

The Nineteenth Century Administrative State

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Date : March 17, 2010

- Jerry Mashaw, [Recovering American Administrative Law: Federalist Foundations, 1787-1801](#), 115 **Yale L.J.** 1256 (2006).
- Jerry Mashaw, [Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829](#), 116 **Yale L.J.** 1636 (2007).
- Jerry Mashaw, [Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861](#), 117 **Yale L.J.** 1568 (2008).
- Jerry Mashaw, *Federal Administration and Administrative Law in the Gilded Age, 1861-1901* (forthcoming in **Yale L.J.**).

Eminent historians, political scientists, and legal academics have long told us that the federal administrative state was almost non-existent until the twentieth century. They were wrong. In a series of four articles published in volumes 115 through 118 of the Yale Law Journal, Jerry Mashaw recounted the rich history of the federal administrative state in the nineteenth century.

The many scholars who believed that the federal administrative state did not exist in the nineteenth century were tricked by our tendency to rely primarily on judicial opinions to inform us of legal developments. There are very few court opinions involving judicial review of federal agency actions in the nineteenth century, but that lack of evidence of the administrative state was attributable to a characteristic of the administrative state at the time—federal agency actions rarely were reviewable in a federal court. The only way a citizen could obtain review of most federal agency actions in the nineteenth century was to sue the individual federal employee in a state court on the basis of some common law doctrine like trespass or conversion. The federal employee would defend his actions on the basis that he was performing duties authorized by federal law. A jury would then decide whether the employee was acting pursuant to law or had violated a common law right.

When Mashaw went beyond court opinions and began researching the national archives, he found abundant evidence of a robust federal administrative state in the nineteenth century. Many agencies had the power to issue binding legislative rules and to issue final orders in adjudicatory proceedings in a wide range of contexts. Mashaw's findings include many that will surprise and disconcert members of every modern "school" of administrative law.

In many cases, an agency had a wide range of discretion because it was given authority to implement a broadly worded statute. Agencies were located in many places in government. Some were part of a cabinet agency, but many were free-standing. Some operated under the supervision of the President or of an officer who served at the pleasure of the President, but many seemed to have no connection with either the President or any cabinet officer. They were even more independent of presidential control than the modern "independent" agencies that provoke controversy today.

Agencies also were not subject to any judicial control. With rare exceptions, the legally binding rules and orders they issued were not subject to any form of judicial review. Moreover, agencies were not subject to any mandatory procedures except a statutory requirement that they provide a brief explanation for any rule or order they issued.

Mashaw gives detailed accounts of many of the powerful nineteenth century federal agencies. My personal favorite is the Steamship Safety Commission of 1852. During the 1830s and 1840s, there were many steamship explosions with enormous resulting property damage and loss of lives. Congress responded to this problem by creating the Steamship Safety Commission of 1852. Within three years, the Commission had issued rules and adjudicated licensing disputes that had the effect of reducing the incidence of steamship explosions and the resulting property damage and loss of lives by over 80 per cent! It issued legally binding rules quickly without using a notice and comment procedure and with no judicial review. It also issued and revoked operating licenses quickly with no oral adjudicatory hearing and no involvement of courts. As far as Mashaw could tell, the Commission employed no lawyers. Decisions were made by experts in the design and operation of steam engines.

A few years ago, Mashaw and a co-author, David Harfst, conducted a comprehensive study of a modern agency that Congress assigned a function analogous to that of the Steamship Safety Commission of 1852. The resulting 1990 book, *The Struggle for Auto Safety*, did not paint a pretty picture of the efficacy of the actions of the National Highway Traffic Safety Commission (NHTSA). Mashaw and Harfst identified only one rule that NHTSA had issued that had a significant beneficial effect on highway traffic safety, and NHTSA required twenty-two years to issue that rule.

I recently asked Mashaw whether his research had persuaded him that the many “reforms” we have implemented over the last century have improved the administrative state. He was not willing to hazard an answer to that question. I think it is at least an open question whether the notice and comment rulemaking procedure subject to hard look judicial review that we take for granted today is an improvement over the relatively lawless but highly effective administrative state that thrived during the nineteenth century.

Cite as: Richard Pierce, *The Nineteenth Century Administrative State*, JOTWELL (March 17, 2010) (reviewing Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 **Yale L.J.** 1256 (2006); Jerry Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 **Yale L.J.** 1636 (2007); Jerry Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 **Yale L.J.** 1568 (2008); Jerry Mashaw, *Federal Administration and Administrative Law in the Gilded Age, 1861-1901* (forthcoming in **Yale L.J.**)), <https://adlaw.jotwell.com/the-nineteenth-century-administrative-state/>.