be intimately connected to the way in which officials were selected and party loyalties maintained. If industrialization was a cause of civil service reform, it was largely in the sense that the wealth generated by industrialization created breathtaking opportunities for corruption in a spoils-oriented public service. And, the scale of theft and corruption exposed in post-Civil War America gave it a notoriety that virtually demanded a reform movement.

Given Congress's major role in patronage appointments, it is not too surprising that civil service reform was championed first by presidents or aspiring presidents, not by congressmen. To be sure, Andrew Johnson had been impeached because of his refusal to abide by the Tenure of Office Act. But, the warfare between Andrew Johnson and the radical Republicans of his own party was political warfare about Reconstruction, not about reform of the

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71. The standard history is PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* (1958). Further general histories include ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883* (1961); and U.S. OFFICE OF PERS. MGMT., U.S. CIVIL SERV. COMM'N, *BIOGRAPHY OF AN IDEAL: A HISTORY OF THE FEDERAL CIVIL SERVICE* (2003).

72. This is not to say that the latter demand was unimportant. Industrial and mercantile interests needed a post office and customs houses that functioned efficiently. Indeed, one area in which the reform of the civil service may have followed the "rational" format described in the text involved the application of merit principles in the Patent Office. As the ownership of patents migrated from individual inventors to corporate enterprises, American business demanded a more stable basis for investing in the development of products ostensibly protected by patent. This could not be accomplished unless the Patent Office were put on a more regular and scientific basis so that patents, once issued, gave reasonable certainty that they would hold up in court. Hence, while early proposals for general civil service reform languished in the Congress, the Patent Office began merit-based hiring and promotion in 1869. The process of patent examination rapidly became professionalized and bureaucratized and the accomplishments of the Office were presented to the Congress and the public as a triumph of the bureaucratic system which protected both the inventor's property rights and the access of the public to the commercialization of useful technological advances. These developments are chronicled in Kara W. Swanson, *The Bureaucracy of Genius: Striking the Patent Bargain in the Nineteenth-Century United States* (Aug. 2008) (unpublished manuscript, on file with author).

public service. And, although the President in the post-Civil War period had thousands of offices nominally under his control, he was a prisoner of the spoils system rather than a political leader who cemented his party's loyalty to him, and to his electoral success, through his power of appointment.

It was the historically reviled Grant who first appointed a Civil Service Commission to look into the reform of the public service.<sup>73</sup> Perhaps equally significant, Grant's authority to appoint the Commission derived from a rider tacked on to an appropriations bill by Carl Schurz, a proponent of civil service reform well before his election to the Senate.<sup>74</sup> The formal pattern of reform was presidential initiative with congressional acquiescence, but the real heart of the civil service reform movement lay outside the government.

The extragovernmental civil service reformers of the 1860s and 1870s were the heirs of the Abolitionist Movement, indeed, sometimes the same persons. They saw the partisan spoils system as a scourge on the republican political landscape that, like slavery, had to be removed in order to free the nation from immorality and corruption. The reformers' analysis of the spoils system and its relationship to democratic values was in some ways reminiscent of Jackson's view of the antidemocratic, Federalist public service. But, while perhaps benign in its initial conception, from the reformers' perspective, rotation in office had become a cancerous growth that threatened American democracy.

The first report of Grant's Civil Service Commission reflects the moral fervor of the reform crusade. The document was prepared by the commission's chair, George William Curtis, one of the major players in the civil service reform movement. In Van Riper's description,

[T]his fifty page document begins soberly enough, but after a few pages of introduction quickly develops a distinct Old Testament eschatological flavor, declaring, "The moral tone of the country is debased. The national character deteriorates." As if this and forty more pages like it were not enough, the report then resoundingly concludes: "The improvement of the Civil Service is emphatically the people's cause, the people's reform, and the administration which vigorously

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73. For a discussion of the Grant Civil Service Commission and its demise, see LEONARD D. WHITE, *THE REPUBLICAN ERA: 1869-1901: A STUDY IN ADMINISTRATIVE HISTORY* 281-87 (1958).

74. Act of Mar. 3, 1871, ch. 114, 16 Stat. 495 (1871).

begins it will acquire a glory only less than that of the salvation of a free Union."<sup>75</sup>

When the Grant Commission expired for lack of congressional appropriations, the battle was carried on outside of government by civil service reform leagues at the local, state, and national levels.<sup>76</sup>

To modern eyes, the idea that civil service reform would purge the public service of venal motives and reestablish a republic of virtue seems wonderfully naïve. In her analysis of the reformers' ideology, Ruth M. Berens describes the "political man" of the civil service reformers as

a good citizen, loving liberty but preferring the public welfare to his private well-being. He put policy above party, and when virtue was at stake, maintained his independence. The economic man who was to become the future civil servant held the government service in great esteem, and was anxious to take upon himself the mantle of public stewardship. He prepared himself carefully for the examinations and strove to the utmost in the competition. Once appointed, he was attentive to duty and anxious to secure promotion. He loved his country, desired security, and was content with a modest salary, since merit brought advancement. The political and economic man, moves

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75. VAN RIPER, *supra* note 71, at 81-82. Added to this high moral tone was a more complex analysis included in the Commission's final report in 1874. Following the introduction there appears a section entitled "The Evils to be Remedied" which begins:

There had been developed, mainly within a single generation, and was existing with fearful powers of expansion and reproduction an aggressive and unscrupulous spirit of mercenary partisanship, which, promoting and dominating the pursuit of politics as a trade, and seeking public office and party and caucus leadership principally for the spoils of money and patronage they could command, was degrading all party action and popular estimation and impairing alike official integrity, political honor, and private morality. This spirit developed and animated all over the country large numbers of little and great partisan combinations, faithful to no party principles, inspired by no patriotic sentiments, conducting no useful debates, contributing nothing to public intelligence or public virtue, but mettlesome and insatiable, everywhere, whenever any official selection was to be made, or any official authority was to be exercised.

*Id.* at 82.

76. While a moral rather than a technocratic crusade, the scope of the reform movement was limited. Civil service reform was not a prelude to some grander program of social and economic reform designed to cure the social evils of industrialization. On the ideology and practice of social services for the lower classes, see GEORGE M. FREDRICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* 111-12 (1965). On the classical liberal ideology of reform leaders, see SPROAT, *supra* note 35.

like a beneficent robot through the pages of reform literature, is not held up as an ideal—a procedure which would neither have taxed the credulity of the reader nor biased the assumptions of the reformers—but with a surprising superficiality assumed as a foundation upon which to base reform.<sup>77</sup>

This was an essentially religious campaign carried on in an age in which religious images, epitomized by William Jennings Bryan's "crown of thorns" and "cross of gold" speeches, were the standard coin of political exchange. But as with most moral crusades, success hinged as much on contingency and the baser instincts of erstwhile allies, as on the rightness of the reformers' cause. While civil service reform was a constant and repetitive theme of editorials and stories in the daily and weekly press throughout the post-Civil War period, the contingency that galvanized public opinion was the assassination of President Garfield in 1881 by a man found to be a "disappointed office seeker."<sup>78</sup> The President's death was interpreted to and understood by the nation as a symbol of the low state to which American government had fallen through exploitation of the spoils system of administration. Before, the spoils system had been equated only with theft—now it was equated with murder.

By the time of the election of 1882, civil service reform had become a major issue in most parts of the country. Indeed, it was such an issue, that the Democratic Party, languishing throughout the whole of the post-Civil War period, very nearly took back the presidency. The lively prospect of a Democratic administration four years hence moved a Republican Congress to action. Jumping on the public bandwagon, it passed the civil service reform measure sponsored by Senator George H. Pendleton and drafted by the New York Civil Service Reform Association.<sup>79</sup>

Of course, the demand for new public policy does not necessarily mean that it will be supplied. Responsiveness to general public clamor is certainly one explanation for the passage of civil service reform in 1883. But, as Ronald Johnson and Gary Leibcap argue,<sup>80</sup> we need some further explanation of why

77. Ruth M. Berens, *Blueprint for Reform: Curtis, Eaton and Schurz* (1943) (unpublished Master's thesis, University of Chicago), quoted in VAN RIPER, *supra* note 71, at 84.

78. *The Merit System and the Parties*, N.Y. TIMES, June 24, 1904, at 8 (stating that Garfield was shot by a "crazy, disappointed office seeker").

79. Act of Jan. 16, 1883, ch. 27, 22 Stat. 403. On the reform period leading to the Pendleton Act, see CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1905).

80. RONALD N. JOHNSON & GARY D. LEIBCAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE* (1994).

politicians, presumably dependent upon patronage for their offices, would throw that system over because of the demands of the idealistic reform movement or public clamor that was not likely to be maintained. On their view, the explanation lies in the way in which the spoils system had come to disserve the interest of both the President and Congress. The vast increase in public employment following the Civil War had made the spoils system ungovernable. So many offices were to be filled that neither presidents nor representatives and senators could devote sufficient time to it to ensure that appointees were both loyal to them and reasonably competent. Appointments were thus in effect delegated to political operatives at the state and local level. As a consequence, office holders viewed local politicians as their benefactors, which, in turn, made the national politicians dependent upon the local power structure to mobilize voters in general elections. Moreover, to the extent that the public service was seen as corrupt and incompetent, national politicians, not the locals, were blamed for the inadequacies of the public service.

To make matters worse, according to Johnson and Leibcap, presidents, representatives, and senators increasingly relied on industrial and commercial interests for support. Because these interests transcended local political affairs, the constituencies of national and local politicians were overlapping but far from congruent. And, in increasingly expensive national campaigns, the assessments on patronage appointees supplied a decreasing percentage of the funds necessary for effective campaigning. In these circumstances, it was in the interests of both presidents and representatives and senators to limit the reach of the spoils system and curtail their dependence on local political machines. And, in bending to the demands for reform, Congress and the President hardly took a radical approach.

The Pendleton Act was both unsurprising and limited in its basic principles. It called for competitive examinations for hiring and promotion and provided relative security of tenure for covered office holders (that is, tenure during good behavior). The implementation of these principles was left largely to the President and the new Civil Service Commission. Moreover, while these principles were similar to those in the British Civil Service and elsewhere, they had a decidedly American flavor. Examinations were to be practical rather than theoretical or academic, as were British exams.<sup>81</sup> In addition, the merit service was not to be a closed system creating a unified state bureaucracy. Offices were to be open by examination throughout the civil service system, not just at the bottom. Hence, appointment to offices above the entry level could be from outside as well as from within. What Stephen Skowronek has called the “state

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81. Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 313 (1959).

of courts and parties”<sup>82</sup> was not about to be displaced at a stroke by a bureaucratic class that viewed itself as representing the state. To this degree, Jacksonian theories of democracy remained.

Nor was the President’s removal power seriously circumscribed. Civil service employees were not removed for partisan political reasons, but enforcement was left to incentives. If appointment had to be by competitive examination, then perhaps the temptation to remove for partisan reasons would be stifled. And, of course, lying not far beneath the surface of this hopeful interpretation of the Pendleton Act’s relative security of tenure was the American constitutional experience. Attempting to circumscribe the power of presidential removal would reopen yet again the constitutional controversies of 1789, the Jacksonian era, and the Johnson impeachment.

As the Pendleton Act tread cautiously around the boundaries of the President’s removal power, it also dealt lightly with presidential appointments. For remember, the Constitution gives the appointment power either to the President or, for inferior officers, to the President, the courts of law, or the heads of departments, as the Congress shall by law prescribe. The Civil Service Commission was not any of these constitutionally ordained parties. The Pendleton Act itself brought only about ten percent of the positions in the federal public service into the competitive civil service. The rest were to be incorporated by presidential executive order, if and when the President saw fit.<sup>83</sup>

This creeping quality to the Civil Service Law had a distinct political advantage. To the extent that incoming presidents profited from the availability of offices not covered by the Act, outgoing presidents would see the possibility of their handiwork being undone by the next incumbent. They thus had a political incentive, and indeed would be importuned by their existing appointees, to take more and more of the public service into the civil service system on their way out of town. Commitment to reform and the need to

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82. SKOWRONEK, *supra* note 42, at 39.

83. In prescribing examinations for the competitive service, the Civil Service Commission was, of course, not itself making appointments. And, the Constitution allows the placement of appointments for “inferior officers” elsewhere than in the President. Nevertheless, as Attorney General A.T. Akerman opined at the time of the creation of the Grant Civil Service Commission, the Congress “has no power to vest appointments elsewhere, directly or indirectly.” 13 Op. Att’y Gen. 516, 521 (1871). By “elsewhere” Akerman meant elsewhere than in the constitutionally named places. And at some point restrictiveness in the requirements for qualifications would at least “indirectly” invade the appointments power. Much better, therefore, that if any invading of the President’s power were to be done, the President would do it himself. Hence, the Civil Service Commission’s functions were largely technical and advisory. The Commission proposed; the President disposed.

reduce the effort demanded to appoint and oversee a rapidly expanding public work force provided further incentives for expansion. Once in place, therefore, the reforms of Pendleton were rapidly consolidated. Over fifty percent of the public service outside the Post Office was covered by the Pendleton Act within five years of its passage.<sup>84</sup>

*C. The Efficacy of Political Control*

The Pendleton Act neither took federal administration “out of politics” nor consolidated the President’s power with respect to administration. The statute ensured that a substantial percentage of the federal civil service would have the basic competence of a decent common school education. And it limited the degree to which federal officials could provide an army of contributors and campaign workers controlled by local party machines. But, the Pendleton Act in no way interfered with the capacities of Congress or the President to influence administrative action using their traditional tools: appointments, removals, legislation, appropriations, investigations, and oversight. The interesting question is the degree to which these traditional tools permitted Congress or the President to maintain control over important policy choices or whether administrators exercised significant, independent discretion to make law in the course of implementing it.

As I have noted, presidential power was at a low ebb from Lincoln’s assassination to the inauguration of Theodore Roosevelt. Presidents won some victories concerning the maintenance of their removal powers and could reduce congressional and local influence with each new batch of federal government employees covered into the civil service system by executive order. But this is a far cry from having effective control over the federal bureaucracy. On presidential control and influence in the period 1869 through 1901, Leonard White, the great student of public administration in the nineteenth century, concluded,

[the presidents] were at the head of the machine, but the machine had power of self-propulsion and power to preserve its own shape and motion. The established course of the public business went on its

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84. SKOWRONEK, *supra* note 42, at 73. For a more detailed discussion of the enactment and consolidation of the Pendleton Act reforms, see WHITE, *supra* note 73, at 278-364.

appointed way, for the most part without requiring or inviting the collaboration of the man who sat in the White House.<sup>85</sup>

White's study of congressional control of administration revealed much greater activity, but with decidedly mixed results concerning the course of administrative development.<sup>86</sup> By his account, Congress constantly inserted itself into administration through private acts and investigations. But the former distracted Congress from the consideration of general issues of policy, and the latter tended to be completely ineffectual in the absence of congressional staff.

To be sure, Congress was active in establishing new departments. It created a Department of Agriculture in 1862, under a Commissioner not of cabinet rank,<sup>87</sup> then raised the Department to executive cabinet status in 1889.<sup>88</sup> Congress established a similar, nonexecutive Department of Education in 1867,<sup>89</sup> but subsequently abolished the Department and moved its functions to the Interior Department.<sup>90</sup> A Department of Justice, first suggested by President Washington, was finally created in 1870,<sup>91</sup> and labor got a department with noncabinet status under the direction of a Commissioner in 1888.<sup>92</sup>

Congress was constantly active in establishing and reorganizing departments, bureaus, and offices. Theodore Lowi estimates that "[n]early half of [Congress's] output during the Distributive Era [1800-1933] was . . . constituent policy."<sup>93</sup> Lowi also notes that Congress reorganized and institutionalized itself continuously from 1816 onward to ensure that there

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85. WHITE, *supra* note 73, at 109. In the same vein, White argues that bureaus often eluded effective departmental control, and hence, indirectly, presidential control as well. Officers dealing with public lands, patents, military pensions, and Indian affairs were all nominally in the Interior Department, but their strong supportive networks outside of government allowed them to operate semiautonomously. *Id.* at 175-81.

86. *Id.* at 68-92.

87. Act of May 15, 1862, ch. 72, 12 Stat. 387.

88. Act of Feb. 9, 1889, ch. 122, 25 Stat. 659.

89. Act of Mar. 2, 1867, ch. 158, 14 Stat. 434.

90. Act of July 12, 1870, ch. 251, 16 Stat. 230, 242; Act of July 30, 1869, ch. 176, 15 Stat. 92, 106.

91. Act of June 22, 1870, ch. 150, 16 Stat. 162.

92. Act of June 13, 1888, ch. 389, 25 Stat. 182. This department received cabinet status as a part of the new Department of Commerce and Labor in 1903, and was finally established as a separate department in 1913. Act of Mar. 4, 1913, ch. 141, 37 Stat. 736.

93. LOWI, *supra* note 7, at 77. By constituent policy, Lowi means to include acts that create a new agency or department or reorganize the government, that is, that are *constitutive* of governmental organization.

were standing committees that paralleled the jurisdiction of major departments. Hence, Woodrow Wilson's famous conclusion that "Congressional government is committee government."<sup>94</sup>

But it would be a mistake to imagine that many of the activities that are evident from perusing the statute books represent congressional initiatives. To be sure, the creation of a department often involved high politics and generated partisan ideological conflict. Whether any aspects of education policy should be a national concern and whether interests such as agriculture or labor should have departments devoted to issues of particular interest to them were controversial questions, often contested on grounds of constitutional principle. But how the work of administration got done was largely a function of how departments organized themselves, and, in this regard, the departments had the leading role. Outside of the Treasury Department, in whose workings the Congress maintained its historically lively interest, the creation or reorganization of bureaus and assignment of personnel was generally done by departments. Legislation addressing these matters responded to departmental proposals or recognized structures that had already been established by administrative action.<sup>95</sup>

Congress seems to have been quite self-conscious about the direction of its administrative state building. William James Hull Hoffer has recently argued that the period 1858 to 1891 represented a distinctive "second state." That state lay between the limited government, assembly dominated, and antibureaucratic "first state" of antebellum America, and the enlarged, activist, expert administrative "third state" that emerged in the first half of the twentieth century.<sup>96</sup> Hoffer describes the building of this second state as following a distinctive progressive logic. It began with federal sponsorship of activities through funding, land grants, or data gathering; moved on to federal supervision of the sponsored activities through new bureaus or departments; and ended in a standardization or unification of policy through federal rules.

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94. LOWI, *supra* note 7, at 76 (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885)).

95. SHORT, *supra* note 12, at 220.

96. WILLIAM JAMES HULL HOFFER, TO ENLARGE THE MACHINERY OF GOVERNMENT: CONGRESSIONAL DEBATES AND THE GROWTH OF THE AMERICAN STATE, 1858-1891 (2007). Hoffer's analysis is based on a comprehensive review of congressional debates surrounding the Morrill Land Grant Colleges legislation; the statutes creating the Department of Agriculture, the Freedman's Bureau, the Department of Education, and the Bureau of Labor; plus the debates over the Pendleton Civil Service Reform Act, judicial or circuit court reform, and the Blair proposals for federal support of common schooling.

Hoffer emphasizes that these developments involved a layering of new “second state” ideas on top of older first state commitments to local control, collective decisionmaking, and protection against authoritarian administrative excesses. His case studies provide example after example of a Congress that used data and reports compiled by administrative agencies as a basis for its legislative debates, amendatory legislation, and the creation of new agencies. Indeed the new agencies were charged to generate data, studies, and reports that would either (1) provide the basis for unification of state and local activities around best practices, or (2) provide the basis for further congressional legislation to ensure that federal resources were properly deployed. Noting that between 1862 and 1888, Congress created as many new departments as had been created in the previous history of the United States, Hoffer concludes, “In the congressmen’s minds this was no longer the state ‘of courts and parties’ and had not been for years.”<sup>97</sup>

Although Hoffer’s study is ostensibly based on congressional rhetoric, he finds much of the evidence for the second state build up of national and administrative capacities in what Congress did. Proponents often masked the progressive logic of new initiatives by concentrating on the contextual details that motivated congressional action. In Hoffer’s words,

[T]he thought processes behind an expanded national government in the United States, from 1858-1891, did not constitute a series of radical departures, but, rather, revealed a halting, gradual, and almost self-effacing series of overlapping dramas. . . . Congressmen learned to encode novelty as the most conservative possible response to absolute exigency or as the most practical housekeeping measure to deal with pesky inefficiencies.<sup>98</sup>

As Hoffer’s careful study of congressional debates suggests, when looking at congressional legislation one must be careful not to allow the form of the legislation, or the partisan debates surrounding it, to obscure the degree of administrative discretion that new statutes vested in administrators. While congressional statutes empowering departments, bureaus, and commissions continued to contain massive detail, critical questions remained for administrative determination. The range of administrative discretion available under apparently detailed statutes will be manifest in the subsequent discussion of military pension adjudication and Post Office restrictions on the use of the mails. But other examples abound.

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97. *Id.* at 171.

98. *Id.* at 197.

In some sense administrative influence, if not direction and control, of national policy was a virtual necessity in dealing with complex matters. Although Congress organized itself into specialized committees, it had little or no staff and was preoccupied with particularized legislation that responded to constituents' petitions. Even in the antebellum, Jacksonian era, the drafting of important legislation had migrated to the departments and bureaus.<sup>99</sup> A highly detailed statute that seemed to give administrative officials modest discretion, such as the statute creating a national currency and a national banking system,<sup>100</sup> represented proposals originated and developed by the Treasury.<sup>101</sup> While in form it elaborated highly specific congressional decisions, the legislation, in substance, ratified Treasury policy.

The 1871 statute consolidating and amending the piecemeal laws enacted since 1838 for the regulation of steamboat safety provides an even more dramatic example.<sup>102</sup> Although the Act's seventy-one sections contain enormous amounts of detail concerning safety equipment, boiler pressures, navigation lights, and the like, these provisions codify many rules previously adopted by the Board of Supervising Inspectors of Steamboats and respond to suggestions for legislative reform that the Board had pressed on the relevant congressional committees for two decades.<sup>103</sup> Moreover, the new statute continued in force the broad discretion of local boards in licensing boats, boilers, and personnel,<sup>104</sup> and of the Supervisory Board in making further rules and regulations having the force of law.<sup>105</sup>

The enormous detail of appropriations statutes could also be deceiving. These often contained elaborate specification of personnel and salary, among other things. But, with respect to some of the largest items of expenditure, appropriations for the Army, the Navy, military pensions, and the Post Office, Congress simply allocated lump sums. Its attempts to control expenditure by prohibiting transfers among accounts, holdovers from year to year, and advanced obligations of funds not yet appropriated were not terribly successful. Departments came back for deficiency appropriations under the implicit threat of ceasing to operate. They generally received the funds they

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99. See Mashaw, *Administration and the Democracy*, *supra* note 9, at 1668-69.

100. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

101. ALBERT S. BOLLES, *THE FINANCIAL HISTORY OF THE UNITED STATES, FROM 1861 TO 1885*, at 43 (1886).

102. Act of Feb. 28, 1871, ch. 100, 16 Stat. 440.

103. See Mashaw, *Administration and the Democracy*, *supra* note 9, at 1643-53.

104. Act of Feb. 28, 1871, §§ 12-17, 16 Stat. at 445-47.

105. *Id.* §§ 24-30, 16 Stat. at 449-50.

requested. Indeed, the specialized organization of Congress tended to work against fiscal control. The Treasury had no authority to screen departmental requests or estimates. These went directly to different committees which competed to fund the activities within their jurisdictions. To a significant degree, agencies controlled the allocation of their own funding, if not the total amounts allocated.<sup>106</sup> While late twentieth-century public choice scholars may have overstated the degree of administrative control over Congress as a matter of contemporary political economy,<sup>107</sup> that approach may more accurately characterize the relationship between administrators and congressional committees in the Gilded Age. Woodrow Wilson's congressional committee government could simultaneously be administrative government.

Congressional abdication of regulatory policymaking is the arena that tends most to exercise modern critics of the administrative state. And there is a tendency to imagine a pre-New Deal or pre-Progressive Era world in which national regulatory policy, if adopted at all, was specified clearly by statute. This image is false.<sup>108</sup> Congress's modest forays into direct federal regulation during this period often ceded virtual *carte blanche* to the implementing authorities to develop substantive policy. For example, although extremely hesitant about entering a field that had been a traditional province of state regulation, when Congress finally passed a general quarantine, it conferred remarkably broad authority:

[t]he Secretary of the Treasury shall, if in his judgment it is necessary and proper, make such additional rules and regulations as are necessary to prevent the introduction of such [communicable] diseases into the United States from foreign countries, or into one State or Territory or the District of Columbia from another State or Territory or the District of Columbia . . . .<sup>109</sup>

106. On congressional control, or lack of control, over appropriations, see WHITE, *supra* note 73, at 54-67.

107. The basic argument for agency control through monopolization of information is from NISKANEN, *supra* note 57. For a sympathetic revision of Niskanen's model which finds his strongest claims overstated, see Gary J. Miller & Terry M. Moe, *Bureaucrats, Legislators, and the Size of Government*, 77 AM. POL. SCI. REV. 297 (1983).

108. For discussion of broad delegations of regulatory authority in antebellum legislation, see Mashaw, *Administration and the Democracy*, *supra* note 9, at 1628-66; Mashaw, *Recovering*, *supra* note 9, at 1292-96; and Mashaw, *Reluctant Nationalists*, *supra* note 9, at 1650-95.

109. Act of Feb. 15, 1893, ch. 114, § 3, 27 Stat. 449, 451 (granting additional quarantine powers and imposing additional duties upon the Marine Hospital Service). On the development of

The statute regulating communicable diseases in animals was similarly expansive. Although internal regulations were to be enforced by state authority (financed by federal funds), the rules and regulations promulgated by the Commissioner of Agriculture were simply to be those “he may deem necessary for the speedy and effectual suppression and extirpation of [communicable animal] diseases.”<sup>110</sup> And when dealing with the exportation of livestock, the Secretary of Treasury was authorized to establish such regulations “as the results of [his] investigations may require,” and to prevent the exportation of diseased animal by such steps and measures “as he may deem necessary.”<sup>111</sup>

Congress’s halting pre-ICC approach to railroad regulation evidenced a similar willingness to rely on administrative discretion. In 1878, Congress adopted an investigation and reporting scheme for railroads that had received any federal subsidy, that is, most of them.<sup>112</sup> Although the new auditor of railroad accounts was only empowered to investigate and make reports to the Secretary of the Interior, these reports were to contain information “on the condition of each of said railroad companies, their road, accounts, and affairs.”<sup>113</sup> In order to carry out this function the auditor was empowered to examine all of the railroads’ books and accounts, and “to prescribe a system of reports to be rendered to him by the railroad companies.”<sup>114</sup>

So far as the statute provides, the auditor, later Commissioner of Railroads, could demand any information he thought useful. And in its earliest food safety regulation, Congress empowered the administrators to exclude from commerce any substance “made in imitation or semblance of butter” if they found that it contained “ingredients deleterious to the public health.”<sup>115</sup> Filling in these large and loose terms was left entirely to administrative discretion.

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federal quarantine laws in the nineteenth century, see Edwin Maxey, *Federal Quarantine Laws*, 23 POL. SCI. Q. 617 (1908).

110. Act of May 29, 1884, ch. 60, § 3, 23 Stat. 31, 32 (establishing a Bureau of Animal Industry).

111. *Id.* §§ 4-5.

112. This system was similar to the regulatory scheme pioneered by Charles Frances Adams in Massachusetts. On the Massachusetts system, see THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 1-56 (1984).

113. Act of June 19, 1878, ch. 316, § 3, 20 Stat. 169, 170. The auditor was upgraded to the title of “Commissioner of Railroads” in the General Appropriations Act of 1882, ch. 130, 21 Stat. 385, 409 (1881). These powers of investigation and required reports are very similar to those provided to the ICC, and after judicial construction of the ICC’s other powers, about all that it wielded. SKOWRONEK, *supra* note 42, at 151.

114. Act of June 19, 1878, § 3, 20 Stat. 170.

115. Act of Aug. 2, 1886, ch. 840, 24 Stat. 209, 212.

None of this is to deny, of course, that Congress retained formal power to rein in administrators through appropriations, amendatory legislation, and investigations. The point is merely that, as the world became more complicated, initiative and information advantages migrated increasingly to those who spent their working hours concentrated on a single subject. Administrators were seldom autonomous, then or now, in the strong sense of an ability to make policy clearly contrary to the desires of the political branches.<sup>116</sup> But administrative discretion subject to relatively loose political control is a constant in American law, not an invention of the twentieth century.

## II. LEGAL CONTROL OF ADMINISTRATIVE ACTION

Contemporary administrative lawyers are accustomed to what Thomas Merrill has called the “appellate review model” of judicial review of administrative action.<sup>117</sup> That model has many forms and variations, but its central features are borrowed from appellate review of lower court decisions. Agencies, like lower courts, are expected to develop the facts and apply the relevant law. On appeal, the reviewing court accepts the record as provided by the lower court or agency and modulates the intensity of its review depending upon whether the issue is one of fact or policy—for the agency—or one of law—for the reviewing court—subject, of course, to the recognition that legal interpretation and policy choice may be so conjoined as to defy separation. Beyond procedural regularity, contemporary judicial review is largely devoted to determining, under multiple verbal formulae, whether agency action has been reasonable.

This was not the nineteenth-century approach. Direct review of administrative action by mandamus or injunction was sharply limited by the Supreme Court’s position that mandamus was inappropriate whenever the Administrator was engaged in anything more than a ministerial, nondiscretionary task. On the other hand, where cases were before the courts exercising original jurisdiction, as in damage actions against government officers or patent infringement suits, the courts exercised *de novo* decisionmaking power concerning both questions of fact and questions of

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116. For the elaboration of this idea of autonomous administrative authority, see DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATION, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001).

117. Merrill, *supra* note 53.

law.<sup>118</sup> Gilded Age judicial review followed this basic pattern, and indeed to some degree enlarged upon it. But, around the edges, one can glimpse harbingers of the appellate model, as well as judicial concern that its essentially bipolar approach was inadequate to the realities of an emerging administrative state.

To contemporary eyes it surely was. Where common law actions were available, courts negated whatever advantages inhered in administrative judgment by *de novo* redetermination. Where only writ review obtained, administrative discretion insulated officers from all but cursory judicial review. “Reasonableness,” the touchstone of modern presumptive, but deferential, judicial review was virtually irrelevant in either form of proceeding.

### A. *The Limits of Mandamus*

Mandamus loomed large in federal court jurisprudence in part because the federal government was engaged in a number of high-volume distributive activities, notably the issuance of land and invention patents, and the provision of military pensions. Denial of a patent or a pension was in essence a refusal to act, and mandamus was the appropriate writ to force government action. While only available from the federal courts in the District of Columbia, most high government officials could be sued there. Many litigants made their way to the capital to seek mandamus. They generally had an unhappy time.

Although the Supreme Court of the District of Columbia was at times sympathetic to the extension of mandamus jurisdiction to control official action, in case after case the United States Supreme Court reaffirmed the narrowness of the writ.<sup>119</sup> Moreover, the Court, in *Gaines v. Thompson*,<sup>120</sup> for the first time explicitly made the mandamus jurisprudence applicable to suits for injunction. In *Gaines*, the plaintiff sought to enjoin the Secretary of the Interior from canceling his entry on a piece of public land. Because the plaintiff was attempting to stop a government action rather than mandate it, he may have taken comfort from the 1858 case of *Walker v. Smith*.<sup>121</sup> In *Walker*, the Court had provided full merits review of a General Land Office decision in a

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118. See Mashaw, *Administration and the Democracy*, *supra* note 9, at 1669-84.

119. See, e.g., *United States v. Comm’r*, 72 U.S. (5 Wall.) 563 (1866) (denying mandamus to compel the issuance of a patent by the Commissioner of the General Land Office); *Comm’r of Patents v. Whiteley*, 71 U.S. (5 Wall.) 552 (1866) (denying mandamus to compel the Commissioner of Patents to reexamine a patent application).

120. 74 U.S. (5 Wall.) 347 (1868).

121. 62 U.S. (21 How.) 579 (1858).

suit for injunction without mentioning the mandamus jurisprudence. A unanimous Supreme Court, in a rather a cryptic opinion by Justice Grier, said:

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.<sup>122</sup>

One might easily read that sentence as suggesting that forcing the Secretary’s hand by mandamus to issue a script or a patent was to be distinguished from actions for prohibitory injunction.

*Gaines*, however, put this theory to rest. The Court there described its mandamus jurisprudence as but part of a “general doctrine, that an officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions.”<sup>123</sup> This doctrine, the Court said, “is as applicable to the writ of injunction as it is to the writ of mandamus.”<sup>124</sup> The Court took a straightforward functional approach, noting that there was no difference between an officer being stripped of his right to exercise discretion

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122. *Id.* at 581.

123. 74 U.S. at 352. For this last bit of reasoning, the Supreme Court cited its decision in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), the case in which the State of Mississippi sought to enjoin Andrew Johnson from carrying out the Reconstruction statutes. *Mississippi v. Johnson* was, indeed, an injunction case, and part of the Court’s reasoning in that case relied on the obvious proposition that President Johnson’s activities under the Reconstruction Acts were hardly ministerial, nondiscretionary duties. But, *Mississippi v. Johnson* was, in essence, a political question case. Indeed, the Court imagined that action of the sort requested would involve it in a political imbroglio. What, the Court asked, was it to do if the President complied with an injunction forbidding execution of the Reconstruction Acts and Congress attempted to impeach him for his failure to implement those same statutes? Was the Court then supposed to enjoin Congress from engaging in impeachment? *Id.* at 500-01.

This political question approach was carried further in *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867), where Georgia sought to restrain the Secretary of War and the general in command of the military district comprising Georgia, Florida, and Alabama from enforcing the Reconstruction Acts. Instead of rehearsing the mandamus jurisprudence and the usual distinctions between discretionary and ministerial functions, the Court simply concluded that it lacked jurisdiction. In the words of the opinion, this was because “a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.” *Id.* at 76.

124. *Gaines*, 74 U.S. at 352.

by a court forcing him to do something and being stripped of his right to exercise discretion by the court forcing him not to do something.<sup>125</sup>

Moreover, in *Gaines*, the Court made clear that this principle covers the whole of the executive's discretionary powers, not just obviously political judgments. For when concluding that the acts of the Secretary of the Interior involved were not ministerial, the Court found discretion in the fact that the determination of the validity of the plaintiff's entry on public lands was "a question which requires the careful consideration and construction of more than one act of Congress."<sup>126</sup> The need for agency statutory interpretation thus excluded judicial review. The language of the *Gaines* opinion makes the modern *Chevron* doctrine of deference to agency interpretations of their own statutes seem a grudging acknowledgement of the interpretive discretion Congress intends to repose in administrators.

### B. *Officers vs. Offices*

Postbellum mandamus jurisprudence nevertheless reflected movement toward reconceptualizing direct judicial review as a public action designed to control official behavior rather than as a private lawsuit between individuals, one of whom happened to occupy a public office. Recognition of the "public law" nature of judicial review was incremental and began inauspiciously. In *Secretary v. McGarrahan*,<sup>127</sup> for example, the Court engaged in dictum that suggested that mandamus would not lie against a current officeholder where the decision in question had been made by his predecessor. Mandamus was characterized as a personal action available only against named individuals.<sup>128</sup>

*United States v. Boutwell*<sup>129</sup> confronted the issue directly. The question in *Boutwell* was whether a new Secretary of the Treasury could be substituted as the defendant in a case in which the prior incumbent had resigned after the lower court decision, but before the decision by the Supreme Court. In rather broad terms, the Supreme Court said, "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent . . . . If he be an officer, and the duty be an official one, still the writ is

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125. *Id.* at 352-53.

126. *Id.* at 353.

127. 76 U.S. (9 Wall.) 298 (1869).

128. The decision is somewhat confusing because the Court combined this dictum with concerns about finality. The predecessor could no longer carry out the duty and the current officeholder had never been given an opportunity to act on the matter. *Id.* at 303, 313.

129. 84 U.S. (17 Wall.) 604 (1873).

aimed exclusively against him as a person, and he can only be punished for disobedience.”<sup>130</sup> There was a technical wrinkle of constitutional dimensions that might have limited the *Boutwell* holding: the Court believed that it was being asked to exercise “original jurisdiction over both a new party and a new cause.”<sup>131</sup> Congress’s attempt to give the Supreme Court original jurisdiction in mandamus actions had been ruled unconstitutional in *Marbury v. Madison*.<sup>132</sup>

The *McGarrahan* and *Boutwell* private-action conception of mandamus was both reinforced and potentially undermined by *Rees v. Watertown*.<sup>133</sup> The plaintiff in *Rees* had obtained a judgment against the city of Watertown, as well as a writ of mandamus to compel the city to levy a tax to pay his judgment. But before the writ could be served, a majority of the members of the city council resigned and the marshal, viewing the writ as personal, declined to serve it on the new council members. The hapless *Rees* went through this process twice more. Each time his writ was evaded by officials resigning their posts. *Rees* then attempted to get the federal court to levy the tax itself. But the Supreme Court easily rejected the notion that a court order could levy taxes—a clear exercise of legislative authority.<sup>134</sup> The Court then told the plaintiff that his proper remedy was a writ of mandamus against the town council, noting, laconically, that this was so notwithstanding that “it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering.”<sup>135</sup>

Apparently recognizing that its approach to mandamus made a mockery of the writ if officials were willing to resign, the Court backed away from that part of *Boutwell*. It managed to do so first in *Commissioners v. Sellew*<sup>136</sup> by ruling that the *Boutwell* principle did not apply when the writ was directed against a board rather than an individual officer. According to the Court, the county board in that case was a corporation with continuing existence. The opinion suggested that “[o]ne of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in *Boutwell*’s case may be avoided.”<sup>137</sup>

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130. *Id.* at 607.

131. *Id.* at 609.

132. 5 U.S. (1 Cranch) 137 (1803).

133. 86 U.S. (19 Wall.) 107 (1873).

134. *Id.* at 116.

135. *Id.* at 117-18.

136. 99 U.S. 624 (1878).

137. *Id.* at 627.

The Court carried this notion further in *Thompson v. United States*,<sup>138</sup> holding that the writ could be served notwithstanding a change of officials “where, as in this case, there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached.”<sup>139</sup> Although the Court claimed that this was analogous to the writ of mandamus against corporations, the defendant in *Thompson* was the clerk of an unincorporated township. Even so, the Court believed that the duty was the township’s, not the clerk’s. The Court suggested a more general retreat from the *Boutwell* approach when it said, “[i]f the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit.”<sup>140</sup>

Elsewhere in its mandamus jurisprudence, the Court recognized that it was dealing with bureaus and offices, not just with statutes and officers. In *United States ex rel. Dunlap v. Black*,<sup>141</sup> two separate plaintiffs sought mandamus against the Commissioner of Pensions. The first plaintiff was denied his writ on the straightforward ground that the Commissioner had simply “adopted an interpretation of the law adverse to the relator,”<sup>142</sup> which, of course, meant that his discretion was not subject to control by mandamus. In the second case, however, the Commissioner’s adverse decision had been reversed on appeal to the Secretary of the Interior. When the Commissioner failed to comply with the Secretary’s decision and declined to issue a pension order, the Court viewed this as making out a prima facie case for a writ of mandamus. Principles of hierarchical control within departments limited the discretion an officer might otherwise exercise. In the Court’s words, “when a superior tribunal has rendered a decision binding on an inferior, it becomes the ministerial duty of the latter to obey it and carry it out.”<sup>143</sup>

### C. From Mandamus to Merits Review?

It is but a short step, of course, from finding that the Secretary’s decisions are binding on subordinates to finding that departmental regulations or precedents are binding on the department. On this theory, one might expand

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138. 103 U.S. 480 (1880).

139. *Id.* at 483.

140. *Id.* at 484.

141. 128 U.S. 40 (1888).

142. *Id.* at 48.

143. *Id.* at 52.

the reach of mandamus substantially by finding that prior departmental instructions, circulars, guidelines, practices, or precedents, until changed, bound the department as a whole, not just subordinate personnel. The “internal law” of administration would thus convert otherwise discretionary decisions into ministerial ones subject to judicial control. The Supreme Court of the District of Columbia seems to have attempted to exploit this progressive logic in a pair of cases involving international claims.

*United States ex rel. Angarica de la Rúa v. Bayard*<sup>144</sup> involved a mandamus suit to force the Secretary of State to pay over interest on funds withheld from the plaintiff in connection with a claim against the Spanish government. Spain had sent payment via the Secretary of State, who decided to retain a portion of the award until it could recoup certain of its commission expenses from the Spanish government. The Secretary bought United States securities with the withheld portion of the award and sent a letter to the plaintiff saying, “[I]t is hoped that no great delay will incur in receiving the payment from Spain, which will liberate this reserve for expenses, and the Department will expect to keep this reserve invested in interest-bearing securities of the United States to cover the delay in the distribution to the claimants.”<sup>145</sup> When the Secretary eventually paid over the funds, but without the interest, the plaintiff sued, claiming that the letter constituted a promise by the U.S. Government which eliminated the Secretary’s discretion to retain the interest.

The Supreme Court for the District of Columbia agreed that a commitment by the United States of this sort would make the Secretary’s action ministerial and enforceable by mandamus. However, that court declined to find that the Secretary had made a binding promise to remit the interest. In addition to believing that the Secretary’s actions in the whole field of foreign relations were “political” and therefore not subject to judicial control, the court thought that the Secretary’s letter was a mere expression of intent or statement of policy, not a binding rule. The U.S. Supreme Court upheld that judgment, but on different grounds. In that Court’s view, the Secretary of State had no authority to bind the United States to the payment. Hence, whatever his intention, there was no binding contract and his successors’ discretion concerning how to deal with the matter remained.<sup>146</sup>

Two years after its decision in *Angarica*, the Supreme Court for the District of Columbia carried its reasoning to the logical conclusion. *United States ex rel.*

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144. 15 D.C. (4 Mackey) 310 (1885).

145. The letter is quoted in the Supreme Court opinion in *United States ex rel. Angarica de la Rúa v. Bayard*, 127 U.S. 251, 255 (1888).

146. 127 U.S. at 261.

*White v. Bayard*<sup>147</sup> involved payments made pursuant to the decisions of a claims commission established to settle American citizens' disputes with Mexico. The commission found that Mexico owed White a sum of money and some other beneficiaries assigned their claims to him as well. In accordance with that decision, Mexico began making periodic payments to White via the Secretary of State. Meanwhile one Richard Porter sued White claiming that he deserved some of the money that had been assigned to White. For nine years the Secretary of State ignored this dispute and paid over installments to White. When Secretary Bayard took office, however, he withheld the tenth installment pending some definitive resolution of the legal battle between White and Porter. White sought a writ of mandamus to force Bayard to release his money.

The Supreme Court for the District of Columbia issued the writ, reasoning that the Secretary of State had a clear statutory duty to forward payments from the government of Mexico to claimants who had received awards from the commission. This, of course, hardly answered the question of whether the Secretary could suspend payments pending the outcome of the legal battle between White and other claimants. But the Supreme Court for the District of Columbia found that the Department of State had previously recognized White as the assignee of the disputed claim after full argument and hearing. These past departmental decisions created a strong presumption against Secretary Bayard's change of policy. The court admitted that Bayard might change the Department's practice, if he had a legitimate reason. But, the simple fact that there was now a legal dispute between Porter and White could not be considered as the equivalent of a denial that White was the proper assignee of the claims. Given the Department's prior decision in White's favor, and its practice of paying him the first nine installments, the Secretary was considered as no longer having discretion to withhold further payments.

The U.S. Supreme Court declined to follow the District of Columbia Supreme Court down this road toward substantive review of administrative discretion based on the Department's prior decisions and practices.<sup>148</sup> The Court held that the Secretary "was not bound to decide between such conflicting claims, after he had notice of them."<sup>149</sup> Moreover, it hypothesized that the Secretary's decision might ultimately be different from that of the court that was hearing the Porter-White lawsuit. From the Supreme Court's perspective, the mere notice of this dispute between Porter and White rendered White's right to the money no longer clear and indisputable and thus made a

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147. 16 D.C. (5 Mackey) 428 (1887).

148. *Bayard v. United States ex rel. White*, 127 U.S. 246 (1888).

149. *Id.* at 250.

mandamus order inappropriate. The Supreme Court did not even discuss the lower court's suggestion that the Secretary's prior determination after notice and hearing made it incumbent upon him either to make a similarly formal finding that White was not the proper assignee or to continue making the payments.

*D. The Rigors of Indirect Review*

Although the Supreme Court rejected expansion of the scope of judicial review in actions for mandamus or injunction, indirect challenges suffered a quite different fate. Where the legality of official action came before the courts in common law actions between private parties, judicial review switched from extremely limited to de novo determination of both law and fact. This was true even if the common law action was against an officer for damages resulting from the officer's conduct in the line of duty. The general principal was stated simply in *Rogers v. Marshal*<sup>150</sup>: "[O]fficers of the law, in the execution of process, are obliged to know the requirements of the law, and if they mistake them, whether through ignorance or design, and any one is harmed by their error, they must respond in damages."<sup>151</sup> Moreover, in these damage actions, the existence or nonexistence of administrative discretion played an opposite role from the one it played in mandamus or injunction cases.

*Buck v. Colbath*<sup>152</sup> provides perhaps the most apt discussion. There, a marshal was sued for trespass after seizing certain goods pursuant to a writ of attachment. According to the plaintiff, he seized goods that were not owned by the party against whom the writ had been issued. The marshal defended by asserting that he was merely following the court's orders under the writ. The Supreme Court, however, distinguished between two types of writs of attachment. In one, the process or order by the court described in detail the property to be seized. In the other, the writ simply directed the officer to levy on property of one of the parties to the litigation sufficient to satisfy the demand against him. Under the first type of writ, the officer had no discretion. Hence, if the court validly ordered the process and the officer followed it he had an absolute defense to personal liability. On the other hand, in the second category of cases, like the one here, the officer had "a very large and important field for the exercise of his judgment and discretion."<sup>153</sup> He was, therefore,

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150. 68 U.S. (1 Wall.) 644 (1863).

151. *Id.* at 650-51.

152. 70 U.S. (3 Wall.) 334 (1865).

153. *Id.* at 344.

“bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice.”<sup>154</sup> In short, however erroneous an officer’s determination, if he had discretion in its exercise, his actions could not be controlled by mandamus or injunction. On the other hand, when sued in damages, an officer exercising discretion was liable if he made an error. Whether error existed was for de novo determination by the court trying the damages action.

Patent litigation and land cases responded to similar principles, although in the latter a division of responsibility began to emerge between court and agency, somewhat along the lines of the appellate model’s law-fact distinction. As we have seen, neither mandamus nor injunction could be used to control a land officer’s discretion with respect to the issuance of patents, the validation or cancellation of entries onto public lands, or the like. However, once the Land Office had acted, litigation between adverse claimants for the same tract could put at issue the validity of administrative determinations. Defendants in these proceedings often attempted to set up the Land Office decisions as conclusive, and early cases often treated them as such, provided the court found that the Land Office had jurisdiction over the property.<sup>155</sup> Equity jurisdiction, however, began to break down this pattern. Moreover, instead of moving from limited review, confined to the question of jurisdiction, to de novo review of law and fact, the Supreme Court articulated a new division of function between court and agency.

*Lindsey v. Hawes*<sup>156</sup> is a good example. The Land Office had granted a patent for a particular parcel to Hawes which the plaintiff sought to have set aside. Hawes argued that the action of the Land Office, as a coordinate tribunal with jurisdiction, was conclusive. The Supreme Court disagreed. The plaintiffs had not been parties to the proceeding by which Hawes obtained his patent. Where several parties were affected by an adjudication between a single party and the government, the Supreme Court believed it only right that those affected might later challenge the findings of the administrative adjudication in a court of equity. The Court then held for the plaintiff on the ground that the Land Office interpretation of the land statutes was incorrect and Hawes’s patent was therefore invalid.<sup>157</sup>

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154. *Id.*

155. Ann Woolhandler, *Judicial Deference to Administrative Action: A Revisionist History*, 43 ADMIN. L. REV. 197, 216–19 (1991).

156. 67 U.S. (2 Black) 554 (1862).

157. *Id.* at 563.

*Johnson v. Towsley*<sup>158</sup> is to the same effect, but provides a much more thorough discussion of the role of courts of equity in reviewing Land Office determinations. Moreover, in *Johnson v. Towsley* there were no missing parties when the Land Office made its determination. The local Register and Receiver of Public Lands had awarded the patent to Towsley over Johnson's objections and that decision was affirmed by the Commissioner of the Land Office. The Secretary of the Interior overruled the Commissioner and granted the patent to Johnson instead.

Before the courts, Johnson argued that the Secretary's decision and delivery of the patent were "conclusive of the rights of the parties not only in the land department, but in the courts and everywhere else."<sup>159</sup> The Supreme Court agreed that it was "general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others."<sup>160</sup> Nevertheless, the Court said "there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action . . . when it invades private rights."<sup>161</sup>

The Supreme Court went on to discuss functional reasons for the existence of this power in the courts of equity. It noted that Land Office proceedings were susceptible to the influence of fraud, perjury, and mistake. Moreover, if there were no such power in the courts of equity, private rights might be at the sufferance of the executive branch, which might recall a patent long after granting it. And without equity court involvement, there would be no way of resolving situations in which the executive seemed to have granted conflicting patents to the same parcel.<sup>162</sup>

Johnson complained that in prior cases courts of equity had refused to accept the Land Office determination as final only if there had been some element of fraud or mistake. The Court acknowledged that there needed to be some special ground for the exercise of equitable jurisdiction.<sup>163</sup> But it refused to accept the proposition that when the officers "by misconstruction of the law,

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158. 80 U.S. (13 Wall.) 72 (1871).

159. *Id.* at 81.

160. *Id.* at 83.

161. *Id.* at 84.

162. *Id.* at 84-85.

163. *Id.* at 86.

take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief.”<sup>164</sup>

*Johnson v. Towsley* thus seemed to set up a division of labor between the Land Office and the courts. Land Office determinations were generally conclusive, but could be upset by a court of equity when the Land Office had made a mistake of law. Later cases affirmed and refined, but also limited, this principle. In *Marquez v. Frisbie*,<sup>165</sup> the plaintiff had alleged that the Land Office had made a mistake of law. But, even so, the Court declined to review the decision. As the Court explained, “where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.”<sup>166</sup> In short, the courts would give relief only “if it can be made entirely plain . . . that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right.”<sup>167</sup>

We thus begin to see in some of the land cases the emergence of the idea that there is a division of responsibility between reviewing courts and administrative agencies. Judgments about the facts and the application of law to fact are for the agency; pure questions of law can be determined independently by the courts. Note, however, that these intimations of the emergence of the “appellate model” of judicial review are in cases between private parties contesting titles to real property. The form of the action is crucial, because it implicates a constitutional separation-of-powers question: whether private rights between private parties can be finally adjudicated by administrative adjudicators.<sup>168</sup> And that, of course, is a question that bedeviled

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164. *Id.*

165. 101 U.S. 473 (1879).

166. *Id.* at 476.

167. *Id.* The plaintiff also asserted that there was fraud, but the Court found that the plaintiff was merely trying to “stigmatize acts which are adverse to the plaintiff’s view of his own rights” and was not alleging any actual fraud. *Id.* at 478.

168. For the view that the divergent practices of nineteenth-century courts hinge crucially on the understanding of the concept of “public rights” in that period, see Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007).

the Supreme Court well into the late twentieth century<sup>169</sup> and still has no truly satisfactory resolution.<sup>170</sup>

These cases, therefore, were limited inroads on the dominant bipolar model of judicial review—de novo review or nothing. I can only speculate concerning the reasons that impelled courts to provide somewhat broader review of administrative action in land cases. One possibility is suggested by the general history of common law property litigation. For centuries, land disputes had been the bread and butter of common law adjudication. The notion that courts were powerless to intervene to correct obvious errors of law whenever title related back to a decision concerning a public land grant was a legal anomaly that could not be sustained.<sup>171</sup> A second, more focused, possibility is that the specific history of fraud, perjury, and corruption in public lands transactions<sup>172</sup> led the courts first to allow investigation of those types of claims and then to make the next logical step to permit review of clear legal error. Whatever the background causes, this form of review remained limited to public lands disputes until the origins of the practice were forgotten or purposefully ignored.

According to Louis Jaffe's standard account,<sup>173</sup> the law-fact distinction morphed into something like a general presumption of the reviewability of administrative action for legal error in the 1902 case *American School of Magnetic Healing v. McAnnulty*.<sup>174</sup> With sweeping language that seemed to reject virtually the whole of the mandamus and injunction jurisprudence of the nineteenth century, the Court said: "The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an

169. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (holding that the Commodity Futures Trading Commission could decide a limited class of private rights claims).

170. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

171. Land Office decisions were probably the most common subject of judicial review proceedings in the federal courts during the second half of the nineteenth century. Justice, then Professor, Scalia, in 1970, described the proceedings as having reached "habeas corpus proportions." Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 884 (1970).

172. For an extended treatment of the difficulties in surveying and selling the public lands, including the adjudication of thousands of private claims, see Mashaw, *Reluctant Nationalists*, *supra* note 9, at 1696-1734.

173. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 327-53 (1965).

174. 187 U.S. 94 (1902).

individual the courts generally have jurisdiction to grant relief.<sup>175</sup> To be sure, the barriers to direct judicial review did not fall all at once,<sup>176</sup> but the seeds of that collapse were sown in the late nineteenth-century Land Office cases. Justice Peckham in *McAnnulty* cited only three cases for the proposition that errors of law were generally reviewable. They were all public lands cases.<sup>177</sup> Justice Peckham did not mention, of course, that those cases, unlike *McAnnulty*, were all proceedings within the federal court's equity jurisdiction in contests between private parties concerning public lands. Thus by selective myopia does the law of judicial review of administrative action continue to develop.<sup>178</sup>

### III. ADMINISTRATIVE ADJUDICATION AND THE "INTERNAL LAW" OF ADMINISTRATION

A study of administrative adjudication in the second half of the nineteenth century reveals a legal world that is, to the contemporary legal imagination, both familiar and strange—familiar in the structure of adjudicatory institutions and procedures, but strange in the sources of that familiarity. The structures and processes of administrative adjudication were designed and built almost entirely by the administrative agencies themselves. Judicial requirements of constitutional due process were nonexistent, and statutes providing adjudicatory jurisdiction almost never specified either internal agency structures or required adjudicatory processes. Yet, as we shall see, a robust common law of adjudication—both substantive and procedural—grew up

175. *Id.* at 108. And this was in a case directly reviewing the legality of a fraud order by the Post Office Department.

176. See JAFFE, *supra* note 173; Merrill, *supra* note 53. Moreover, judicial review remained highly deferential. According to Reuel E. Schiller,

By the 1920s, courts consistently deferred to agency actions with respect to public health, customs and postal regulations, the administration of veterans' pensions, and various licensing regimes. The same was true of the actions of taxing agencies, the Patent and Trademark Office, the Federal Land Office, and the Bureau of Immigration.

Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 408 (2007) (internal footnotes omitted).

177. 187 U.S. at 108 (citing *Gardner v. Bonestell*, 180 U.S. 362 (1901); *Johnson v. Drew*, 171 U.S. 93, 99 (1898); and *Burfenning v. Chi. Ry. Co.*, 163 U.S. 321 (1896)).

178. My personal favorite modern example of this is Justice Douglas's startling and ahistorical reading of the standing provisions of the APA in *Association of Data Processing Organizations v. Camp*, 397 U.S. 150 (1970). For a recent detailed account see Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009).

within administration as agencies struggled to manage their adjudicatory caseload, unify decisions across multiple deciders, develop reliable evidentiary bases for decisionmaking, and provide fair opportunities for contest by interested parties.

This “internal law” of administration was significant both quantitatively and qualitatively. While we are prone to imagining that mass administrative adjudication is a feature of the second half of the twentieth century, the Bureau of Pensions was deciding hundreds of thousands of cases in the immediate postwar years, and it continued to do so for decades as Congress repeatedly amended and expanded military pension eligibility. The Land Office, the Patent Office, the Court of Claims, the Controllers Office of the Treasury, and the Post Office decided tens of thousands more.

These were not trivial cases. Land was still the greatest source of wealth, even as industrial capital, often protected by invention patents, was striving for dominance. Decisions by the Land and Patent Offices were both, therefore, economically consequential, as were the decisions of the Pension Office. Although pension amounts were small, a remarkable proportion of Northern families depended upon military pensions for a part of their livelihood.<sup>179</sup> Finally, a fraud order by the Post Office often simply ended a firm’s capacity to do business. Yet, virtually none of those adjudicatory actions were subject to judicial review, detailed statutory constraints, or systematic political oversight.

As noted previously, I will portray the nineteenth-century model of administrative adjudication through two case studies: pension adjudication at the Bureau of Pensions and regulation of pornography, lotteries, and fraud by the Post Office. But before beginning those more specific inquiries, we should seek to understand the general contours of this legal world of mass adjudication and internal administrative law by viewing it through the eyes of a contemporary observer. Happily for us, an acute observer is available, one who seems to have originated the now largely forgotten category of “internal administrative law.”

#### *A. The General Contours of Agency Adjudication*

In 1903, Bruce Wyman published *The Principles of the Administrative Law Governing the Relations of Public Officers*. His book was the first attempt to systematize American administrative law at the national level. More

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179. By 1893, for example, the number of pensioners had reached one million, and pension expenditures consumed forty-two percent of the federal government’s income. Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 126 (2001).

importantly, for purposes of this discussion, Wyman distinguished sharply between what he called the “external” and the “internal” laws of administration. According to Wyman, the external law—legislation and common law—regulates the relationship between citizens and officials. The internal law—agency or executive rules, orders, guidelines, and precedents—arranges the relations between or among public officers and structures their activities.<sup>180</sup>

Like the cases on judicial review rehearsed in Part II, Wyman viewed these spheres as connected, but largely distinct. When a citizen sues for damages pursuant to the common law, he or she is entitled to recover unless the officer acted in accordance with his or her statutory mandate. On the other hand, courts have no warrant to interfere with administration by prerogative writ (principally mandamus or injunction) so long as officers act within their jurisdiction and comply with the internal law of administration laid down by superiors who have discretionary authority to direct their activities.<sup>181</sup> Indeed, Wyman was so insistent upon this separation—one that immunizes administrative discretion from judicial interference—that he argued that statutes providing appellate judicial jurisdiction to review the reasonableness of administrative discretion should be held unconstitutional.<sup>182</sup>

True to the premise that external administrative law was relatively limited, Wyman’s treatise is devoted in large part to the elucidation of internal law, the actions, regulations, and decisions of administrators when performing their administrative functions: execution, legislation, and adjudication. Moreover, Wyman devotes nearly half of his book to our current subject. His appendices reprint statutes, regulations, and manuals relating to administrative adjudication concerning military pensions, claims against the United States, customs disputes, patent cases, cases before the land offices, and complaints concerning the administration of the internal revenue laws. Wyman recognizes that he is breaking new ground here, although he puts the matter rather delicately:

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180. WYMAN, *supra* note 44, at 1-23.

181. *Id.* at 4-8.

182. *Id.* at 75-85 (discussing *United States v. Duell ex rel. Bernardin*, 172 U.S. 576 (1899); *United States v. Richie*, 58 U.S. (17 How.) 525 (1854); and *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851)). Wyman approves of the decisions in *Ferreira* and *Richie*, which construe congressional appeal statutes to avoid the unconstitutional conferral of judicial power to review administrative discretion, and condemns *Duell*, which upholds the patent statute permitting appeals of patent decisions to the Court of Appeals of the District of Columbia.

It is still the doctrine that all controversies must be decided in the judicial courts; which must be so, it is said, because the theory of the law of the land involves the supremacy of the ordinary judicial tribunals. In the face of such theories, the jurisdiction of the administration to determine its own controversies has been established to an extent not often appreciated.<sup>183</sup>

As noted above, the offices and bureaus that populate Wyman's appendices were deciding tens of thousands of cases every year, many of them with complete finality.

Wyman goes on to discuss a host of cases to illustrate the basic point that the allocation of jurisdiction to administrators to determine controversies is simply a function of legislative design and the internal arrangements made by the administration for adjudicating disputes.<sup>184</sup> Moreover, while the external law of administration governs the administrators' jurisdiction to decide, in Wyman's view the procedures for determining administrative controversies are a function of the internal law.<sup>185</sup> Here again, Wyman reflects the due process doctrine of his times. Once it was determined that judicial process was not demanded by the Constitution and that the Administrator was following whatever procedures were required by statute, the due process inquiry was virtually at an end.<sup>186</sup> The question of whether the private party had received due process and the question of whether the decision sought to be reviewed could be decided by administrative adjudication consistent with Article III were essentially the same question. As Wyman's treatise and subsequent scholarship<sup>187</sup> reveal, the Article III question that exercised the legal mind at the close of the nineteenth century was not whether administrative jurisdiction invaded judicial prerogatives, but whether the judiciary could, consistent with the Constitution, be given jurisdiction to hear appeals from adjudications statutorily allocated to the administrative process.

While we will here be concerned largely with the processes and activities of two offices, Wyman's appendices reveal remarkably consistent approaches to administrative adjudication across a range of different types of controversies. This commonality may have been facilitated by the common departmental

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183. *Id.* at 321.

184. *Id.* at 320-41.

185. *Id.* at 342.

186. See, e.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

187. See Mashaw, *Administration and the Democracy*, *supra* note 9, at 1679-81; Merrill, *supra* note 53, at 53-55.

home for three of the major adjudicatory agencies, the Patent, Land, and Pension Offices. But similarity of approach was not limited to these three, and in many respects these offices functioned quite independently of Interior Department oversight and control.<sup>188</sup>

In virtually all cases, the administration specified how claims or protests were to be presented, what evidence should be submitted and in what form, who had initial authority to make determinations, to whom appeals might be directed, time limits for filing claims and appeals, and so on. Intermediate appeals in high-volume cases were often to special boards or commissions that performed only adjudicatory functions. Some decisionmakers' independence was protected by statutory "for cause" removal requirements and limitations on the number of members of the multimember board who could be appointed from the same political party.<sup>189</sup>

Variation existed, of course, as procedures were tailored to different adjudicatory functions. Procedure in adversarial cases, such as patent interference claims or mutually exclusive claims to public lands, tended to be more formal, with greater attention to matters such as the sufficiency of notice, or the avoidance of *ex parte* presentation of evidence. And, as my case studies of pension claims and Post Office regulation will reveal, adjudicatory systems were built and administered to facilitate the policies and accommodate the politics that provided the substance of and contextual environment for radically different government programs. But, apart from the very limited judicial review provided, the modern administrative lawyer would find little surprising in the administrative adjudicatory processes utilized in the late nineteenth century.

In addition to the statutes themselves, substantive adjudicatory norms were provided by agency regulations, manuals, guidelines and instructions, and to some degree, opinions of the Attorney General and judicial decisions. Increasingly, however, departments and agencies built up bodies of internal doctrine and precedents and made them available to all interested parties. Between 1868 and 1887, the government began publishing adjudicatory decisions of the Treasury (under the customs laws), the Patent Office, the

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188. See WHITE, *supra* note 73, at 175-81 (ascribing this independence to the support of strong networks of politically influential private interests).

189. See, e.g., Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136. This statute established a nine-member board of general appraisers in the customs service of the Treasury Department. The members were appointed by the President and subject to Senate confirmation. They served without a specified term and could be removed only for cause.

Solicitor of the Post Office, the First Comptroller, the Land Office, the Interstate Commerce Commission, and the Pension Office.<sup>190</sup>

The recognition that these adjudicatory functions created law gave impetus to the recognition that specialized tasks required specialized administrators. As one of the officials of the Land Office put it, those determining land disputes needed to be “able men of legal education and mature judgment.”<sup>191</sup> At the Land Office an appellate Board of Law Review was created in 1881, and staffed by the Commissioner of the Land Office and two legal assistants.<sup>192</sup> As demonstrated in my case studies, the regularization of procedural and substantive adjudicatory norms often went hand in hand with the specialization and professionalization of administrative offices. Quite often this “bureaucratization,” in the Weberian “rule of law” sense, antedated the Pendleton Act. Whatever was happening elsewhere in the governmental service, adjudicatory functions were recognized as requiring specialized skills, functional differentiation of personnel, and protection from the politics of patronage.

### *B. The Case of Military Pensions*

The provision of veterans’ pensions is one of the oldest functions of national government in the United States. As its title indicated, the first pension statute adopted under the 1787 Constitution merely amended and carried forward policies that had begun in the Confederation.<sup>193</sup> Every war, and many periods of peace, brought forth new pension legislation covering new classes of beneficiaries.

#### *1. The Rise and Rise of Military Pensions*

The Civil War and the postbellum periods were exceptional, perhaps, only in the enormous increase in coverage, expenditures, and work for the Pension Office.<sup>194</sup> Beginning in 1862,<sup>195</sup> Congress passed pension legislation in every

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190. See WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900*, at 124-25 (1982).

191. WHITE, *supra* note 73, at 203 (quoting ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE 11 (1880)).

192. INST. FOR GOV'T RESEARCH, *THE GENERAL LAND OFFICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 29 (1923).

193. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

194. The Pension Office had been given important legislative status in 1833 with the creation of the Office of Commissioner of Pensions in the War Department. Act of Mar. 2, 1833, ch. 54,

Congress and often in every year. As an unpublished paper puts the matter, pension legislation had a “simple pattern: more money for more veterans over time.”<sup>196</sup> For example, under the 1862 statute, eligibility extended to “any officer, noncommissioned officer, musician, or private of the army, including regulars, volunteers, and militia, or any officer, warrant, or petty officer, musician, seaman, ordinary seaman, flotilla-man, marine, clerk, landsman, pilot, or other person in the navy or marine corps.”<sup>197</sup> By 1873, others had been discovered who warranted benefits. In addition to those listed in the 1862 Act, the 1873 Consolidation Act included:

[A]ny enlisted man, however employed, in the military or naval service of the United States, or in its marine corps, whether regularly mustered or not . . . any pilot, engineer, sailor, or other person not regularly mustered, serving upon any gunboat or war-vessel of the . . . United States . . . any person not an enlisted soldier in the army, serving for the time being as a member of the militia under any State under orders of an officer of the United States, or who volunteered for the time being to serve with any regularly organized military or naval force of the United States, or who otherwise volunteered and rendered service in any engagement with rebels or Indians . . . any acting assistant or contract surgeon . . . or any provost-marshal, deputy provost-marshal or enrolling officer . . .<sup>198</sup>

And while the 1862 Act had included widows, minor children, dependent mothers, and dependent sisters as eligible to receive benefits because of the death of a serviceman, the 1873 Act broadened this category to include dependent fathers and brothers as well.<sup>199</sup>

Every amendment or extension of eligibility brought a raft of new applications, and reapplications by existing beneficiaries whose benefits had been enhanced. For example, an 1871 statute made veterans of the War of 1812

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4 Stat. 619, 622. That Office was periodically continued for two-year terms in appropriations legislation, until made permanent in 1849 and relocated in the Interior Department. Act of Mar. 3, 1849, ch. 108, 9 Stat. 395.

195. An Act To Grant Pensions, ch. 166, 12 Stat. 566 (1862).

196. Claudia Linares, *The Civil War Pension Law 2* (Univ. of Chi. Ctr. for Population Econ., Working Paper No. 2001-6, 2001). The standard treatment of the political and social origins of the post-Civil War military pension system is THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

197. An Act To Grant Pensions, 12 Stat. at 566.

198. Act of Mar. 3, 1873, ch. 234, 17 Stat. 566, 566-67.

199. *Id.* at 570.

and their dependents eligible for pensions without proof of disability. From the time this legislation took effect in February 1871, to October 1, 1872, the Pension Office received more than twenty thousand new claims, a remarkable number for a war that had been over for nearly sixty years.<sup>200</sup> Congress was still liberalizing the 1812 pension system as late as 1886.<sup>201</sup>

But this caseload was nothing compared to that spurred by Civil War pension legislation. Should the burden of claims processing decrease, Congress could almost always be counted upon to provide the Pension Office with more business. Prior to 1879, for example, benefits were payable from the date of a soldier's death or discharge from duty provided that the application was filed within five years of the relevant date. Applications filed after that five-year window were payable only from the date of a completed application.<sup>202</sup> A successful lobbying effort by pension agents and attorneys<sup>203</sup> produced the removal of the five-year window restriction.<sup>204</sup> Applications flooded in. The so-called "Arrears" statute had dramatic effects. Between 1874 and 1878, the Pension Office adjudicated between 30,000 and 45,000 claims a year, and provided benefits to about 230,000 persons at an expenditure of roughly thirty million dollars. In 1880, the office adjudicated 50,000 new claims, and by 1883 the number exceeded 100,000. This was mass administrative adjudication, which would require serious managerial effort for years to come.

An even greater liberalization of the pension statutes occurred just as the period under discussion closed. After years of rancorous debate, a massive lobbying campaign, and an initial veto by President Grover Cleveland (which may have cost him a second consecutive term),<sup>205</sup> newly elected President Benjamin Harrison signed legislation in 1890 that eliminated the requirement that pensions be based on a service-connected disability.<sup>206</sup> Section 2 of that Act provided that all persons who had served ninety days during the Civil War were honorably discharged and "who are now or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits" were entitled to a pension. Existing

200. WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* 113 (1918).

201. Act of Mar. 19, 1886, ch. 22, 24 Stat. 5.

202. See Act of Mar. 3, 1873, § 15, 17 Stat. at 572; Act of July 27, 1868, ch. 264, § 6, 15 Stat. 235, 236.

203. GLASSON, *supra* note 200, at 165-66.

204. Act of Jan. 25, 1879, ch. 23, § 3, 20 Stat. 265, 265.

205. President Cleveland's unpopularity with the Grand Army of the Republic, the chief lobbying group for increased pension coverage and rates, is often credited with causing his defeat by Benjamin Harrison in the 1888 election. STUART MCCONNELL, *GLORIOUS CONTENTMENT: THE GRAND ARMY OF THE REPUBLIC, 1865-1900*, at 149 (1992).

206. Act of June 27, 1890, ch. 634, 26 Stat. 182.

beneficiaries with service-connected disabilities were not disqualified from receiving these additional pensions. Moreover, because the test for disability related only to incapacity to perform manual labor, beneficiaries were not required to be out of the labor market. As one early scholar and sometime critic of the pension legislation put it, “[p]ensions were provided for the highly paid but rheumatic lawyer, for the prosperous business man hurt in a street accident, for the ex-soldier public official with heart disease, and for the mechanic who had lost a hand in an industrial accident.”<sup>207</sup> Once again, the response was enthusiastic. Whereas in 1890 the Pension Office was paying a little over 500,000 pensioners a total of \$73 million per year, by 1900, the pension rolls had reached nearly one million and annual expenditures had also doubled.

## 2. *Making Pension Policy*

Managing claims adjudication entailed more than deciding cases. The Pension Office was required to make policy as well. Congress often left major gaps in the pension legislation and, even when statutes were relatively specific, failed to anticipate problems that arose in administration.

The 1862 statute that began the Civil War pension system, for example, provided that pensions were available to Army or Navy servicemen who were disabled “by reason of any wound received or disease contracted while in the service of the United States and in the line of duty.”<sup>208</sup> Benefits were provided according to rank but were to be rated in accordance with the severity of the disability suffered. Note, however, that the statute did not say disabled for what or how ratings were to be determined. The Pension Office was left to interpret the meaning of disability and to provide some uniform system for relating specific injuries to levels of compensation. Commissioner Joseph H. Barrett reported to Congress in 1864:

While the Act of July 14, 1862, does not distinctly state that the disability to be taken into account is that for procuring a subsistence by *manual* labor, such has been the construction of its meaning . . . . In estimating the degree, reference is not had to the particular employment of the applicant before entering the service, but to his capacity for manual labor of any kind. The loss of a limb, or of its extremity, has always been rated as a total disability; and the other

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<sup>207</sup> GLASSON, *supra* note 200, at 236.

<sup>208</sup> An Act To Grant Pensions, ch. 166, 12 Stat. 566, 566 (1862).

effects of wounds have been estimated proportionably, as nearly as may be.<sup>209</sup>

In short, the Commissioner was left to determine, apparently based on practice under prior pension laws, a host of substantive questions: that disability meant work disability and that work meant manual labor; that disability was to be gauged in relation to employment in the general economy, not in terms of the applicant's preservice or postservice vocation; and that a baseline of total disability would be established in relation to specific losses. Proportionate awards would then be made on the basis of whether particular injuries had equivalent or lesser effects in relation to that baseline standard.

In "procedural" sections of the Act, Congress was hardly any more definitive. With respect to the adjudicatory process, Congress stated delphically that applicants were entitled to a pension "upon making due proof . . . according to such forms and regulations as are or may be provided by or in pursuance of law."<sup>210</sup> "[I]n the line of duty" was undefined and would become a constant source of controversy.<sup>211</sup> And while the statute empowered the Commissioner to appoint civil surgeons to examine applicants and to reexamine beneficiaries to determine whether their disabilities continued, Congress had nothing to say about who these civil surgeons might be and how they might be integrated into the adjudicatory process.

Over time, Congress responded to some of these issues. For example, in 1866, it established three grades of disability,<sup>212</sup> each of which, or its equivalent, entitled the claimant to a particular dollar amount of compensation. But Congress left in effect the 1862 Act which had made payments based on rank and on total disability. Thus, under the 1866 legislation, a private who was presumably entitled to eight dollars per month for total disability under the 1862 statute could obtain a payment of fifteen dollars per month for a

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209. H.R. EXEC. DOC. NO. 38-1, at 657-58 (1864).

210. An Act To Grant Pensions, 12 Stat. at 566.

211. See *infra* notes 276-287 and accompanying text.

212. Act of June 6, 1866, ch. 106, 14 Stat. 56. The first included those who had lost both hands or both eyes or who were "otherwise so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the constant personal aid and attendance of another person." *Id.* at 56. A second grade of disability included loss of both feet or one hand and one foot or claimants who were "otherwise so disabled as to be incapacitated for performing any manual labor, but not so much so as to require constant personal aid and attention." *Id.* And finally, there was a third grade of disability which included loss of one hand or one foot and claimants who were "otherwise so disabled as to render their inability to perform manual labor equivalent to the loss of a hand or a foot." *Id.*

disability that was merely equivalent to the loss of one hand or one foot.<sup>213</sup> Nor did Congress provide any guidance on what “equivalence” might mean under any of the three grades of disability provided in the 1866 legislation. Examples need not be added. Notwithstanding Congress’s more than lively interest in veterans’ pensions, much concerning both the construction of an appropriate adjudicatory process and the development of substantive and evidentiary policies would be left to Pension Office discretion.

### 3. *Processes of Pension Adjudication*

By the time of the Civil War, adjudication of military pension claims had long since abandoned its early practice of using federal judges as “commissioners” to make a factual record<sup>214</sup> in favor of a wholly administrative adjudicatory system. Postbellum claims processes evolved in response to new legislation and new information gained in the process of adjudicating claims. But the basic structure of operations was relatively straightforward.<sup>215</sup> Three questions had to be answered. First, had the applicant been attached to the Army or Navy in one of the capacities that was pensionable under the relevant legislation? Second (prior to 1890), was the applicant under a disability that was the result of an injury or illness incurred in the line of duty? And, finally, did the disability resulting from that injury or illness qualify the applicant for a pension, and at what level?

According to Robert Sewell’s 1865 treatise,<sup>216</sup> the serviceman applying for benefits was to execute, before a court (or an official authorized to administer oaths), a declaration witnessed by two parties attesting to his identity, the fact of service and injury, and his current residence and occupation. Sewell goes on to describe in great detail an ideal application with a number of highly technical requirements that would aid in a favorable outcome.

When a claim arrived in the Pension Office, it was forwarded to an examiner in one of the geographically organized adjudicating divisions, who determined whether the applicant’s declaration and accompanying evidence

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213. See GLASSON, *supra* note 200, at 129-31.

214. See Mashaw, *Recovering*, *supra* note 9, at 1332-33.

215. This description is based upon *Instructions and Forms To Be Observed in Applying for Pensions Under the Act of July 14, 1862*, reprinted in ROBERT SEWELL, PRACTICE IN THE EXECUTIVE DEPARTMENTS OF THE GOVERNMENT UNDER THE PENSION, BOUNTY, AND PRIZE LAWS OF THE UNITED STATES 260 (1865). Accord CALVIN B. WALKER, TREATISE ON PRACTICE OF PENSION BUREAU, GOVERNING ADJUDICATION OF ARMY AND NAVY PENSIONS, BEING UNWRITTEN PRACTICE FORMULATED (1882).

216. SEWELL, *supra* note 215, at 81-119.

stated a *prima facie* case for a pension. If so, the examiner then requested a service record from the Adjutant General of the Army and any available medical records from the Army's Surgeon General. He also ordered a civil surgeon's examination from one of the surgeons who had been approved for making such examinations by the Pension Office. The Pension Office treated the Adjutant General's report as conclusive concerning dates and facts of enlistment, service, and discharge; the Surgeon General's medical records were also treated as presumptively correct, but could be rebutted by other evidence. Civil surgeons' reports were also entitled to deference by the examiner. The medical evidence might also include a report by a three-person Board of Surgeons, which was available to the claimant if the initial civil surgeon's or Surgeon General's reports were unfavorable. After 1883, virtually all examinations were done by a three-person medical board in the first instance and the review board process was retained only for those cases initially examined by a single physician.

Having collected this information, the examiner then forwarded a brief recommending either acceptance or rejection to his division chief. According to a second treatise penned by Deputy Commissioner Walker, the examiner was to be

careful to bear in mind that he is in charge at the same time of both the interest of the claimant and the government, and does not look upon every case with suspicion, regarding himself as the agent of the Government to protect it alone, or on the other hand, consider himself a special agent of the claimant, striving if possible to make out a claim.<sup>217</sup>

Here lie the roots of the "three-hat" inquisitorial process that the Supreme Court approved for Social Security disability claims 106 years later.<sup>218</sup>

The initial examiner's brief and the evidence was passed on to the Board of Review. Although the examiner's determination was not final until approved by the Board, the latter was instructed to defer to the factual determinations of the initial examiner.<sup>219</sup> At this point, however, the case was not over. If satisfied

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217. WALKER, *supra* note 215, at 44.

218. Richardson v. Perales, 402 U.S. 389 (1971).

219. Comm'r of Pensions, Order No. 59 (Aug. 20, 1881), *reprinted in* FRANK B. CURTIS & WILLIAM H. WEBSTER, A DIGEST OF THE LAWS OF THE UNITED STATES GOVERNING THE GRANTING OF ARMY AND NAVY PENSIONS AND BOUNTY-LAND WARRANTS; DECISIONS OF THE SECRETARY OF THE INTERIOR, AND RULINGS AND ORDERS OF THE COMMISSIONER OF PENSIONS THEREUNDER 350, 350 (1885) ("Matters of fact . . . as well as the ascertainment of the character and reliability of testimony and credibility of witnesses, are questions solely for the adjudicating

with the legal sufficiency of the claim, the Board of Review would pass the file on to the Medical Referee (an office created in 1873), where individual medical reviewers fixed the amount to which the claimant was entitled by reason of his disability. Here, again, the medical examiner was to treat the opinion of the examining civil surgeon(s) or Surgeon General with deference. If the Board of Review made a finding adverse to the claimant, he was entitled to take an appeal to the Assistant Secretary of the Interior. Indeed, if at any point the examiners or medical personnel found a claim defective, the claimant was invited to submit additional information that might support an award.

Although this process was based almost exclusively on paper records and sworn affidavits, it favored claimants. Information provided to the Pension Bureau came mostly from persons known to the claimant, either through his military service or residence in a local community. And, while acceptance rates are difficult to compute,<sup>220</sup> they seem to have hovered between seventy and eighty percent.<sup>221</sup>

Moreover, as in contemporary Social Security disability adjudication, the paper record gave way to face-to-face hearings and cross-examination when the relationship between the Bureau and the claimant took on an adversarial flavor. Where claims were likely to be denied because fraud was suspected, investigation was done by special agents who examined the claimant and witnesses personally. Prior to 1881, this examination was largely *ex parte*, but thereafter was done on notice and opportunity to contest.<sup>222</sup> Special agents were instructed that their examinations were to “be conducted in no way secretly, but . . . free and open to all parties in interest, and any claimant or pensioner shall have the privilege of meeting his accuser face to face, and to cross-examine all the witnesses against him.”<sup>223</sup>

While this was a highly articulated and bureaucratically specialized process, it was nevertheless one in which adjudicatory personnel necessarily exercised

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divisions . . . . The sole function of the Review Board is to treat cases judicially, upon the papers . . . .”).

220. The annual reports of the Pension Bureau provide statistics on applications and awards, but the lag between application and award meant that an application in 1871 might well have been decided in 1872 or even later. Hence, awards as a percentage of annual application does not reflect the true award rate with complete accuracy.

221. See Heywood T. Sanders, *Paying for the “Bloody Shirt:” The Politics of Civil War Pensions*, in *POLITICAL BENEFITS: EMPIRICAL STUDIES OF AMERICAN PUBLIC PROGRAMS* 137, 148-50 (Barry S. Rundquist ed., 1980) (computing the award rates for the period 1878 to 1899).

222. See 1883 PENSION OFFICE, U.S. DEP’T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF PENSIONS 325 [hereinafter PENSION OFFICE REPORT].

223. GENERAL INSTRUCTIONS TO SPECIAL EXAMINERS OF THE UNITED STATES PENSION OFFICE 7 (1881).

significant discretion. And, as anyone familiar with contemporary disability determination processes knows,<sup>224</sup> disability decisions are analogous to fact-based determinations by one-person juries. They are influenced by the subjective understandings of the adjudicators and by the adjudicatory climate created by both administrative and political controllers. Whether the Pension Office was lenient or strict in its determinations thus depended not only on the understandings and discretion of individual examiners, but also on whether the adjudicatory climate of the time emphasized assuring benefits for all eligible individuals or protecting the fisc and preventing fraud. And, as is true of contemporary disability benefits administration, the political climate changed in response to shifting public and congressional concerns and changes in presidential administrations.

Consider *In re Ammerman*.<sup>225</sup> According to the published decision of the Assistant Secretary of the Interior who first ruled on the case,

[a]ppellant alleges that on or about September 1, 1863, while standing in front of his tent, certain of his comrades being engaged in play among themselves, one of them kneeled down be hind [sic] him, and another standing in front pushed him over the one kneeling, and that he was thrown on his head and shoulders, producing a fracture of the left clavicle . . . .<sup>226</sup>

The application was rejected on the ground that this horseplay did not qualify as an injury that had occurred in the line of duty. However, when Benjamin Harrison replaced Grover Cleveland, a new wind swept through the Pension Office, and Ammerman's claim was granted.<sup>227</sup> Because the Harrison-Cleveland race had revolved importantly around differences over pension policy (Cleveland had vetoed numerous private bills granting pensions to denied applicants and a general statute eliminating the requirement that disabilities be service-connected), Ammerman's case caught the attention of the *New York Times*. The title of the article, *Bidding for Popularity: All Sorts of*

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224. See generally JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983) (describing the process of Social Security disability claims adjudication).

225. 1 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN CASES RELATING TO PENSION CLAIMS AND THE LAWS OF THE UNITED STATES GRANTING AND COVERING PENSIONS 5 (1887) [hereinafter PENSION CLAIMS].

226. *Id.*

227. 3 PENSION CLAIMS, *supra* note 225, at 1 (1890).

*Pension Claims Now Passed*, suggests some skepticism concerning the new Assistant Secretary's pension policy.<sup>228</sup>

Indeed, there was widespread belief that the pension system was riddled with fraud and deeply compromised by partisan political competition. General M.M. Trumbull wrote, “[v]eteran diseases’ are those miraculous ailments which rage unsuspected in the bodies of old soldiers until seductive pension laws bring them to the notice of the sufferers.”<sup>229</sup> And, William Glasson, the early historian of the military pension system, described the 1890 statute as “the high bid for the political support of the 450,000 G.A.R. [Grand Army of the Republic] men and other ex-soldiers, with both the Republican and Democratic parties bidding.”<sup>230</sup> The views expressed about the pension system in the popular and elite press seemed to follow party lines. Republican outlets found the pensioners honorable and deserving; Democratic and independent sources (including some Republican reformers or “Mugwumps”) saw military pensions as ill-disguised raids on the Treasury, facilitated by unscrupulous pension attorneys and claims agents.<sup>231</sup>

Congress also intervened massively in pension administration through the passage of private bills and personal assistance to claimants in perfecting their applications at the Pension Office. Morton Keller reports, “in the 49th Congress [1885-1887], 40 percent of the legislation in the House and 55 percent in the Senate consisted of special pension acts.”<sup>232</sup> And Robert M. La Follette, Sr., estimated that he spent a quarter to a third of his time in the House of Representatives (1884 to 1890) engaged in pension casework.<sup>233</sup> In these senses, “politics” influenced pension adjudication. But, there is nothing nefarious or corrupt in congressmen passing statutes that benefit their constituents or engaging in case work. And, in cases like *Ammerman*, the

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228. *Bidding for Popularity: All Sorts of Pension Claims Now Passed*, N.Y. TIMES, May 27, 1889, at 5 (discussing, in addition to Ammerman's case, Assistant Secretary Cyrus Bussey's decision to award a pension to William Jones of the Ohio Volunteers). Jones was injured, according to the article, while “standing on a portico in front of his quarters at dinner time, eating his rations, when two of his comrades, who were scuffling . . . , pushed him backward over the balustrade. The act was intentional on the part of his comrades, and was unsuccessfully resisted by Jones.” *Id.*

229. M.M. Trumbull, *Pensions for All*, 35 POPULAR SCI. MONTHLY 721, 724 (1880).

230. GLASSON, *supra* note 200, at 238.

231. See Blanck, *supra* note 179, at 129-48.

232. MORTON KELLER, AFFAIRS OF STATE 311 (1977).

233. ROBERT M. LA FOLLETTE, SR., LA FOLLETTE'S AUTOBIOGRAPHY: A PERSONAL NARRATIVE OF POLITICAL EXPERIENCES 84 (3d ed. 1919).

Harrison Administration was quite open in maintaining that the Cleveland Administration had been too strict in its interpretation of the pension laws.<sup>234</sup>

On the other hand, some practices at the Pension Office could make pension administration a tool of electoral politics. With a constant backlog of work, pension cases could be rushed to completion in the months immediately preceding a national election. President Garfield's Pension Commissioner, Colonel W.W. Dudley, is reported to have allocated scarce personnel disproportionately to the task of deciding claims in electorally critical states and to have ordered that no claims be finally denied in the months preceding the presidential election.<sup>235</sup>

The level of fraud and the effects of political chicanery at the Pension Office are difficult to estimate. In her monumental study of military pensions, Theda Skocpol calculates that less than one percent of the 300,000 pension applications that were granted in the period 1861 to 1876 were subsequently denied because of fraudulent applications.<sup>236</sup> But, as Skocpol notes, that may not be a good measure of the extent of illegitimate claims, and no other is available. She ultimately concludes that "nothing exact can be said about the proportions of illegitimate pensioners or expenditures."<sup>237</sup> The effects of illegitimate political maneuvers are similarly difficult to assess. Although there is some evidence that Democratic counties did better in their pension applications during Democratic administrations and Republican counties in Republican administrations, a recent statistical analysis finds that decisions on claims were overwhelmingly determined by the medical evidence submitted by examining physicians (or boards of physicians).<sup>238</sup>

Whatever the true relationship between partisan politics and pension administration, oscillations in statutory and interpretive policies could not be resisted by the Pension Office. It had to be responsive (to the extent that the law allowed) to the demands of its political overseers, even at the cost of consistency across time. Inconsistency on the part of examiners and medical personnel acting at any one time, however, was, at least potentially, within administrative control. The Pension Office's attempts to ensure both

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234. 4 PENSION CLAIMS, *supra* note 225, at iii (1891) (stating in the preface that it is intended to highlight "a spirit of larger liberality exercised by the present administration in applying the pension system to those entitled to its benefits").

235. See Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85, 109-10 (1993).

236. *Id.*

237. THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 145 (1992).

238. Blanck, *supra* note 179, at 148-71.

responsive and consistent interpretation of pension legislation created an elaborate, and somewhat arcane, internal law of administration.

#### 4. *Center and Periphery at the Pension Office*

The Military Pension Bureau was one of the larger enterprises of the federal government. By the mid-1880s, it had over 1,500 personnel in its central office in Washington. And as we have seen, all final determinations on veteran's claims were made only after central office review both by the Board of Review, which determined the legal sufficiency of the claim, and by the Office of the Medical Referee, which assigned disability ratings. This centralized oversight clearly helped to unify adjudicatory norms. But, the central office was highly dependent upon information that came in from the field. While central office personnel could send cases back for additional development, they were in some sense at the mercy of both the examiners in field offices around the country and the medical professionals who did disability examinations on contract with the Bureau. In its attempts to control the activities of these dispersed and part-time personnel, the Pension Office generated a continuous stream of manuals, instructions, digests, and precedents. In the process, it necessarily made policy in order to implement the laws.

For the purposes of this case study, I will look at pension office policy from two perspectives. First, I will examine how the Pension Office sought to control the activities of examining surgeons. While other aspects of the evidence in a pension case were often important, the reports of the examining surgeons were clearly the most critical evidence in the mine run of cases. Assuring disinterested and professional examinations was one of the Pension Bureau's highest priorities. Second, I will look briefly at the way in which the Pension Office shaped the substance of the pension system in its interpretation of what it meant for a disability to have been incurred "in the line of duty." As I shall show, the Pension Bureau ultimately shifted military pensions from a compensation scheme for war-related injuries to a scheme for supporting disabled veterans and their dependents, provided the veterans' disabilities could be traced to some event in their military service for which they were themselves blameless victims.

#### 5. *Examining Surgeons*

The 1862 chartering legislation empowered the Commissioner "to appoint, at his discretion, civil surgeons to make the biennial examinations of pensioners which are or may be required to be made by law, and to examine applicants for invalid pensions, where he shall deem an examination by a

surgeon to be appointed by him necessary.”<sup>239</sup> Congress announced no criteria for appointment, and Commissioner Barrett described the qualifications of the physicians chosen in the most general terms:

[R]egard has been had not only to the professional skill and standing of the persons selected, but also to their integrity and impartiality in rendering a just verdict on the cases coming before them. . . . The number and locations of examining surgeons having been left to my discretion, it is proper to state that I have designed to make appointments only where the convenience of applicants seemed to require such an officer, and that it has not been thought best to appoint such examiners where the constant and ready attention of regular army surgeons could be relied on.<sup>240</sup>

By the end of 1863, over six hundred examining surgeons had been appointed.<sup>241</sup>

Biennial examinations of recipients by teams of two surgeons had been a feature of the pension landscape since 1859,<sup>242</sup> and an 1864 amendment to the general pension law allowed the Commissioner to order special examinations as well, “from time to time, as he shall deem for the interests of the government.”<sup>243</sup> Whether doing initial, biennial, or special exams, examining surgeons were to provide certificates giving “a particular description of the wound, injury or disease, and specify[ing] how and in what manner [the pensioner’s] present condition and disability are connected therewith. The degree of disability for obtaining subsistence by manual labor must also be stated.”<sup>244</sup>

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239. An Act to Grant Pensions, ch. 166, § 8, 12 Stat. 566, 568-69 (1862).

240. PENSION OFFICE REPORT, *supra* note 222, at 581-82 (1862).

241. *Id.* at 582-86; *id.* at 639-48 (1863).

242. Act of Mar. 8, 1859, ch. 88, § 2, 11 Stat. 439, 439.

243. Act of July 4, 1864, ch. 247, § 8, 13 Stat. 387, 388. The Commissioner’s 1864 Report alluded to the potential cost-savings such biennial and special examinations could produce: a review of the 407 pensioners enrolled at the Boston agency by Doctors George Stevens Jones and A.B. Bancroft resulted in a twenty-two percent reduction in the dollar value of the roll. PENSION OFFICE REPORT, *supra* note 222, at 658-59 (1864) (reporting a decrease in the roll from \$29,596 to \$23,176 and hypothesizing that “[a] general reduction, in an equal or still greater proportion, of the entire invalid list, without any injustice to the pensioners, may be assumed as the result of a strict enforcement of this law”).

244. SEWELL, *supra* note 215, at 262-63. Initially, nonappointed civil surgeons could also perform these examinations upon a showing of the impracticability of obtaining an examination from appointed surgeons. But a claimant was required to supplement the nonappointed surgeons’ certificates with affidavits establishing their competence and impartiality, an

From the onset, equitably assigning rates of compensation for the wide array of disabilities and diseases claimants presented was the Bureau's single greatest challenge. Remember, first, that there were two separate compensation schemes at work: one scaled payments primarily according to rank, the other according to severity of impairment with no consideration of rank. In an attempt to harmonize them, the Commissioner construed total disability for manual labor in the 1862 statute to mean "a total disability for the performance of manual labor requiring severe and continuous exertion."<sup>245</sup> By contrast, manual labor in the 1866 and 1872 statutes was interpreted "to include also the lighter kinds of labor which require education and skill."<sup>246</sup> This distinction (sensible, but hardly obvious from the legislation) still left a large gap between the monthly rates under the two regimes, and the Commissioner lobbied Congress for the establishment of an intermediate rate.<sup>247</sup> When Congress passed the Consolidation Act in 1873, it responded not by defining compensable injuries with greater precision, but with a sweeping one-sentence delegation: "the rate of eighteen dollars per month may be proportionately divided . . . ."<sup>248</sup>

"Proportionality" was the Bureau's second great challenge. Despite the Commissioner's constant pleas for "a more definite system" for rating disabilities,<sup>249</sup> and "some method of securing greater uniformity in estimating the disabilities of invalid pensioners and claimants," such as the "preparation of a scale of disabilities . . . to be intrusted to a commission of surgeons" or a designated medical officer within the Bureau,<sup>250</sup> no congressional assistance was forthcoming. The Commissioner undertook to set proportional ratings himself through the issuance of rulings and through guidance promulgated to the examining surgeons.

In 1870, the Commissioner began providing the examining surgeons with detailed guidelines. For example, the temporary loss of the use of a limb was an eight-dollar total disability, while the permanent loss of the use of a limb was a fifteen-dollar third-grade disability. For purposes of subdividing the eight-

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added expense that many invalids doubtless preferred not to incur. Moreover, the Bureau would not reimburse invalids for examinations conducted by nonappointed surgeons. HENRY C. HARMON, A MANUAL OF THE PENSION LAWS OF THE UNITED STATES OF AMERICA 249-50 (1867).

245. PENSION OFFICE REPORT, *supra* note 222, at 661 (1874).

246. *Id.*

247. *Id.* at 331 (1872).

248. Act of Mar. 3, 1873, ch. 234, § 5, 17 Stat. 566, 569.

249. PENSION OFFICE REPORT, *supra* note 222, at 658 (1864).

250. *Id.* at 791 (1865).

dollar rate, the loss of a thumb or a single hernia was one-half disability; the loss of an index finger or a big toe was three-eighths disability; and the loss of another finger or toe was one-fourth disability.<sup>251</sup> These guidelines were further refined in each new set of instructions.<sup>252</sup> By 1883, the Commissioner reported that there were 120 different grades of pensions being paid to disabled veterans.<sup>253</sup>

As time passed, the Bureau also sought to professionalize its rating process. In 1871, the Commissioner had created a Medical Division “[i]n order . . . to multiply the safeguards against error, ignorance, and dishonesty, which affect both the right of the pensioner and the interests of the Government.”<sup>254</sup> He staffed the Division with “competent surgeons, whose duty it is rigidly to inspect all returned certificates and to correct and adjust all medical questions, under the supervision of the Commissioner.”<sup>255</sup> The Division set quickly to work and in 1872 returned “at least 40 [percent] of the certificates of examination of this class of claimants . . . for reconstruction and greater detail . . .”<sup>256</sup> The Consolidation Act created the office of Medical Referee, whose initial occupant, T.B. Hood, proved a powerful force for standardizing the Bureau’s approach to medical questions. Using the expertise of this growing medical apparatus, the Commissioner promulgated yet more refined rules defining fractional rates of disability and clarifying statutory terms.<sup>257</sup>

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251. U.S. PENSION BUREAU INSTRUCTIONS TO EXAMINING SURGEONS FOR PENSIONS [hereinafter PENSION BUREAU INSTRUCTIONS], *reprinted in* PENSION OFFICE REPORT, *supra* note 222, at 437-38 (1870).
252. *Id.* at 8-9 (1884); *Id.* at 6 (1877). For the fractional rates corresponding to the degrees of deafness, see Comm’r of Pensions, Ruling No. 136 (Oct. 7, 1885), *reprinted in* CURTIS & WEBSTER, *supra* note 219, at 397; and Comm’r of Pensions, Ruling No. 80 (Apr. 3, 1884), *reprinted in* CURTIS & WEBSTER, *supra* note 219, at 395.
253. PENSION OFFICE REPORT, *supra* note 222, at 313 (1883).
254. SEC’Y OF THE INTERIOR, REPORT OF THE SECRETARY OF THE INTERIOR 388.
255. PENSION OFFICE REPORT, *supra* note 222, at 388 (1871).
256. *Id.* at 331 (1872).
257. See Comm’r of Pension, Ruling No. 136 (Oct. 7, 1885) (defining fractional ratings for forty subdivisions of eighteen-dollar third-grade disability), *reprinted in* CURTIS & WEBSTER, *supra* note 219, at 397; Comm’r of Pension, Ruling No. 80 (Apr. 3, 1884) (same), *reprinted in* CURTIS & WEBSTER, *supra* note 219, at 395; Comm’r of Pension, Ruling No. 57 (n.d.) (defining fractional ratings for subdivisions of eight dollar “total disability”), *reprinted in* CURTIS & WEBSTER, *supra* note 219, at 394; U.S. PENSION BUREAU, BUREAU OF PENSIONS, ITS OFFICERS AND THEIR DUTIES: THE MANNER IN WHICH THE WORK OF ADJUDICATING CLAIMS IS PERFORMED 88-91 (1893).

The Bureau emphasized the importance of examining surgeons' independence, professionalism, and identification with the Bureau rather than with claimants. Normatively, an examining surgeon was to

bear in mind that he is an agent for this Office and not for pensioners or claimants. He is not *under any circumstances* to advise claimants, or to directly or indirectly aid them in the preparation or prosecution of their claims, for the moment he does so, though his intentions may be perfectly pure, he puts himself in the attitude of an attorney, a position he should sedulously avoid.<sup>258</sup>

Even if they were agents of the government, individual physicians might be biased in some undisclosed fashion or have idiosyncratic views about particular maladies and their effects. As early as 1868, therefore, the Commissioner began to use multimember boards of surgeons for reviews or initial examinations where possible. In 1882, Congress was finally convinced to mandate that all examinations be made by three-surgeon boards.<sup>259</sup> Commissioner Dudley noted in his report on the implementation of this new requirement that, as a matter of policy, where possible, he organized boards to contain two members of one political party and one of the other.<sup>260</sup> Although all pension commissioners, including Dudley, were suspected of using their discretion to aid incumbent administrations, he, at least, seems to have attempted to depoliticize professional medical judgments in the adjudication of individual claims.

Nonetheless, three-man, partisan-balanced boards were a compromise position, a retreat from a more radical proposal advanced by Commissioners Baker and Bentley in 1875 and 1876: the replacement of appointed, but part-

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258. PENSION BUREAU INSTRUCTIONS, *supra* note 251, at 16 (1877) (emphasis added). Examining surgeons were reminded that they were confidential advisers to the Bureau, *id.* at 8, and charged to report every instance of violation of the pension laws and every case of fraud or attempt at fraud, *id.* at 16. A circular from the Commissioner warned, "Examining surgeons are recognized as confidential agents of the Office. In no instance should they communicate what they have recommended, or intend to recommend, either to an attorney or a claimant." Comm'r of Pensions, Circular No. 3 (Sept. 23, 1873), reprinted in PENSION BUREAU INSTRUCTIONS, *supra* note 251, at 23 (1877). The 1884 instructions also prohibited the delegation of a surgeon's duties to nonappointed physicians. PENSION BUREAU INSTRUCTIONS, *supra* note 251, at 13 (1884).

259. Act of July 25, 1882, ch. 349, § 4, 22 Stat. 174, 175 ("[A]ll examinations, so far as practicable, shall be made by the boards, and no examination shall be made by one surgeon excepting under such circumstances as make it impracticable for a claimant to present himself before a board . . .").

260. PENSION OFFICE REPORT, *supra* note 222, at 324 (1883).

time, civil surgeons with a professional staff of salaried employees. In 1875, Commissioner Baker lamented that

[n]umerous instances have occurred where incompetent surgeons have been imposed upon the Office, no means being at hand to test their qualifications before appointment. In other instances, claim-agents have secured their appointment by means of petitions to members of Congress, thereby placing the examining-surgeons under obligations to give biased ratings of disabilities, favorable to their clients.<sup>261</sup>

Commissioner Baker saw bias resulting not only from the obligation incurred through political patronage, but also from “local prejudices and influences.”<sup>262</sup> More mundanely, examining surgeons might simply be unfamiliar with the evaluative standards of the Bureau or might file fatally incomplete certificates. In such cases, the Bureau could remand, requesting a more thorough or pointed examination, but the costs of multiple examinations for the same claim were high, and often the Bureau’s only remedy was delisting the surgeon.<sup>263</sup>

Commissioner Baker thus suggested

the employment of a number of surgeons at a fixed annual salary, equal in amount to at least the average earning of first-class physicians, who shall be assigned to certain defined districts into which the country shall be divided . . . . It is believed that sixty will be the number required . . . .<sup>264</sup>

Commissioner Bentley enlarged upon the so-called “sixty surgeons” plan in 1876, advocating the deployment not only of salaried surgeons but investigative clerks to work alongside them, thereby eliminating the system of proof by ex parte affidavit and potentially biased medical examination, and instead substituting a system of roving commissions, operating under the hierarchical control of the Bureau.

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261. *Id.* at 441 (1875).

262. *Id.* at 442.

263. Turnover among the examining surgeons was not trivial. Between June 1874 and June 1875, for example, of 1443 surgeons, 70 were dismissed for incompetence or neglect of duty, 49 resigned, 23 died, 18 changed residence, giving an attrition rate of around 11%, and 214 new surgeons were appointed. *Id.* at 440. In the previous year, attrition was a comparable 10%. *Id.* at 659 (1874).

264. *Id.* at 442 (1875).

[The surgeon and clerk] should constitute a commission on behalf of the Government to make the required medical examinations in any case, and to receive the parol testimony offered in its support; and to that end the claimant, with his principal witnesses should appear before them and submit themselves to cross-examination on behalf of the Government.<sup>265</sup>

The necessity for a more thorough, even adversarial, style of evaluation of the medical aspects of claims arose, as Doctor Hood pointed out, because of a fundamental change in the nature of pension applications. Through the 1860s, the vast majority of claimants alleged wounds or disabilities which were relatively easily verifiable; a decade later, however, it was “comparatively rare that claim is now made for a disability contracted in service; it is a question of *sequels* to disabilities incurred in service.”<sup>266</sup> Tracing the pathological connection of existing diseases to their service origins became a major concern. A host of maladies were urged as caused by weaknesses resulting from wartime injuries or diseases. Whether these causal stories were true, or even scientifically plausible, was a source of continuing debate. The problems described by Baker and Bentley were all too real, but Congress never acted on their recommendations. Employing full-time medical personnel to assist in disability determinations has never been politically popular. The American Medical Association long opposed the inclusion of disability insurance under the Social Security system on the ground that it was the camel’s nose under the tent of socialized medicine. And even today, the Social Security Administration relies almost exclusively on treating physicians and contract personnel for both the provision of medical evidence and its interpretation.

The last line of supervision for examining surgeons was the Medical Division, which attempted to control examinations more closely by specifying the particular medical issues to be resolved and by scrutinizing surgeons’ certificates and returning those that did not pass muster. The Bureau initiated all medical examinations by issuing an order to a surgeon or board of surgeons (and forwarding a copy to the claimant); each order “set forth precisely the injuries and diseases, or both, for which the applicant claims, and the surgeon should therefore look very carefully to the order, that the examination shall include every alleged cause of disability.”<sup>267</sup> Special instructions might accompany orders, and surgeons were to return those instructions and the

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265. *Id.* at 703 (1876).

266. *Id.* at 704-05 (quoting Doctor T.B. Hood).

267. PENSION BUREAU INSTRUCTIONS, *supra* note 251, at 13 (1884).

order itself along with their certificate of examination. Insufficiently detailed certificates were rejected:

When a certificate shall fail to furnish information upon which the claim may be intelligently and safely adjudicated, it will be returned to the surgeon for amendment in the defective points, and if it may not be corrected without the re-examination of the claimant, the examination will not be paid for.<sup>268</sup>

Preliminary review and rejection of such certificates fell to the medical clerks in the Medical Division.<sup>269</sup>

Because no adjudication became final until reviewed in the central office, the quality and efficiency of the examiners and clerks in that office were a central concern. And, as previously noted, by the mid-1800s, the central office was a large enterprise. In his 1883 Report, the Commissioner of Pensions indicated that, by April of that year, of the more than 1500 employees in the central office fifteen were medical examiners and thirty-five were the principal “legal” examiners. But, those fifty decisional personnel oversaw an army of over one thousand clerks who, in fact, carried out most of the examining functions.<sup>270</sup>

The Commissioner was at pains to explain to Congress that “[t]he speedy and proper adjudication of pension claims depends upon the judgment and qualifications of the examining force who have the work in hand.”<sup>271</sup> He argued that this required both selection and promotion on the basis of merit, including not only formal schooling but also “a careful examination to determine whether the applicant possesses the other qualities necessary to a full understanding of the business in hand.”<sup>272</sup> Clerks and examiners were hired based upon rather basic educational requirements but were then trained by the more experienced people in the division. They spent their first six months as probationary employees. The Commissioner reported that about ten percent were mustered out after the probationary period.<sup>273</sup> Clerks were then promoted up through the clerical ranks (four grades) and to examiner status based upon

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268. *Id.* at 18; see also WALKER, *supra* note 215, at 52.

269. Report of N.F. Graham, Acting Med. Referee, to W.W. Dudley, Comm’r of Pensions (Sept. 21, 1883), reprinted in PENSION OFFICE REPORT, *supra* note 222, at 337-39 (1883).

270. For a breakdown of the clerical force at the Bureau between July 1882 and June 1883, see PENSION OFFICE REPORT, *supra* note 222, at 329 (1883).

271. *Id.* at 330.

272. *Id.*

273. *Id.*

their work in the Bureau. According to the Commissioner, “promotion has been granted irrespective of race, influence, or anything else than attainment in the work of this office.”<sup>274</sup>

It would appear that although the Bureau of Pensions operated in a highly charged political environment, it was nevertheless a highly bureaucratized operation. Procedures and evidentiary requirements were specified in great detail. The work was parceled out to employees who had discrete functions and who attained their positions on the basis of merit and accomplishment within the Bureau. Systematic review of the work product was provided by the Medical Referee’s office and the Board of Review. The whole adjudicatory regime operated under the rules and guidelines promulgated by the Commissioner and the precedents set by decisions on appeal to the Secretary of the Interior. All of this internal law was published and made available to interested parties.<sup>275</sup>

Notwithstanding the relatively small number of appeals, the Secretary of the Interior sometimes made significant policy by precedent. Decisions on the question of whether injuries were incurred within the “line of duty” provide an important example. Until 1890, all invalid pension legislation required that compensable diseases and disabilities originate “in the line of duty.” For many years, the Bureau took as foundational a pre-Civil War opinion of Attorney General Caleb Cushing, which framed the issue not as a question of the soldier’s status at the time of his injury—that is, on active duty, rather than on furlough or under arrest—but instead as the relationship between the conduct causing the injury and the soldier’s military obligations.

[T]he performance of duty must have relation of causation or consociation, mediate or immediate, to the wound . . . . [T]he question is not whether, when the cause of disability or death occurred, the party was on duty or not, in active service, or on furlough or leave . . . but whether, in any of the possible conditions of service, the cause of

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274. *Id.* at 330-31.

275. Appeals in rejected cases were numerous but small in relation to the total caseload. In 1883, for example, the Commissioner reported that 746 rejected applicants had appealed their cases to the Secretary. *Id.* at 322. But, in that same year, the Bureau disposed of over 104,000 cases, rejecting nearly 43,000 of them. *Id.* tbl.6, at 387. It should be noted that this was eighteen years after the war had ended, and allowance rates tended to decline as claims came to be more and more based on allegations that some injury or disease incurred during the war had produced a disability that manifested itself only two decades later. In the early years, up to 1870, allowance rates were above eighty percent. *Id.* at 307.

disability or death was appurtenant to, dependent upon, or connected with, acts within, or acts without, the line of duty.<sup>276</sup>

Thus, a soldier under military detention pressed into defense of his fort could nonetheless sustain a pension-conferring injury, while one on active duty wounded in an unnecessary or prohibited activity, like drinking or fighting, could not.

The Secretary of the Interior elaborated on this basic theme in a variety of contexts. A soldier acting in conformity with his superior's orders and Army regulations was presumptively acting in the line of duty, while one violating an Army regulation was not.<sup>277</sup> The Secretary held pensionable injuries sustained by a colonel in an unprovoked attack by an inferior officer,<sup>278</sup> but rejected a widow's claim based on the poisoning death of her husband, who mistook extract of colchicum (a medicinal alkaloid, in small quantities) for whiskey.<sup>279</sup> Curtis and Webster's *Digest* discusses a number of other situations that presented similar questions, including injuries incurred while foraging for food and accidental wounds.<sup>280</sup> For many years, all of these precedents adhered closely to Attorney General Cushing's early approach.

This principle undergirded the initial decision in the *Ammerman* "horseplay" case described above.<sup>281</sup> Brokenshaw's case, also decided by Assistant Secretary Hawkins, reached the same conclusion. Brokenshaw alleged "an injury of left side . . . caused by three soldiers, names unknown, jumping on him while he was climbing into his bunk, crushing ribs of left side just below his heart."<sup>282</sup> The Assistant Secretary cited as controlling both *Ammerman*, for the proposition that roughhousing had "neither a natural nor a logical connection with the military service and the line of duty in said

276. 7 Op. Att'y Gen. 149, 149 (1855).

277. Compare *In re Cook* (Pension Bureau Nov. 8, 1862), reprinted in CURTIS & WEBSTER, *supra* note 219, at 265, with *In re Champion* (Pension Bureau Aug. 15, 1865), reprinted in CURTIS & WEBSTER, *supra* note 219, at 265.

278. *In re Vimont* (Pension Bureau Jan. 17, 1866), reprinted in CURTIS & WEBSTER, *supra* note 219, at 265.

279. *In re McCarty* (Pension Bureau July 14, 1881), reprinted in CURTIS & WEBSTER, *supra* note 219, at 266.

280. CURTIS & WEBSTER, *supra* note 219, at 264-81.

281. *In re Ammerman* (Pension Bureau June 25, 1886), reprinted in 1 PENSION CLAIMS, *supra* note 225, at 5 (1887).

282. *In re Brokenshaw* (Pension Bureau July 23, 1887), reprinted in 1 PENSION CLAIMS, *supra* note 225, at 194 (1887).

service,”<sup>283</sup> as well as an earlier ruling of the Commissioner, *In re Harrington*,<sup>284</sup> for the proposition that “[t]he Government cannot be held responsible for injuries received during personal quarrels and altercations which are in no way incident to the performance of military duty.”<sup>285</sup> Evidently, the quasi-judicial review performed by the Secretary not only exhibited deference to, but took seriously and occasionally adopted the reasoning of, the decisions of the Bureau.

In overruling both *Ammerman* and *Brokenshaw*, Assistant Secretary Bussey announced a definite intent to broaden the scope of the line of duty:

[Ammerman] was in his proper place, ready to perform such duty as he might be called upon to do. The injury alleged . . . happened to him without any fault or neglect on his part. The injury was connected as a result with the service, in that the service had placed him in the position where, without fault on his part, he had received such injury. This connection is sufficiently close and direct . . . . In the vast mass of cases in which pensions are allowed, the injury or the disease on account of which the allowance is made is connected with the service in no other manner than that obedience to military orders and regulations placed the soldier in the position where he was exposed to the causes of such disease or injury.<sup>286</sup>

With respect to *Brokenshaw*, the Assistant Secretary went further, engrafting onto the line of duty inquiry the common law concept of contributory negligence:

In the original *Ammerman* decision . . . the Department declined to recognize the doctrine of *contributory negligence* as affecting the line of duty, and failed, therefore, to notice either the *guiltiness* or the *innocence* of the injured party. . . . [Brokenshaw] was . . . in no degree a contributor to his own injury, but was merely the helpless recipient of an irresistible assault. His title to remedy is plain, but it does not lie against his assailants. It lies in the system of pensions . . . . Brokenshaw

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283. *Brokenshaw*, reprinted in 1 PENSION CLAIMS, *supra* note 225, at 196 (1887).

284. *In re Harrington* (Pension Bureau Aug. 29, 1885), reprinted in CURTIS & WEBSTER, *supra* note 219, at 279.

285. *Brokenshaw*, reprinted in 1 PENSION CLAIMS, *supra* note 225, at 195 (1887) (quoting *Harrington*).

286. *In re Ammerman*, (Pension Bureau 1887), reprinted in 3 PENSION CLAIMS, *supra* note 225, at 1, 2 (1889).

was “in his proper place, ready to perform such duty as he might be called upon to do” . . . .<sup>287</sup>

Bussey’s decisions constituted a major shift in the basic purposes of the military pension system. Prior decisions rejected the idea that the government functioned as an “insurer” against soldiers’ everyday injuries. Military pensions were, on this view, designed to compensate for injury or illness traceable to military conduct—acts either of a peculiarly soldierly nature or taken under orders. The later *Brokenshaw* result embraces an understanding of the pension system as a broad-based workers’ compensation scheme through which federally provided compensation substitutes for private remedies.

Precedent in the Pension Bureau thus seems to have operated very much as common law lawyers expect it to operate in courts. Over long periods, individual cases arising out of multitudinous contexts were rationalized in terms of a basic principle, such as Attorney General Cushing’s opinion, that made the cases “line up.” Changing social circumstances, in the *Ammerman* and *Brokenshaw* cases, an election that signaled displeasure with restrictive pension decisions, produced a substantial change of direction. But that change of direction was articulated by drawing on preexisting legal principles as well, this time to explain why prior decisions were in error. If wise adjudicatory decisions are those that both respect the past and anticipate the future, Assistant Secretary Bussey’s expansive vision of “line of duty” was wisdom incarnate. A year after his *Brokenshaw* decision, Congress eliminated the requirement that a veteran’s disability result from injury or disease incurred in the line of duty.

#### 6. Pension Administration’s Internal Law

From the perspective of the early twenty-first century, it is easy to imagine that the rights revolution of the 1960s and 1970s finally brought recipients of government benefits within the ambit of administrative law’s insistence that fair procedures and transparent rules be made available to those subjected to adverse government action.<sup>288</sup> To be sure, disappointed Social Security

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<sup>287.</sup> *Brokenshaw*, reprinted in 3 PENSION CLAIMS, *supra* note 225, at 195 (1890) (quoting *Ammerman*).

<sup>288.</sup> This is nothing more than the received wisdom that surrounds *Goldberg v. Kelly*, 397 U.S. 254 (1970), and its progeny. Before he became widely known for his popular book, *The Greening of America*, Charles Reich was famous in legal circles for his pathbreaking articles lamenting the poor state of the protection of economic interests based on government beneficence. Those articles, Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); and Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964), were cited by the Court in *Goldberg*’s footnote 8. 397 U.S. at 263 n.8. By

applicants and recipients had long had a statutory right to hearings before an independent hearing examiner—the process upon which the APA’s formal adjudicatory hearings were modeled. But so-called “grant and benefit” programs, including veterans’ benefits, are excepted from the coverage of the Administrative Procedure Act. Hence, in the absence of specific statutory requirements, pre-*Goldberg* claimants asserting interests based on government beneficence seemed to be bereft of legal rights—left to the vagaries of discretion exercised through informal processes and applying secret law—or perhaps simply individual subjective judgment.

With judicial review precluded by statute until 1988<sup>289</sup> and Congress largely inattentive to both the substance and procedures for claims adjudication, veterans seeking military pensions appear as legal stepchildren from the viewpoint of external administrative law. Yet a detailed look inside the administration of veterans’ benefits in the Gilded Age reveals a very different picture. Administrators developed a regularized, transparent system that was surely as fair to claimants and beneficiaries as the technology of the times and the demands of mass adjudication would allow. Nor are these developments of merely antiquarian interest. As I will suggest below, closer attention to the internal law of contemporary administration might not only make us better informed about the administrative law we actually have, but it may also inform our approach to what external administrative law should demand.

But the Pension Bureau is one case and we should recognize that veterans were then, and are now, a politically popular subset of beneficiaries. Although the program had its detractors, the internal law elaborated in the administration of nineteenth-century veterans’ benefits was not against the grain of broad political sentiment. Pornographers, fraudulent marketers of defective goods and worthless stocks, abortionists, and organizers of rigged

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1975, the development of due process protections for governmentally conferred interests was being characterized variously as “a due process explosion” or a “due process revolution.” See Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1268 (1975); Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975).

289. For many years, judicial review of veterans’ claims was precluded by 38 U.S.C. § 211(a) (1970), which provided: “[T]he decisions of the Administrator on any question of law or fact [concerning a claim for benefits] . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision . . . .” This, and subsequent amendments to § 211, were held not to preclude constitutional claims, *Johnson v. Robison*, 415 U.S. 361 (1974), but most other types of legal challenge remained immune from judicial review. This situation changed with the adoption of the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), which converted the Veterans Administration into a cabinet level department and created a new Article I court, the United States Court of Veterans Appeals.

lotteries are not nearly so political appealing. Yet, as my next case study will show, while the Post Office was both aggressive and creative in pursuing such persons or firms, it was scrupulous in providing procedural and structural protections for those subject to its power to deny them the crucial privilege of access to the U.S. mails.

*C. Regulation and Adjudication at the Post Office*

From the perspective of the early twenty-first century, it is difficult to appreciate the significance of the Post Office in the political, economic, and social life of the early Republic. In Richard John's well-known account,<sup>290</sup> the carriage of newspapers, and hence the dispersion of news from national population centers to the interior, made the Post Office a critical, perhaps the most important, institution in the development of American national identity. This high politics of state building was, of course, conjoined with the low politics of political patronage. Post offices, indeed multiple post offices, could be opened in every congressional district, and Congress jealously guarded its legislative prerogative to designate post offices and post roads.<sup>291</sup>

In a system of de facto congressional appointment of local federal officials, congressional patronage went well beyond the satisfaction of local constituent pressures for the opening of a post office in every hamlet in the nation. Carriage of the mails was by contract and these contracts provided additional scope for congressional patronage through the congressman's influence with local postmasters. Indeed, the opportunities for corruption in the process of letting contracts for mail carriage created some of the major political scandals of antebellum politics. These scandals generated significant bureaucratization of Post Office administration well before the advent of Pendleton Act civil service reforms,<sup>292</sup> and reform continued throughout the Gilded Age.<sup>293</sup> Members of the Railway Postal Service and the clerks in the central office of the Post Office in Washington, D.C., for example, were subjected to training and testing that went far beyond the requirements of the Civil Service Commission. Indeed, the members of the Railway Postal Service may have been the most

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290. RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1995).

291. See Mashaw, *Recovering*, *supra* note 9, at 1293-95.

292. See Mashaw, *Administration and the Democracy*, *supra* note 9, at 1619-24.

293. NELSON, *supra* note 190, at 122-23.

highly trained and efficient personnel of the federal government outside of certain branches of the military.<sup>294</sup>

Notwithstanding increasing coverage and usage of telegraphic communication, commercial dealings at a distance were almost completely dependent upon a secure and effective system for delivering the mails. In the absence of bank clearinghouses, the mails provided not only the means for making or negotiating business arrangements, they provided the payment system as well. One of the most familiar, indeed, iconic, scenes in motion pictures about the American West depicts the danger and excitement of bandits robbing either a stage coach or a train. Passengers fork over their money and jewelry, but the principal interest of the outlaws lies in the mailbags. Those mailbags are filled with money. Federal criminal law recognized the economic importance of a secure postal system from the earliest days of the Republic. Opening a letter containing money was made a capital offense in 1794.<sup>295</sup>

Letter writing was not solely the provenance of commercial intercourse and political instruction.<sup>296</sup> As restless Americans migrated from their original East Coast habitats to populate the Western lands, first across the Alleghenies and then across the Mississippi and the Rocky Mountains as well, familial and social bonds were maintained through the mails. The personal letter became virtually a literary form, and the privacy of a sealed first-class letter was guarded by severe sanctions for anyone breaking the seal.<sup>297</sup>

Given the importance of the mail system to the political, economic, and social life of the nation, congressional attention initially focused largely on insuring a comprehensive, effective, secure, and inexpensive postal system. The Post Office was a service organization. To be sure, it had some ancillary authority to regulate how mail was packaged and to determine what postage was due for different types of communications, but the content of those communications was none of the government's business. As with many aspects of American life, the issue of slavery and the Civil War transformed the Post Office's regulatory authority. After the war, reform-minded Americans saw in the Post Office a means for carrying on their moral crusades against obscenity,

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294. For a detailed, if somewhat glorified, description of the training and testing of clerks and Railway Mail Service employees in the Post Office, see MARSHALL CUSHING, *THE STORY OF OUR POST OFFICE: THE GREATEST GOVERNMENT DEPARTMENT IN ALL ITS PHASES*, 68-100, 163-91 (1893).

295. Act of May 8, 1794, ch. 23, § 16, 1 Stat. 354, 360-61.

296. On the growth of letter writing as a general social practice, see DAVID M. HENKIN, *THE POSTAL AGE: THE EMERGENCE OF MODERN COMMUNICATIONS IN NINETEENTH-CENTURY AMERICA* (2006).

297. *Id.* at 93-118.

pornography, abortion, gambling, and fraudulent commercial and investment schemes. Their efforts built on earlier, sometimes extralegal, regulation of what was considered mailable. And, as we shall see, it took some time for the postal authorities to work out reasonable procedures for determining whether allegedly objectionable materials were indeed unmailable.

### 1. *The Emergence of Post Office Regulation*

Amos Kendall seems to have been the first Postmaster who exercised authority to censor the content of the mails. In the mid-1830s, Abolitionists in New York and Boston began mailing to Southern destinations thousands of pamphlets advocating the end of slavery. Local citizens in Charleston, New Orleans, and Norfolk broke into their local post offices and seized and burned the Abolitionists' literature. The Postmaster in New York then stopped transmitting Abolitionist materials and sought instruction from Washington.<sup>298</sup> The Postmaster at Charleston also sought advice from Kendall, who informed him that the Post Office had no legal authority to exclude newspapers from the mail or to refuse their delivery because of their content. On the other hand, Kendall seemed to take back his own advice when he added, "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."<sup>299</sup> President Jackson immediately sought congressional authority for the Post Office to reject mail that tended to undermine "amicable intercourse."<sup>300</sup> Jackson's proposals received a cool reception in both the House and the Senate, and the 1836 revision of the postal law reaffirmed the prior position that postmasters were forbidden to withhold delivery of the mail for any reason.<sup>301</sup>

Nevertheless, on Jackson's advice, Kendall instructed Southern postmasters that Abolitionists' papers should be delivered only to persons who subscribed

298. The controversy over Abolitionist literature is described in considerable detail in MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICAN* 149-51 (1975); and DOROTHY GANFIELD FOWLER, *UNMAILABLE: CONGRESS AND THE POST OFFICE* 26-41 (1977). See also W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830-1860* (1938).

299. Amos Kendall, *The Incendiaries*, NILES' WKLY. REG. (Baltimore), Aug. 22, 1835, at 448.

300. Andrew Jackson, Seventh Annual Message to Congress, December 7, 1835 in *THE STATESMANSHIP OF ANDREW JACKSON AS TOLD IN HIS WRITINGS AND SPEECHES* 399 (Francis Newton Thorpe ed., 1909).

301. Act of July 2, 1836, ch. 270, § 32, 5 Stat. 80, 87. The legislative history of Jackson's proposal is discussed briefly in *Ex parte Jackson*, 96 U.S. 727, 733-35 (1877).

to them. President Jackson even suggested that postmasters should take the names of subscribers and have them published in local newspapers. Hence, congressional legislation notwithstanding, censorship of the Abolitionist press quickly became the rule in the South.<sup>302</sup> This implicit power to censor the mails in order to preserve the public peace was supported by later attorneys general. Concerning complaints that the Deputy Postmaster at Yazoo City, Mississippi, was refusing to deliver copies of a Cincinnati newspaper, Attorney General Caleb Cushing wrote:

On the whole, then, it seems clear to me that a deputy postmaster, 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.<sup>303</sup>

With the outbreak of war, the relationship between the Post Office's actions and congressional and presidential instruction remained complicated. In 1861, Congress authorized the suspension of mail delivery to the seceding states.<sup>304</sup> This authorization, however, failed to specify how mail from the South to the North was to be treated. Postmaster Blair initially allowed mail to be delivered if it came by private courier to various drop off points in loyalist jurisdictions.<sup>305</sup> On August 1, 1861, President Lincoln ordered total suspension of all commerce between the North and the South.<sup>306</sup> This seemed to undercut Blair's more lenient policy, but he continued to apply it. Lincoln's blockade order, in Blair's view, was meant to be enforced by the Treasury and War Departments, and they had failed to give him any instructions concerning cutting off the mail.<sup>307</sup>

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302. Kendall's orders are discussed in WAYNE E. FULLER, *THE AMERICAN MAIL: ENLARGER OF THE COMMON LIFE* 92 (1972); and THEODORE D. JERVEY, *ROBERT Y. HAYNE AND HIS TIMES* 379-81 (1909).

303. 8 Op. Att'y Gen. 489, 501 (1857).

304. Act of Feb. 28, 1861, ch. 61, 12 Stat. 177.

305. FOWLER, *supra* note 298, at 43.

306. *Business Activity Compatible with a State of War*, N.Y. TIMES, Aug. 26, 1861, at 4.

307. *The Great Rebellion*, N.Y. TIMES, Aug. 22, 1861, at 1.

Blair continued to innovate. He ordered the withholding of mail addressed to particular individuals whom the State Department suspected of treason,<sup>308</sup> and he ordered the New York Postmaster to cease acceptance of five newspapers that had been indicted for disloyalty.<sup>309</sup> By the end of 1861, Blair had suspended mailing privileges for twelve newspapers, not all of which had been indicted.<sup>310</sup> Blair seemed to assume that his actions required no legislative authorization. He justified his summary suspension of mailing privileges by arguing that judicial proceedings to prove treason were too slow. While Blair agreed that the government could not shut the papers down without providing appropriate judicial process, he also believed that the government was not required to aid in the circulation of material harmful to the war effort.<sup>311</sup>

In 1862, the House Judiciary Committee inquired into Blair's authority to determine what could and could not be transmitted through the mail. In his testimony before the Committee, Blair claimed a twenty-five-year tradition of excluding treasonous communications from the mail "solely by authority of the executive administration."<sup>312</sup> In Blair's view, nothing in the statutes governing the Post Office Department required it to become a party to treason.

On the other hand, Blair's testimony before the Committee revealed that his censorship activities had gone well beyond the attempt to interdict treasonous letters or publications. He had also withdrawn a number of obscene or scandalous publications.<sup>313</sup> His actions went well beyond the existing statutes concerning obscenity, which restricted mail delivery only of publications coming from abroad. In the end, however, the Judiciary Committee approved Blair's policy. Like Blair, the Committee concluded that the failure to exclude these materials would allow the "postal system,

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308. 2 THE WAR OF REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE RECORDS OF THE UNION AND CONFEDERATE ARMIES 162, 179, 191 (1897) (reproducing correspondence between Trott, Blair, and Secretary Seward).

309. REPORT OF THE POSTMASTER GENERAL, 3 S. EXEC. DOC. NO. 37-1, at 582-84 (1861) [hereinafter 1861 REPORT]; FOWLER, *supra* note 298, at 45.

310. FOWLER, *supra* note 298, at 48.

311. 1861 REPORT, *supra* note 309, at 583 (citing Supreme Court Justice Joseph Story for the proposition that the government need not be the agent of its own destruction).

312. FRANCIS W. KELLOGG, POSTMASTER GENERAL'S AUTHORITY OVER MAILABLE MATTER, H.R. MISC. DOC. NO. 37-16, at 8 (1863) [hereinafter MAILABLE MATTER REPORT] (featuring the testimony of the Postmaster General).

313. *Id.* at 8-9.

established and sustained for the benefit of the people, [to] be turned into the means of the destruction of life, property, and morals.”<sup>314</sup>

Congressional legislation caught up with Blair’s pornography policy in 1865 in a statute providing that “no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character shall be admitted into the mails of the United States.”<sup>315</sup> But the 1865 statute contained only criminal penalties for its violation. Provisions in the original bill that would have authorized the Postmaster General to seize obscene publications received at the Post Office were eliminated in the final statute.<sup>316</sup> Notwithstanding this apparently intentional “gap” in the statute, the Justice Department supported the Post Office’s position that it could exclude obscene publications from the mail.<sup>317</sup> According to one report, in 1873 alone, postal inspectors seized not only obscene materials, but 15,000 letters from young people soliciting obscene matter.<sup>318</sup>

In a similar legal move, the Postmaster General, supported by the Justice Department, found an implied seizure authority in an antilottery statute making it a criminal offense “to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever.”<sup>319</sup> Indeed, the antilottery statute was broader than the obscenity statute because it covered letters in addition to circulars or other printed matter. But the letter portion of the statute proved unenforceable. The Post Office had not been given authority to open and inspect sealed envelopes or packages without a warrant. As a consequence, Attorney General Evarts found it “quite impossible, in the present state of the postal laws, to develop or define any rules which would furnish safe guidance to the postmasters of the country in attempting to enforce the prohibition of the [lottery] statute.”<sup>320</sup> A postal employee who opened or detained mail suspected of containing lottery-related material without a warrant would violate the 1836 statute prohibiting any unauthorized tampering with the mail. Even if the employee acted reasonably and in good

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314. CONG. GLOBE, 38th Cong., 2d Sess. 661 (1865) (containing the debate on the Committee’s report); see MAILABLE MATTER REPORT, *supra* note 312, at 8; FOWLER, *supra* note 298, at 51; WAYNE E. FULLER, MORALITY AND THE MAIL IN NINETEENTH-CENTURY AMERICA 100 (2003).

315. Act of Mar. 3, 1865, ch. 89, 13 Stat. 504, 507.

316. CONG. GLOBE, 38th Cong., 2d Sess. 661.

317. 1 Op. Assistant Att’y Gen. P.O. Dep’t 41, 42-43 (1873).

318. FULLER, *supra* note 314, at 252.

319. Act of July 27, 1868, ch. 246, 15 Stat. 194, 196 (1868); see 12 Op. Att’y Gen. 538 (1868).

320. 12 Op. Att’y Gen. 538. For a description of the multiyear campaign against the Louisiana Lottery and its offshoots, see CUSHING, *supra* note 294, at 505-65.

faith, the Attorney General believed that the employee was unlikely to escape liability.

Congress continued to amend and reform the regulatory provisions of postal statutes throughout the 1870s and 1880s.<sup>321</sup> For our purposes, the most important new initiative was an 1872 statute reorganizing the Post Office and codifying its governing statutes.<sup>322</sup> This statute introduced the so-called “fraud order.” Upon evidence that a fraudulent scheme was being pursued through the use of the mails, the Postmaster General was authorized to issue an order directing local postmasters to refuse payment on money orders drawn to the perpetrator of the fraud and to return to sender all registered mail addressed to the target individual or firm. Here at last was explicit statutory authority for the Post Office to use administrative means to protect the mails from misuse, a power that it had been exercising since 1835.<sup>323</sup> Although textually broad, the fraud order statute was construed to avoid converting all common law frauds accomplished through some use of the mails into a federal offense. As the Assistant Attorney General for the Post Office put the matter:

It is not every fraudulent practice that can be reached through the instrumentality of these statutes. The statutes are leveled at fraudulent schemes and devices. A party pursuing a legitimate business may be guilty of the wrong of cheating and defrauding his client or customer, and that, too, through the medium of the mails, without subjecting himself to the penalty imposed by the statutes. It is true that if the mails are used in the furtherance of any particular plan or system of cheating or defrauding it would bring the party thus offending within the purview of the statute. It must appear, however, that there exists a plan

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321. Those statutes include: Act of Sept. 19, 1890, ch. 908, 26 Stat. 465 (strengthening the antilottery statutes, including banning second-class periodicals from the mails if they merely contained lottery related advertisements); Act of Mar. 2, 1889, ch. 393, 25 Stat. 873 (providing a list of particular schemes that were forbidden to be promoted by the use of the mail); Act of Sept. 26, 1888, ch. 1039, 25 Stat. 496 (providing for the first time explicit congressional authorization for the Post Office to confiscate obscene material “under such regulations as the Postmaster General shall prescribe”); Act of June 18, 1888, ch. 394, 25 Stat. 187 (expanding the provisions of the Comstock Law to cover any matter that exhibited “libelous, scurrilous, or threatening” language on the wrapping); Act of July 12, 1876, ch. 186, 19 Stat. 90 (strengthening further the antilottery and obscenity statutes); and Act of Mar. 3, 1873, ch. 258, 17 Stat. 598 (strengthening the obscenity provisions of prior law and promoting Anthony Comstock’s campaign against sexual immorality).

322. Act of June 8, 1872, ch. 335, 17 Stat. 283.

323. Similar explicit authority was provided for the removal of obscene material in an 1888 statute providing that obscene matter “shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.” Act of Sept. 26, 1888, 25 Stat. at 496.

or scheme or device for obtaining money by a false pretense and that the use of the mails constitutes a material element of this device.<sup>324</sup>

The flexing of Post Office regulatory muscle did not go uncontested in the courts, but broad scale attacks on the constitutionality of national regulation of the mails were rebuffed. The most important decision, *Ex parte Jackson*,<sup>325</sup> involved a habeas corpus petition by Orlando Jackson, a lottery promoter, who had been convicted of violating the antilottery statute and sentenced to pay a fine of one hundred dollars. He had been arrested in New York and was detained there pending satisfaction of the judgment against him.

Jackson argued that the lottery statute violated Article I, § 8 of the Constitution. Although the power to establish post offices and post roads gave Congress the power “to protect the mail by appropriate legislation,” it also imposed a duty, in Jackson’s view, to provide “the secure transportation and delivery of all letters and packets which were considered legitimate mail matter at the time of the adoption of the Constitution.”<sup>326</sup> Lotteries had been used as financing devices by states and localities since the earliest days of the Republic. In classic *reductio ad absurdum* form, Jackson argued that allowing the Congress to regulate the mailability of lottery materials would make it possible for Congress to “cut off all means of epistolary communication upon any subject which is objectionable to a majority of its members.”<sup>327</sup>

While the habeas petitioner, Jackson, concentrated on the question of whether the Necessary and Proper Clause and the postal power gave Congress the authority to pass the statute in question, the Justice Department defended on the procedural ground that the posture of the case did not permit the Court to hear a habeas petition at this juncture.<sup>328</sup> Neither the petitioner nor the government addressed the potential First and Fourth Amendment problems involved in censoring the mails, but the Supreme Court’s opinion at least touched on both issues.

Justice Field, writing for a unanimous court, ruled for the government. Congress’s power to determine what would be carried in the mails, and to where, necessarily implied a power to determine that some items would not be carried and should be excluded. Field seemed unconcerned by the potential First Amendment problem, but went out of his way to make clear that in

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324. 1 Op. Assistant Att’y Gen. P.O. Dep’t 864, 865 (1883).

325. 96 U.S. 727 (1877).

326. *Id.* at 729.

327. *Id.* at 730-31.

328. Brief of the Government, *Ex Parte Jackson*, 96 U.S. 727 (No. 6).

implementing the lottery statute, sealed correspondence could not be opened without a warrant.<sup>329</sup> However halting and uncertain the statutory authorizations, *Ex parte Jackson* supported Congress's and the Post Office's authority to regulate the content of the mails in the interests of public welfare and morals.

The antivice regulatory actions at the Post Office were, of course, part of the larger antivice crusades of the late nineteenth and early twentieth centuries. And they were linked together in the person of Anthony Comstock,<sup>330</sup> a larger than life morals vigilante who epitomized the fears of "respectable" Americans concerning the deteriorating moral tone of the century. Comstock operated both locally and nationally. He was both chair of the Committee for the Suppression of Vice of the New York Chapter of the Young Men's Christian Association, and Special Agent for the Post Office to enforce the 1872 statute. Comstock was no mere enforcer. Finding the 1872 legislation too weak, Comstock mobilized public opinion and lobbied effectively for a much stronger set of restrictions which were embodied in the so-called Comstock Law of 1873.<sup>331</sup>

Armed with more powerful regulatory authority, Comstock cut a wide swath. He estimated that by the end of his career that he had been responsible for over 3600 arrests. He claimed to have destroyed 73,608 pounds of books; 877,412 obscene pictures; 8495 negatives for making obscene photos; 98,563 articles for immoral use; 6436 indecent playing cards; and 8502 boxes of pills and powders used for purposes of abortion.<sup>332</sup> But Comstock, while a formidable and picturesque figure, was primarily interested in criminal prosecutions and the seizure and destruction of immoral articles from their manufacturers or distributors, rather than in administrative enforcement. We will turn our attention, therefore, to the less titillating, but equally far-reaching, activities of the Post Office in exercising its fraud order authority.

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329. 96 U.S. at 735.

330. See, e.g., NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* (1997) (describing Comstock's campaign to stamp out abortion and contraception).

331. Act of Mar. 3, 1873, ch. 258, 17 Stat. 598.

332. JAMES R. PETERSEN, *THE CENTURY OF SEX: PLAYBOY'S HISTORY OF THE SEXUAL REVOLUTION: 1900-1999*, at 11 (1999).

## 2. *Fraud Order Jurisdiction*

Because the use of the mails was essential to all enterprises that operated in interstate commerce, the fraud order authority gave the Post Office something akin to the jurisdiction that would later be provided to the Federal Trade Commission to issue cease and desist orders against deceptive acts and practices in commerce. Moreover, as exercised, the Post Office's antifraud authority anticipated the more focused jurisdiction of the Securities and Exchange Commission and the Food and Drug Administration. The courts and the Justice Department generally acceded to the Post Office's broad construction of its regulatory jurisdiction.

For example, the Post Office intercepted the mail of, and brought criminal charges against, the issuer of bonds in an enterprise that amounted to little more than a Ponzi scheme.<sup>333</sup> The defendant complained that there was no fraud involved in making promises that he could not keep. The Supreme Court concluded that although there were no outright falsehoods in the bond offering, beyond the obvious inability of the issuer to make good on the promise of spectacular interest payments, the postal statute embraced "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."<sup>334</sup> Similarly, a fraud order was issued against C.W. Mixer for peddling bogus cures for cancer. Responding to Mixer's advertisements, the Department of Agriculture acquired some of Mixer's medications, tested them, and found them to be completely ineffective. On that basis, the Assistant Attorney General for the Post Office Department notified Mixer that he must show cause why a fraud order should not be issued against him.<sup>335</sup>

But neither the statutes nor the judicial decisions had much to say about the means by which these substantive restrictions would be implemented. Those matters would be left largely to the policies adopted by the Post Office Department itself.

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333. *Durland v. United States*, 161 U.S. 306 (1896).

334. *Id.* at 313.

335. See *Hearings on H.R. Res. 109 To Investigate the Post Office Department Before the House Committee on Expenditures in the Post Office Department*, 62d Cong. 2013 (1911).

### 3. *Implementation*

Early in the nineteenth century, the postal service began to employ “special agents” to investigate inefficiency, corruption, and theft in the postal system.<sup>336</sup> These special agents had broad powers of inspection, but no authority to arrest malefactors or bring prosecutions on behalf of the Post Office. Over time these temporary and ad hoc special agents evolved into a core of postal inspectors that was recognized in legislation.<sup>337</sup> Like most parts of the federal government, the inspection bureau was perennially underfunded,<sup>338</sup> but business was brisk. Inspectors responded not only to departmentally initiated inquiries but also to thousands of complaints that poured in from ordinary Americans. The Office of Inspection handled nearly 30,000 complaints in 1880, a figure that had risen to nearly 200,000 by 1900.<sup>339</sup>

While many complaints and investigations involved loss or destruction of the mail, by 1879 the obscenity and fraud business was sufficient to justify a specialized group of inspectors.<sup>340</sup> As complaints arrived, usually addressed just to the Postmaster General, the Division of Post Office Inspections and Mail Depredations categorized the complaints by topic and assigned them to field offices located throughout the country. Special agents who concentrated on particular sorts of offenses were assigned to investigate the complaints. While in the early days of the Post Office special agents were a motley crew who failed to give the central office successful control over local operations,<sup>341</sup> by the 1870s and 1880s the special agents had become an elite core who not only enforced the postal statutes but operated as an all-purpose investigative bureau which unified local practices and displaced the historic powers of local postmasters.<sup>342</sup>

Post Office Inspectors or Special Agents were indeed a part of the folklore of the American West. They wrote memoirs celebrating their daring deeds and investigative methods which sold widely and promoted the detective story as a

336. FULLER, *supra* note 302, at 240.

337. See Act of July 2, 1836, ch. 270, § 9, 5 Stat. 80, 81.

338. See REPORT OF THE POSTMASTER-GENERAL, H.R. EXEC. DOC. NO. 41-1, at 10 (1869); FULLER, *supra* note 302, at 273.

339. FULLER, *supra* note 302, at 258.

340. REPORT OF THE POSTMASTER-GENERAL, H.R. EXEC. DOC. 46-1, pt. 4, at 18 (2d Sess. 1879).

341. See CARPENTER, *supra* note 49, at 70-77.

342. *Id.* at 94-116. On the crucial role of the emergence of rural free delivery in curbing the power of local postmasters, see *id.* at 123-43.

new literary genre.<sup>343</sup> They were a quasimilitary corps that was increasingly recruited from the other elite corps at the Post Office, the Railway Mail Service. And, as at the Pension Office, the Post Office organized these officials along functional lines that featured specialization of subject matter and recruitment and promotion on the basis of merit.<sup>344</sup>

There was also heavy involvement in enforcement by the Assistant Attorney General for the Post Office Department. While seizures could be effected by the Post Office staff, prosecutions had to be carried out by U.S. Attorneys. Moreover, there were constant questions about whether particular items fell within the obscenity, fraud, or antilottery statutes. Questions of law, practice, and interpretation were answered by the Assistant Attorney for the Post Office Department and by the First Assistant Postmaster General through the latter's division of correspondence. In his hagiographic account of the Post Office in 1893, Marshall Cushing described the First Assistant Postmaster General as "the great conundrum man of the Department."<sup>345</sup> The replies to questions sent out through the division of correspondence were periodically codified in the rulings of the Post Office, which in Cushing's description "were printed in the Postal Guide and became the law and gospel of the postmasters."<sup>346</sup>

The reach of the obscenity laws seems to have been a continuous source of concern to the Assistant Attorney General, who struggled to instruct the inspectors concerning the difficult line to be drawn between the offensive and the obscene. Thus, while the Assistant Attorney General may have agreed with the complainants that a publication called the *Labor Vindicator* was characterized by "great vulgarity of expression," vulgarity was not the same as obscenity.<sup>347</sup> The Assistant Attorney General turned back a similar effort to exclude the popular *Police Gazette* from the mail.<sup>348</sup> And Reverend H.W. Spalding's effort to suppress a pamphlet entitled *The Deistic Pestilence and the Religious Plague of Man* was rebuffed with the opinion that the federal statutes prohibited the mailing of obscene material, not blasphemous attacks on the church.<sup>349</sup>

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343. *Id.* at 70. For a flavor of the tales of the special agents, see CUSHING, *supra* note 294, at 320-71.

344. CARPENTER, *supra* note 49, at 83-84.

345. CUSHING, *supra* note 294, at 192.

346. *Id.*

347. 1 Op. Assistant Att'y Gen. P.O. Dep't 41, 43 (1873).

348. 1 Op. Assistant Att'y Gen. P.O. Dep't 866, 866-67 (1883).

349. 1 Op. Assistant Att'y Gen. P.O. Dep't 898, 899 (1884).

Direction of lower-level personnel obviously could not be carried out solely through the medium of opinions of the Assistant Attorney General for the Post Office Department. The primary source of instruction seems to have been the monthly *Postal Guide*. The *Guide* was distributed to all local postmasters and was available to the public by subscription. The policies of the Department were also collected from time to time in codified form in bound sets of Post Office regulations. Some examples from the 1879 regulations will provide a general sense of what was covered.

Some instructions were procedural, such as the direction that postmasters should submit items to the First Assistant Postmaster General if they were in doubt about their mailability.<sup>350</sup> Others were more substantive, such as the direction that regular issues of newspapers could not be excluded from the mail just because they contained advertisements for lotteries.<sup>351</sup> And some were protective, such as the instruction that local postmasters were prohibited from detaining first-class matter on the mere suspicion that it contained forbidden articles or from breaking the seal on any letter or package to determine its content.<sup>352</sup> These same regulations instructed postmasters to seize obscene matter wherever encountered and forward it to the dead letter office,<sup>353</sup> even though, as previously recounted, the statute criminalizing the use of the mails to transport obscene matter contained no seizure authority.

The inability to inspect sealed or first-class mail created significant problems of enforcement. To be sure, much of the material advertising lotteries, promoting fraudulent schemes, or hawking obscene publications was mailed second or third class and was therefore open for inspection. But payments made for banned materials were almost always sent first class or by registered mail. Hence, for example, so long as potential customers knew that lottery tickets were available they could be bought and sold through the mails in sealed envelopes.<sup>354</sup> On the other hand, once someone was determined to be

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350. POSTAL LAWS AND REGULATIONS OF THE UNITED STATES OF AMERICA § 228, at 80 (Arthur H. Bissell & Thomas B. Kirby eds., 1879).

351. *Id.* § 227, at 80.

352. *Id.* § 434, at 112.

353. *Id.* § 436, at 112, 113.

354. An early opinion of the Justice Department suggested that any communication addressed to a lottery company could be seized as unmailable. 1 Op. Assistant Att'y Gen. P.O. Dep't 455 (1879). But this position was rebuffed by the judiciary, *Commerford v. Thompson*, 1 F. 417 (C.C.D. Ky. 1880), and later regulations of the Post Office Department instructed local postmasters that they could not assume that letters addressed to lottery companies or their agents contained material concerning lotteries. H.R. MISC. DOC. NO. 50-63, § 379, at 159 (1887).

engaged in a fraudulent scheme (which sometimes also applied to lotteries) all of their mail could be interdicted. The fraud order thus became one of the Post Office Department's most important regulatory tools.

#### 4. *The Fraud Order Process*

As in other cases, the Post Office investigated potential frauds both on its own initiative and in response to complaints made to postal officials, the Assistant Attorney General for the Post Office Department, U.S. Attorneys, and other government departments. Local postmasters who became aware of lottery or fraud schemes were directed to investigate and to make appropriate notification to the local U.S. Attorney and the Postmaster General. If the central office believed that the facts justified a fraud order, a notice was sent to the target of the potential order outlining the charges and inviting a written response.<sup>355</sup> An Assistant Attorney General's opinion in 1883 noted that "[w]hen a preliminary notice is sent the party charged, if he desires, is heard by himself or attorney. He is allowed to file his written statement and that of others supported or unsupported by affidavit. Indeed the greatest possible latitude is allowed for explanation or defense."<sup>356</sup> Oral hearings seem not to have been routine although there is evidence that they were provided in some cases.<sup>357</sup> After the hearing, paper or oral, the Assistant Attorney General made a recommendation to the Postmaster General, who then decided whether or not to issue a fraud order.

Notice and opportunity to defend were excluded in situations in which there was conclusive evidence of fraud.<sup>358</sup> Moreover, the evidence upon which the fraud order was based may not have been fully revealed to the target. Evidence often came largely from the postal inspector's reports, which had been compiled from confidential statements by informants who had been promised anonymity.<sup>359</sup> If the Postmaster General was satisfied that the target had engaged in fraud through the use of the mails, he issued a written order

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355. See 1 Op. Assistant Att'y Gen. P.O. Dep't 816 (1874); 1 Op. Assistant Att'y Gen. P.O. Dep't 78 (1882).

356. 1 Op. Assistant Att'y Gen. P.O. Dep't 796, 799 (1883); accord 1 Op. Assistant Att'y Gen. P.O. Dep't 816, 823 (1883).

357. See 1 Op. Assistant Att'y Gen P.O. Dep't 95, 96 (1885) ("[T]he argument urged in a petition . . . by Mr. Dawson, his counsel, who personally appeared before me and made an argument on behalf of the petitioner, is that as the business is now conducted it involves no fraudulent use of the mails.").

358. 1 Op. Assistant Att'y Gen P.O. Dep't 796 (1883).

359. H.R. REP. NO. 59-4919, at 2 (1906).

forbidding the payment of money orders to the company or individual and ordering that all mail addressed to the target of the order be returned to its sender marked "fraudulent."

These procedures were hardly the full formal trappings of civil or criminal trial. But the Supreme Court was unreceptive to claims that due process required judicial process before the Post Office could intercept someone's mail.<sup>360</sup> Moreover, given the limited nature of judicial review by mandamus or injunction, the Postmaster General's decisions concerning whether the facts justified an order were essentially unreviewable. In the early twentieth century, federal courts did begin to review the question of whether, on the agreed upon facts, the Postmaster had exceeded his authority by banning mailable materials,<sup>361</sup> but they would not inquire into the sufficiency of the evidence upon which the Department acted. As one court said in a proceeding objecting to the evidence upon which a fraud order had been based, "It may have been hearsay; it may have been secondary; it may have been delivered by an incompetent witness; or it may have been such as the courts would receive. But whatever it was, it was evidence satisfactory to him."<sup>362</sup>

These limitations on judicial jurisdiction might be interpreted as a license for arbitrary enforcement, but internal law tended to furnish its own constraints. The Assistant Attorney General for the Post Office Department counseled the Postmaster General not to accept hearsay "on any doubtful proposition."<sup>363</sup> Moreover, the Assistant Attorney General had a lively sense of the legal novelty of permitting a person or firm to be completely excluded from the mail system. On this basis, he concluded that the power to issue fraud orders was meant to be exercised personally by the Postmaster General. In his words,

The power conferred by law upon the Postmaster-General, upon evidence satisfactory to him, to order the return of registered letters or the refusal of payment of money orders, is a very arbitrary power, in derogation of common right, and can be exercised only by the Postmaster-General. He has not delegated, and can not delegate, the power to inspectors.<sup>364</sup>

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360. *Public Clearing House v. Coyne*, 194 U.S. 497 (1904).

361. *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

362. H.R. REP. NO. 59-4919, at 2 (quoting *People's U.S. Bank v. Gilson*, 140 F. 1 (E.D. Mo. 1905)).

363. 1 Op. Assistant Att'y Gen. P.O. Dep't. 816, 819 (1883).

364. 2 Op. Assistant Att'y Gen. P.O. Dep't. 247, 248 (1886).

Moreover, the instructional guide to Post Office inspectors and local postmasters was particularly attentive to both process and the careful supervision of street-level personnel. The manual charged the inspectors with a thorough understanding of all laws and regulations pertaining to the Post Office.<sup>365</sup> Local postmasters were prohibited from providing advice concerning the mailability of a particular item.<sup>366</sup> Once they received arguably unmailable material, samples were to be submitted to the central government, either to the First Assistant Postmaster General for determination where obscenity was in question, or to the Assistant Attorney General for the Post Office Department concerning lottery or fraud related materials.<sup>367</sup> While the instructions were more detailed concerning how Inspectors were to go about their investigation of fraudulent schemes,<sup>368</sup> the determination of whether a scheme was fraudulent or not was left to the Assistant Attorney General and ultimately to the Postmaster General.<sup>369</sup> Investigators were urged to collect as many statements as possible from potential victims of fraudulent schemes and to preserve any physical evidence that came into their possession. They were authorized to use test letters to determine whether seemingly legitimate businesses were actually engaged in fraudulent activity, and they were required to consult with their supervising inspector concerning whether a fraudulent scheme had in fact been discovered.<sup>370</sup>

The great breadth of the fraud regulations, combined with vigorous enforcement, generated resistance. In 1906, a bill was unsuccessfully promoted in Congress to rein in the administrative powers of the Post Office. Under the proposal, no fraud order would take effect until fifteen days after notice of its issuance had been received by the target. And the order would be stayed if the target filed a bill in a United States Circuit Court, which would apparently have had *de novo* authority to determine whether the fraud order should issue.

George B. Cortelyou, a former Post Office Special Agent and Postmaster General (and then Secretary of the Treasury) defended the existing

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365. U.S. POST OFFICE DEP'T, INSTRUCTIONS TO POST OFFICE INSPECTORS CONCERNING THEIR CONDUCT, POWERS, AND DUTIES § 11, at 9 (1899) [hereinafter 1899 INSTRUCTIONS].

366. *Id.* at 94.

367. *Id.* at 95.

368. *Id.* at 57.

369. Later editions of the instructions which reach beyond the scope of this study provided greater detail concerning fraudulent investment schemes. See U.S. POST OFFICE DEP'T, INSTRUCTIONS TO POST OFFICE INSPECTORS CONCERNING THEIR CONDUCT, POWERS AND DUTIES § 53, at 63 (1905).

370. 1899 INSTRUCTIONS, *supra* note 365, § 50, at 60.

administrative scheme in an article in the *North American Review* in 1907.<sup>371</sup> Cortelyou had little doubt that the courts would ultimately sustain the determinations of the department even if the bill were enacted. He noted that since the enactment of the fraud order legislation, 2400 fraud orders had been issued, but only 30 cases had sought to challenge their propriety. Moreover, the Post Office had never lost a case.<sup>372</sup> That exemplary record is, perhaps, not too surprising given the limited nature of judicial review. Nevertheless, according to Cortelyou the purpose of the proposed legislation was really to produce delay within which the fraudulent scheme could be carried out. In Cortelyou's words:

It is not the law, but the law's delay, which the operators of fraudulent methods would be glad to obtain. For it must be borne in mind that many, if not most, of the schemes to defraud are of the fly-by-night order; of the kind whose methods and base of operations are constantly changing; who shift from name to name and city to city, for the express purpose of avoiding too close scrutiny; who are often hard to locate for the deeds of the present and harder to convict for the deeds of the past.<sup>373</sup>

Cortelyou went on to give a number of examples of the types of frauds that had been prohibited by the Post Office fraud order process and to regale his readers with the stories of extensive delays that were attendant upon prosecution of these same malefactors in court. Cortelyou assured his readers that fraud orders were issued only after careful investigation and a hearing of all sides by the Assistant Attorney General. Moreover, he asserted that the Department often entered into settlements with targets of inquiry.

According to his description, when investigators determined that "advertisements or misleading statements were not deliberately designed to defraud and that the business is not otherwise open to serious criticism, the opportunity is given to discontinue the objectionable features, and the business is allowed to proceed undisturbed."<sup>374</sup> He described the Post Office investigators as conciliators or mediators as well as enforcers. When investigating complaints against reputable concerns, he said, "it usually develops that misunderstandings occurred through delays in shipment, loss in

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371. George B. Cortelyou, *Frauds in the Mail: Fraud Orders and Their Purposes*, 184 N. AM. REV. 808 (1907).

372. *Id.* at 815.

373. *Id.* at 812.

374. *Id.* at 809-10.

transit or some other cause easily accounted for and explained, giving the Department an opportunity to act as peacemaker and adjust the difficulty.”<sup>375</sup>

If Cortelyou is to be credited, the fraud order process was a fair, even a benign and helpful, regulatory scheme. It was one whose effectiveness depended crucially on the ability of the Post Office to enforce the postal laws by administrative means. The attempt to emasculate the fraud order process by judicial review was defeated in the same year that the Hepburn Act rescued the ICC’s regulatory authority from the clutches of an unsympathetic Supreme Court.<sup>376</sup> But Congress seems not to have had consistent views concerning the need for administrative enforcement. In 1906, the Pure Food and Drug Act also failed to provide any effective means for removing adulterated foods and drugs from the market save through lawsuits. And Cortelyou’s admonitions seem to have been forgotten when the Federal Trade Commission was established in 1914 and given a cease and desist authority that had no bite until judicially enforced. Thus, when some of the jurisdiction that was exercised by the Post Office through its fraud order process was parceled out to more specialized agencies in the early twentieth century, those agencies arguably wielded less potent regulatory mechanisms than the ones the Post Office had been exercising in various forms since the 1830s.

#### IV. ADMINISTRATIVE LAW IN THE GILDED AGE

The social, economic, and political ferment of the last quarter of the nineteenth century makes our twenty-first-century pace of change seem almost modest by comparison. Our enduring images of that period are summoned by words like “capital,” “monopoly,” and “invention”; “party,” “scandal,” and “corruption”; “labor,” “farmers,” and “immigrants.” Private enterprise ruled, we are told, and bent government to its will. A squalid politics of partisan competition and a corrupt scramble for government subsidies disgraced America’s democratic pretensions. The conspicuous display of private wealth gilded an era whose underlying realities were widespread poverty, urban slums, and social injustice.

This story is more than a historical conceit, but it fails to do justice to the generation that, emerging from the horrors of the Civil War, built the foundations of an empire in a few short years.<sup>377</sup> The crucible of war revealed

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375. *Id.* at 810.

376. See Merrill, *supra* note 53, at 27-33.

377. For some revisionist history of the period, see *THE GILDED AGE: A REAPPRAISAL* (H. Wayne Morgan ed., 1963).

the underlying self-indulgence of Emersonian idealism and individualism.<sup>378</sup> Military duty and comradeship schooled a realistic faith in values of competence and useful work. Educated men who returned from the war, and women who endured it, chose active lives in both private and public life. They understood their reborn nation in nationalist terms,<sup>379</sup> not in terms of Jeffersonian longings for weak and decentralized governance or agrarian individualism.<sup>380</sup>

In many ways, the national government provided a tepid response to the social, economic, and political demands of the times. Yet there was reform and there was state building. Between 1861 and 1891, while the population of the country doubled,<sup>381</sup> federal civilian government employment more than quadrupled.<sup>382</sup> Moreover, in Leonard White's description, the government bureau was moving toward a model of "businesslike" government.<sup>383</sup> Not only were businessmen found as the heads of departments, executive leadership also was provided by the appointment of returning military officers to civilian posts and the increasing presence of academics whose specialties were of the more practical sort found in departments of statistics, economics, or political science. And as we have seen, even before Pendleton, bureaus were instituting systems of merit appointment and promotion, as well as organizing their work into specialized units.

Stephen Skowronek argues that these civil service reforms were a "patchwork" built on top of a dominant and countervailing system of patronage. In his words, "[t]he merit service grew as an expedient response to new demands on government, but it operated as a contradiction within a state that relied upon very different talents and procedures."<sup>384</sup> Skowronek uses a similar patchwork metaphor to characterize reforms in the Army and for the passage of the Interstate Commerce Act. His general position is perhaps summed up in his description of the politics of the Interstate Commerce Act:

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378. See FREDRICKSON, *supra* note 76.

379. See, e.g., 2 FRANCIS LIEBER, *Amendments of the Constitution, Submitted to the Consideration of the American People*, in MISCELLANEOUS WRITINGS OF FRANCIS LIEBER: CONTRIBUTIONS TO POLITICAL SCIENCE 137 (1881).

380. See Samuel Fowler, *The Political Opinions of Jefferson*, 101 N. AM. REV. 313 (1865).

381. This figure was calculated from estimated population totals in 1 BUREAU OF THE CENSUS, *supra* note 11, tbl.A6-8, at 8 (1975).

382. This figure was calculated from 2 BUREAU OF THE CENSUS, *supra* note 11, tbl.Y308-317, at 1103. As in prior periods the largest numbers of new employees were in the Post Office Department, but other parts of the executive establishment grew at a comparable rate.

383. WHITE, *supra* note 73, at 387.

384. SKOWRONEK, *supra* note 42, at 82.

“Congress had not transformed the conflicts within society into a coherent regulatory policy but had merely translated those conflicts into governmental policy and shifted them to other institutions.”<sup>385</sup>

I have no quarrel with Skowronek’s account, only with his emphasis. When compared with European models of bureaucratic administration, or with American bureaucracy in the post-New Deal era, American civil administration was indeed a patchwork—a work in progress that contained many conflicting elements. But what American governmental reform, then or now, has not been a patchwork, a compromise between the old and the new and among the contending interests with a stake in the policy outcome? Coherence is not the dominant attribute of congressional legislation. The failure of Pendleton, or other reforms, to reconstitute the American state on a rational-bureaucratic model should not blind us to developments that left American government with significantly greater capacities near the end of the nineteenth century than it had when it emerged from the Civil War.

Similar caution should be used in assessing Theodore Lowi’s claim that a student of congressional legislation in the Gilded Age would be unaware of major social movements to promote the rights of workers, farmers, or women.<sup>386</sup> To be sure, women’s rights are nowhere to be found in late nineteenth-century national legislation. But the creation of departments of labor and agriculture surely hint at the recognition of the demands of workers and farmers for attention from the national government. And the fingerprints of farmers’ groups were all over both the Interstate Commerce Act and the Morrill Land Grant Colleges legislation subsidizing higher education in the agricultural and mechanical arts. To be sure, much remained to be done. But these new departments institutionalized the voice of important social movements in public administration. Subsequent legislative policy would depend importantly on the information and proposals generated by the administrators charged with attending to these clientele groups. Modest first steps provide the capacity for bolder strides through both legislative and administrative initiatives.<sup>387</sup>

These are hardly the only areas in which the federal government occupied new policy space, created new bureaus and departments, or increased

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385. *Id.* at 149.

386. LOWI, *supra* note 7, at 78.

387. On the signal success of the Department of Agriculture in building a bureaucratic system largely immune from political control, see CARPENTER, *supra* note 116, at 179–325.

governmental capacities.<sup>388</sup> Administration was growing, taking on new roles, and becoming more professionalized. But where was administrative law?

According to Frank Goodnow, in the first book-length treatment of administrative law published in the United States, administrative law was both ubiquitous and invisible.<sup>389</sup> In Goodnow's view, although administrative law "has exercised on Anglo-Saxon political development an influence perhaps greater than that exerted by any other part of the English law," the term administrative law formed a part of the legal vocabulary of only "the most advanced legal thinkers."<sup>390</sup> Goodnow begins, therefore with a definition: "Administrative law is . . . that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights."<sup>391</sup> For Goodnow, the law fixing the competence of administrative authorities and that fixing the rights of individuals in relation to those authorities, were but two sides of the same coin:

[W]hile administrative law emphasizes the powers of the government and the duties of the citizen, it is nevertheless to the administrative law that the individual must have recourse when his rights are violated. For just so far as administrative law delimits the sphere of action of the administration it indicates what are the rights of the individual which the administration must respect.<sup>392</sup>

As previously mentioned, in his later treatment of American administrative law,<sup>393</sup> Goodnow breaks the field into three principle categories—the law relating to the relationship of administration to the political branches, the law governing legal control through judicial review, and the legal rules and processes developed in the course of administration by those officials having policymaking authority. The last is, of course, what Bruce Wyman characterized in his 1903 treatise as the "internal law" of administration.<sup>394</sup> And, as Wyman recognized, the striking feature of administrative law in the whole of the nineteenth century was how little administrative law was generated by external sources, the courts, presidential direction, or

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388. See SHORT, *supra* note 12; WHITE, *supra* note 73.

389. 1 GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 44, at 6-9.

390. *Id.* at 7.

391. *Id.* at 8-9.

392. *Id.* at 8.

393. GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW*, *supra* note 44, at 371-72.

394. WYMAN, *supra* note 44.

congressional statute, and how much was established by the rules, precedents, and practices of administrative agencies themselves. The Gilded Age was no exception.

*A. Political Accountability*

To be sure, legislation provided much of the basic skeleton of administrative law in postbellum America. Congress created numerous departments and bureaus and reorganized others. It shaped federal civilian employment through its veterans' preference legislation,<sup>395</sup> repeal of the Tenure of Office Act, and passage of the Pendleton Civil Service statute. Theodore Lowi's estimate<sup>396</sup> that nearly half of congressional legislation in this period was devoted to the establishment or reorganization of government authorities might be somewhat inflated, but legislative state building in the Gilded Age was substantial.

Still, much of this activity was inspired by administrative practices and proposals.<sup>397</sup> And legislation often gave broad authority to administrators concerning the organization and procedure by which the statute was to be implemented and substantial control over substantive policy as well. Statutory authority for Post Office regulation of lotteries, pornography, obscenity, and fraud ratified and strengthened preexisting Post Office practice. Amendments to that authority, such as the Comstock Law of 1873,<sup>398</sup> were promoted by the administrators in charge of enforcement. The Pension Office, notwithstanding constant congressional attention to the pension laws, had less success promoting its desired reforms. In some cases, such as the sixty surgeons bill, congressional apathy or opposition thwarted administrative plans for a more professionalized and unified administrative system. But in others cases, Congress's failure to act, or the vagueness of its statutory language, simply left the Pension Office to develop its own organization, procedures, and substantive interpretations.

Presidential creation of administrative law was at a low ebb following Lincoln's assassination. While Andrew Johnson narrowly escaped impeachment for his alleged violation of the Tenure in Office Act, that statute

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395. J. RES. 27, 38th Cong., 13 Stat. 571 (2d Sess. 1865).

396. LOWI, *supra* note 7, at 77.

397. *See supra* notes 99-107.

398. Act of Mar. 3, 1873, ch. 258, 17 Stat. 598.

remained in effect until Grover Cleveland orchestrated its repeal in 1887.<sup>399</sup> And while the Pendleton Act in some sense strengthened the President by reducing congressional influence over lower level appointments, administration in the departments seems to have operated mostly independent of presidential direction. The President could, by appointment of like-minded administrators, change administrative policy, as we saw in connection with the interpretation of “line of duty” by the Pension Office in the late 1880s. But, like Congress, the President had no staff to assist him in the management of the executive branch. As Leonard White reports:

There was no agency directly serving the President to inquire, to report, and to advise. In the absence of such administrative aids he was necessarily barred from an active role in management. His mind was directed primarily to Congress, not to the executive departments.<sup>400</sup>

There is some irony in the recognition that in an era of bellicose political competition, and one in which every action of the government tended to be interpreted in terms of partisan political motivation, the actual implementation of government programs seems to have operated relatively free from the control of the elected branches of the government. The abstract structure of the legal relationship between Congress, the President and administrators gave elected officials ultimate authority over all administrative action. Administrators could not act without statutory authority or human and fiscal resources. These were all within the control of Congress. The President retained the power to appoint and, after a two-decade hiatus, regained the removal power—a power that had been transformed by convention into a presumptive power to direct administrative action, at least within the boundaries laid down by legislation.<sup>401</sup> Yet the information advantages of continuous attention, even in understaffed and underfunded agencies, gave administrators substantial autonomy. The part of administrative law that deals with the structure of political control of administration had by the end of the nineteenth century taken on a form that is familiar to twenty-first-century administrative lawyers. Political control was supreme in theory, but spotty in fact.

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399. JAMES FORD RHODES, *HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850*, at 265-66 (1919).

400. WHITE, *supra* note 73, at 392.

401. See GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 44, at 62-70.

*B. Legal Accountability*

Legal control through the judiciary was, by contrast, quite decidedly different from our contemporary understandings. The “partnership” model of court-agency relations that emerged in the twentieth century was barely perceptible in the decisions of the federal courts or the legislation empowering executive departments and agencies. Writ review by mandamus or injunction emphasized agency authority both to interpret and to implement the law. And, while administrative determinations could be called into question in suits between private parties, the degree to which courts would second guess prior agency determinations was uncertain. Common law actions against officials for damages tended to yield *de novo* judicial determinations both on law and fact. On the other hand, Land Office determinations were routinely treated as subject to attack only for lack of jurisdiction, notwithstanding some incursions on the Land Office’s final authority over legal interpretation in private suits for equitable relief. Meanwhile, full fledged appeals were allowed from the decisions of the Court of Claims. But the most numerous class of monetary claims was excepted from Court of Claims jurisdiction: the multitudinous claimants for veterans’ pensions could pursue relief from the judiciary only through an almost universally ineffective application for a writ of mandamus.

Given the paucity of appellate review, the basic rule of public administrative law that emerges from the judicial decisions of the nineteenth century is that administrative discretion will not be disturbed by judicial intervention. Private rights were protected by private actions. Where those actions brought the legality of the determinations of government officials incidentally into question, the authority of the court to decide questions of fact or law was highly dependent upon the form of private action brought. Decisions in these “private actions” evidence an awareness of their “public law” overtones, but they tend to be resolved on the basis of private law principles. The central preoccupation of late twentieth- and early twenty-first-century administrative lawyers, the struggle to make legal control in the administrative state respond to appropriate general principles of administrative and judicial competence, is visible only at the margins of the nineteenth-century jurisprudence.<sup>402</sup>

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402. Or perhaps, once again, we are looking in the wrong places. In a recent paper, James Pfander and Jonathan Hunt investigate the private bill practice in antebellum America. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic* (2009) (unpublished manuscript, on file with the author). They find that Congress routinely enacted private bills to compensate officers who had been held liable for illegal acts, but who had acted reasonably or in

The Supreme Court also ostentatiously declined to meddle in administrative procedure. The constitutional clause that looms largest in modern administrative procedure, the requirement for due process of law, is almost wholly absent from the administrative law jurisprudence. Indeed, the Supreme Court seemed exasperated by due process claims against either the national or the state governments. In *Public Clearing House v. Coyne*,<sup>403</sup> when reviewing a challenge to a Post Office fraud order, the Court said:

It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. . . . That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations.<sup>404</sup>

It was even more dismissive of claims against state actors in *Davidson v. New Orleans*,<sup>405</sup> where it lamented:

It is not a little remarkable, that while [the Due Process Clause] has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century . . . this special limitation upon its powers has rarely been invoked in the judicial forum . . . . But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and

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accordance with their instructions from superiors. Moreover, Congress also compensated parties who were unable to sue the offending officer because the officer was absent or insolvent. *Id.* at 29. Hence, on their interpretation, the doctrine of sovereign immunity and of official common law liability, operated not to deny inquiry into the reasonableness of government action, but to put that inquiry in the hands of Congress. *See id.* at 5-6. And in the halls of Congress these matters were handled by specialized committees that built up precedent and deployed it in a quasi-judicial fashion. *Id.* at 15, 24 n.122. Hence, to some degree, the familiar reasonableness review in contemporary American administrative law was, while missing from nineteenth-century judicial review, firmly ensconced in another institution.

403. 194 U.S. 497 (1904).

404. *Id.* at 508-09.

405. 96 U.S. 97 (1877).

the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.<sup>406</sup>

The Court would, of course, begin to heed some of these litigants' cries in its substantive due process jurisprudence of the early twentieth century. But it would be many more years before a concept of "administrative due process" would be developed that separated the question of administrative due process from the question of whether adjudicatory jurisdiction was required to be placed in an Article III court.

### C. *Managerial Control Through Internal Law*

The limitations on political control and judicial review in nineteenth-century America emphasized the role of administrators themselves in developing an internal law of administration. Some of that law was transsubstantive administrative law in familiar contemporary fashion. The Civil Service Commission had jurisdiction that cut across the whole of the Executive Branch. And the Justice Department's authority to provide interpretive advice not only made it an arbiter of the construction of particular legal provisions of interest to an individual agency, but also gave it a capacity to provide constructions that informed the activities of all agencies.<sup>407</sup> The bevy of cross-cutting legislation that now applies to all federal administrative agencies,<sup>408</sup> however, lay far in the future. Most "internal administrative law" was, at least formally, the work of individual agencies or departments and related to their own affairs.

Yet it is not difficult to see a series of quite familiar "rule of law" principles emerging from administrative practices common to many agencies.<sup>409</sup> The first is surely uniformity and consistency in the application of the law. To some degree this is imperative in any hierarchical system in which top level

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406. *Id.* at 103-04.

407. Opinions of the Attorneys General first became generally available in 1840. On the development of the advisory functions of the Attorney General, see HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 78-92 (1937).

408. See JERRY L. MASHAW, RICHARD A. MERRILL & PETER SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 150-68* (6th ed. 2009).

409. See WYMAN, *supra* note 44, at 342-56.

administrators wish to keep control over subordinates. But as early as the first decade of the nineteenth century, Thomas Jefferson, that archenemy of bureaucracy, was insisting that centralized control was essential to protect citizens from biased or erroneous actions by federal officials.<sup>410</sup> My case studies document the significant administrative energies devoted to promoting uniformity and consistency in both the Pension Office and the Post Office. Each published a constant stream of rules, guidelines, and precedents to instruct lower level personnel. Moreover, decisions were subjected to multiple levels of internal review that put final authority in relatively few hands in the central offices.

Administrative practice also furthered norms of transparency. Although there was no Federal Register Act, or Federal Register, the administrative rules, guidelines, and precedents were made available to the general public—at least the interested public—not just lower-level personnel. Transparent enunciation of administrative policy had reached a high degree of sophistication in the Pension Office, a practice that not only produced a “level playing field” for claimants, their agents, and attorneys, who were seeking public benefits, but also provided constant fodder for critique in the popular press and more academic publications. Regulatory enforcement authorities then and now are more circumspect about publishing their enforcement methods and priorities. But information concerning the Post Office’s enforcement of the antilottery, antipornography, and antifraud statutes was made available through its monthly Postal Guide and the publication of decisions by the Assistant Attorney General for the Post Office Department.

Finally, notwithstanding the absence of judicial demands for administrative due process, the adjudicatory processes at both the Pension Office and the Post Office paid significant attention to issues of adjudicatory fairness. Adjudicators were not neutral in the sense of modern administrative law judges, or the Board of Review established to review valuation questions in the Treasury Department in 1890. But the Pension Office gave strict instructions to examiners and to examining physicians concerning their posture vis-à-vis both claimants and the government. They were not to favor either, but to decide cases on the facts presented. It established three-physician boards to limit idiosyncratic bias, and even sought to avoid partisan bias by dividing the members of the boards, where possible, between the political parties.

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410. Letter from President Thomas Jefferson to Governor Charles Pinckney (July 18, 1808), in 12 THE WRITINGS OF THOMAS JEFFERSON 102 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

In a similar fashion, the Post Office sought to avoid local or prosecutorial bias in enforcement. Local postmasters were not allowed to interdict letters or publications presented for mailing without clearance from the Assistant Postmaster General. And fraud order determinations could not be made by investigating special agents, but had to be referred to the Assistant Attorney General for the Post Office Department, and ultimately to the Postmaster General. Hearings concerning whether a fraud order should issue were held before the Assistant Attorney General, who was not an employee of the Post Office.

Notice and opportunity to contest were also prominent features of both of these adjudicatory systems. Pension Office claimants and Post Office targets had access to counsel to press their claims, opportunities for appeal within the agency process, and the opportunity to fully present their evidence and confront and contest contrary evidence in the government's possession. A substantial portion of these hearing processes was carried on through documentary presentations, but that is true in administrative proceedings today. Orality and cross examination were provided, then and now, only when necessary for the adequate presentation and testing of evidence.<sup>411</sup>

The rich development of what Bruce Wyman characterized as internal administrative law is mostly missing from contemporary legal analysis. To be sure, practitioners in one or another substantive area pay close attention to agency lawmaking within their particular fields. But since the monumental study of administrative processes undertaken to inform the drafting of the Federal Administrative Procedure Act,<sup>412</sup> little attention seems to be paid to the degree to which these practices reflect broader normative currents in the way administrative action should be structured and constrained. The major contemporary exception to this balkanization of the study of internal law might be found in the emerging field of global administrative law. Global administrative law almost necessarily imagines that there is a normative core of responsible and responsive administrative practice that can be identified and implemented without necessarily making administrative institutions accountable either to elected representatives or to courts having broad jurisdiction to review their decisions. For, at the global level, these political and legal constraints hardly exist.<sup>413</sup>

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411. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Richardson v. Perales*, 402 U.S. 389 (1971).

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

413. For a flavor of the global administrative law scholarship referred to here, see Sabino Cassese, *Administrative Law Without the State: The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L.

A similar attention to administrative practice in the emergence of internal administrative law norms might be rewarded at the domestic level as well. To take one example, when the Supreme Court decided the famous *Goldberg v. Kelly* case,<sup>414</sup> it proceeded as if there were no tradition of notice and opportunity to contest in the law of American public benefits. This was, of course, true if one looked only for judicial decisions requiring administrative hearings in those programs. But if the Court had looked at the administrative practices of the Veterans Administration in adjudicating claims to military pensions, or the practices of the Social Security Administration in adjudicating disputes concerning old age or disability pensions, it would have found well-articulated practices that closely tracked the demands that it seemed to pull from thin air and impose on the adjudication of public welfare claims.

Justice Black looked at traditional practice, but in the wholly different context of creditor-debtor relations in private law. And only Chief Justice Burger, joined by Justice Black, gave controlling significance to the then-Department of Health, Education and Welfare's internal administrative law. That department had a proposed rule in process concerning the requisites of a "fair hearing" in the program of Aid to Families of Dependant Children that would have required all of the elements deemed necessary by the majority opinion in *Goldberg*, plus some additional ones, such as, the public provision of the assistance of counsel.

The Court's willingness to impose procedural formalities in *Goldberg v. Kelly* was, of course, influenced by its exposure to other welfare cases involving oppressive practices in some state welfare agencies and by the racial and class discrimination issues latent in the administration of need-based public assistance. But, even if one believes that the Supreme Court should constitutionalize benefits administration beyond some very basic requirements to assure respect for individual dignity, as I do not,<sup>415</sup> the Court's approach would have been better articulated as an acceptance of customary best practices in a broad range of public benefits regimes. Moreover, attention to practice and internal law across agencies playing similar roles might be more protective of individual procedural protections than the "thumb on the scales" for

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& POL. 663 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale? Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, 99 AM. SOC'Y INT'L L. PROC. 143 (2005); and Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15.

414. 397 U.S. 254 (1970).

415. See generally JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) (arguing for a "dignitary theory" of due process).

administrative discretion that the Court invoked in retreating from *Goldberg*. The bland statement in *Mathews v. Eldridge*<sup>416</sup> that the Court must give “substantial weight . . . to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals”<sup>417</sup> provides little assurance that the Court has educated itself concerning the realities of benefits administration in social security disability cases or in similar or related programs.

#### **CODA: THE JURISPRUDENTIAL STATUS OF INTERNAL ADMINISTRATIVE LAW**

Because the “internal administrative law” created by agency rules, precedents, and practices is largely ignored by modern administrative law scholarship<sup>418</sup> and legal analysis, it may seem odd to think of this law as “law” at all. Forgetting that administrative law both constitutes and empowers administrative action at the same time that it structures and constrains administrative behavior, administrative law is often thought of as just that set of external constraints that limit agency discretion. And even if one recognizes the broader vision of administrative law that Frank Goodnow articulated,<sup>419</sup> the idea of agencies “constituting” administrative law through their internal decisions about organization and procedure seems to undermine the notion that legitimate administrative authority comes only through legislation, or in some instances, presidential direction. Internal law seems to cut agencies loose from the external political and legal controls that make them “lawful” actors.

The question of what makes internal administrative law “law” is a deep one that cannot be taken up in this Article. For now, suffice it to say that I believe that the “lawness” of internal administrative law is to be found precisely in the same place as the recognition of the law-like nature of all public law. Benedict Kingsbury has recently suggested that this same problem with respect to global administrative law should be approached from two directions, that is, by combining the Hartian positivist or “social fact” conception of law with a

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<sup>416</sup>. 424 U.S. 319 (1976).

<sup>417</sup>. *Id.* at 349.

<sup>418</sup>. For a similar lament, see Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 861 (2009), stating that “[T]he aim of this Article is to create the category of self-regulation and to persuade students of the administrative state that it has been a mistake to ignore it.”

<sup>419</sup>. See *supra* notes 389–393 and accompanying text.

normative element that explains why only certain social facts give rise to the recognition of their law-like quality.<sup>420</sup>

Concerned, as other global administrative law scholars are, by the lack of legitimating electoral or legal controls for many global administrative actors, Kingsbury sees this as a special problem for global administrative law. But this is a problem for all of administrative law – indeed, for all of public law. As Jack Goldsmith and Daryl Levinson have argued, legal analysts often distinguish between international law on the one hand and national constitutional law and national public law on the other.<sup>421</sup> National public law is understood as a nonproblematic expression of sovereign will; international law is seen as a problematic exercise in hoped-for compliance. But this conventional understanding simply ignores the deep similarities in both systems. Mesmerized by the routine compliance of public officials with domestic statutes, constitutions, and judicial judgments, observers fail to note that the same enforcement problem that is said to be a dominant characteristic of international law also infects national public law. If those exercising the sovereign power decide not to abide by the law, there is nothing standing outside the state that will force them to do so.

Thus, the question of how administrators bind themselves by their internal administrative law is but a microcosm of the more general question of how the rule of law can, or does, work in any domestic constitutional regime. Americans tend to place their faith in judicial review. But what binds the courts or motivates their attempts to bind others? The question of who guards the guardians is as old as the idea of government according to law.

Yet, that the internal law of administration did work in nineteenth-century America, and does work now, is hardly controversial. Both inside and outside of administration, agency rules, practices, and precedents are taken both to have normative force and to be subject to normative critique concerning whether they instantiate an appropriate vision of lawful administration. How practice comes to have normative force and subject itself to normative critique is a question for another time. A study of administrative law in the Gilded Age, an era before the field of administrative law had a name, simply makes it more obvious that this is a question worth investigating. For in an era in which electoral and judicial controls over administration were even weaker than they

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420. Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 EUR. J. INT’L L. 23 (2009).

421. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

are today, without a robust internal law of administration the rule of law in American public law could hardly be said to have existed.