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Introduction

Jerry L. Mashaw's Creative Tension with the Field of Administrative Law

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In the United States, the subject of federal administrative law – the body of law that constitutes, empowers, and constrains federal bureaucratic agencies – is both timeless and timely. Timeless because national bureaucracy is an enduring and probably inevitable presence in this country as in all large wealthy democracies. Timely because, amid the patterns of ideological polarization and divided government that have dominated our era, the flow of congressional legislation is frequently blocked, leaving the bureaucracy as the primary arena for struggle over policymaking.

This volume assembles the latest work on US administrative law by nearly two dozen scholars in the area. The focal point for their contributions is the work of Jerry L. Mashaw, a figure widely admired despite (or perhaps because of) his ambivalent relationship to the field. On the one hand, Mashaw is the consummate insider: a professor at Yale Law School since 1976 and holder of a Sterling chair, the university's highest honor; three-time winner of the ABA Administrative Law Section's award for scholarship; and public member of the Administrative Conference of the United States. On the other hand, Mashaw is an outsider. Throughout his career, he has been trying to persuade scholars of administrative law that their field is misconceived in both its premises and focus. He has pushed boundaries, composed sweeping indictments, built bridges to other disciplines, and illuminated alternative ways of seeing. He has lived in never-ending creative tension with the field he calls home. The contributors to this volume – in their critiques, interrogations, and extensions of Mashaw's provocative work – provide a collective account of administrative law's commitments, possibilities, limitations, and strains as an approach to governance and as an intellectual enterprise.¹

¹ Not that Mashaw's scholarship has been confined to administrative law. He has also published extensively on the substantive law and policy of social welfare benefits. E.g., MICHAEL J.

I AN INTERNAL LAW OF ADMINISTRATION

The dominant concerns of federal administrative law as an academic field, from at least the 1930s through to the present, have been: (a) how Congress delegates power to agencies through statutes; and (b) how federal courts control an agency's actions through lawsuits, usually to ensure conformity with a congressional statute.² The reasons are not far to seek. Congress is the font of democratic legitimacy in the nation's traditional constitutional theory. And courts are the traditional model for legitimate decision-making in the mind of the legal profession, in which most law professors are socialized. The academic field's focus on statutes and lawsuits is consistent with a broader sentiment in the nation's political culture that, in order to subject our government to the rule of law, we cannot trust the agencies themselves and must rely instead on officials external to the bureaucracy – that is, elected lawmakers and life-tenured judges. Thus “administrative law” has been largely synonymous with external constraints – statutory and especially judicial – on agency action.³

To Mashaw, this is a mistake. We are not wrong in our aspiration to subject government to law. But we are wrong to think that exacting statutory commands and judicial review are the means to fulfill that aspiration. Instead we should look to the agencies themselves. An agency, under the right conditions, can self-generate law from within – and do it far better than elected lawmakers or courts can. This is the thesis of Mashaw's *Bureaucratic Justice* (1983), perhaps his most enduring book.⁴ It is a case study of Social Security Disability Insurance (SSDI), the largest system of administrative adjudication in the Western world. Mashaw finds that the Social Security Administration (SSA) self-generates law quite successfully in its administration of SSDI. And he believes that SSA's success reflects much broader possibilities for the generation of law within agencies. Hence the title of *Bureaucratic Justice's* opening

GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE (1999); THEODORE R. MARMOR, JERRY L. MASHAW, & PHILIP L. HARVEY, AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES (1990).

² On the process by which administrative law came to focus on the external constitutional environment of the agency more than on the agency's internal practices, between about the 1910s and 1930s, see G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 94–127 (2000); Kevin M. Stack, *Reclaiming “the Real Subject” of Administrative Law*, Introduction to BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS (Lawbook Exchange 2014) (1903).

³ Since the 1980s, there has been one major exception to the focus on Congress and courts: increased scholarly and pedagogical interest in how agencies are affected by the President (still an external actor). This is discussed in Section II of this Introduction, *infra*.

⁴ JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

chapter: “The Quest for an Internal Administrative Law,” a quest that is not only SSA’s but Mashaw’s own.

What is this “law” that Mashaw insists agencies can produce within themselves? He never explicitly defines law, though his discussion makes fairly clear what he has in mind. He begins with some familiar positivist markers, as when he says that “internal law exists [at SSA] in the sense of norms backed by sanctions” and that “these norms are recognized and acted upon by the relevant officials.” But this is not all that defines law for Mashaw, or, at least, not all that defines law worth having. Mashaw’s concern is “not just whether (on some plausible conception) an internal administrative law exists, but whether that law can make persuasive claims to provide an acceptable system of administrative justice.”⁵ He seeks to “affirm a vision of administration that is subject to the normative evaluation and improvement that is the promise of legal discourse.”⁶ He wants norms not merely that are backed by sanctions and recognized and followed by officials in the positivist sense, but that are “capable of generalization, critique, improvement; even of producing a sense of satisfaction, acceptance, and justice” among the people who are governed,⁷ in other words, a law “that will satisfy our demands for legitimation of the exercise of administrative power.”⁸

To subject our government to law that has these characteristics, Mashaw believes that we cannot rely upon elected legislators or courts. Rather:

The task of improving the quality of administrative justice is one that must be carried forward primarily by administrators. The task is too complex for the nonexpert, too time and resource consuming for outside institutions with competing interests. . . . The twists and turns of political agendas, the episodic and random interests of courts and of outside commentators provide information on social perceptions and expectations and shed some light on the ultimate effects of bureaucratic routines. But the job of evaluating the significance of these external communications and, having thus evaluated them, responding with appropriate action can reside only with the bureaucracy itself.⁹

The only actor capable of subjecting government to law of the kind that meets Mashaw’s standard is the agency. True administrative law must be internal.

But, of course, the agency is a “they,” not an “it.” What does Mashaw mean when he says “the bureaucracy itself” must be relied on to produce law? The content and nature of agency-generated internal law – and the persons within the agency who create it – can vary. In the case of SSA,

⁵ *Id.* at 213. ⁶ *Id.* at 14. ⁷ *Id.* at 15. ⁸ *Id.* at 213. ⁹ *Id.* at 15.

the dominant type of internal law is bureaucratic rationality. SSA managers reduce the disability program's vague and competing goals to rules that are relatively objective, even to the point of being crude, but have the virtue of rendering the decisions of thousands of low-level SSDI examiners more transparent, replicable, consistent, and capable of being evaluated for accuracy and procedural fairness. The main protagonists in this story are the SSA's high-level career managers, who formulate the rules and design the quality assurance systems by which those rules are implemented and evaluated.

Yet bureaucratic rationality is not the only species of internal law, nor are high-level career managers the only agency personnel capable of making internal law. One alternative that Mashaw recognizes is professionalism. At SSA, the professionals that Mashaw has in mind are physicians and vocational counselors who provide opinions to the examiners on the physical ability and employment capacity of people applying for benefits. These doctors and counselors have norms that they recognize and follow (though the norms are client-oriented and contextual, rather than objective and transparent); those norms are susceptible to reform efforts (but more through the agency's choice of which professionals to rely on, and how much, not through box-checking quality assurance review of the professionals' decisions); and the norms may help render decisions acceptable to citizens seeking benefits (perhaps more effectively than faceless bureaucratic rationality can do).¹⁰ In fact, bureaucratic rationality and professionalism coexist in the SSDI program, in uneasy tension. The managers and quality assurance analysts are dominant, which Mashaw thinks is largely sound, while doctors and vocational experts play a more circumscribed role, which Mashaw thinks the managers might expand on a limited, experimental basis.¹¹ What matters, for our purposes, is that an agency's internal law may consist of multiple kinds of norms that exist simultaneously. What they have in common is that they arise within the agency and serve law's purposes: to constrain official action, serve as workable focal points for reform, and foster legitimacy.

Moreover, the agency's self-generation of internal law in all its variety can serve law's purposes better than do Congress or the courts. To be sure, Mashaw countenances *some* role for Congress in creating the law to which the government is subject. Congress's proper role is to define the goals of a program that the administering agency should pursue.¹² But, insists Mashaw, we are mistaken to think that law's purposes will be fulfilled if only we can get

¹⁰ *Id.* at 26–29, 32–33, 35–36. ¹¹ *Id.* at 37–40, 202–09.

¹² Thus, Mashaw's discussion of the varieties of internal law begins with the Social Security Act—the “skeleton” that SSA must “flesh out.” *Id.* at 23–24.

Congress to write *highly specific* statutes to govern the agency.¹³ Presumably Mashaw would also admit that members of Congress have some salutary role to play in their oversight activities. Lawmakers may be prominent among the above-mentioned “outside commentators” who provide the agency with useful “information on social perceptions and expectations and shed some light on the ultimate effects of bureaucratic routines.”¹⁴ But it must be left to the agency to evaluate this information and decide how best to respond to it.

If the positive contribution that Congress can make in subjecting government to law is limited, the positive contribution that courts can make is even smaller, and often offset by the damage they do. In Mashaw's words, “the history of American administrative law is a history of failed ideas. Administrative law's basic technique for formulating and implementing guiding legal norms – lawsuits asserting private rights and challenging the legality of official action – seems to have forced it to oscillate continuously between irrelevance and impertinence.”¹⁵ Courts are irrelevant when they review the individual SSDI decisions on which disappointed applicants happen to sue. Applicants sue in only a tiny and unrepresentative fraction of SSDI cases, and even if they sued more frequently, the suits are so idiosyncratic in their facts and so numerous and scattered across different judges that the judiciary is incapable of providing useful guidance for SSA's mine run of applications. Meanwhile, courts are impertinent when they make orders going beyond an individual decision, for such orders implicate managerial problems “too subtle, too connected with other aspects of the system's operations, to permit sure-handed judicial remedies,” as when a court's injunction to reduce a backlog causes the agency to speed up its decisions in ways that render them cursory and inaccurate.¹⁶

Bureaucratic Justice's total rejection of courts' capacity to foster internal law is a view that Mashaw reached gradually in the years leading up to the book's publication in 1983. When he first began studying social welfare benefit programs in the early 1970s, he immediately recognized that the liberal aspiration to subject these programs to the rule of law needed to rely upon internal law, such as quality assurance programs to encourage consistent, accurate, and transparent decision-making for the bulk of applications. In this respect, the early Mashaw was already at odds with the Supreme Court, which at the time (in *Goldberg v. Kelly*¹⁷) was seeking to promote legality in benefit programs by making the agency's *individual* decision-making process look like a court's

¹³ *Id.* at 181–85. See also Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985).

¹⁴ MASHAW, *supra* note 4, at 15. ¹⁵ *Id.* at 1. ¹⁶ *Id.* at 185–90. ¹⁷ 397 US 254 (1970).

individual decision-making process, despite the fact that most benefit applicants had no lawyers and were ill-positioned to take advantage of court-like procedures. Nonetheless, argued Mashaw in a 1974 article titled “The Management Side of Due Process,” courts could still foster the kind of law that agencies really needed – the internal law of bureaucratic rationality – by issuing broad injunctions telling agencies to adopt quality assurance systems. The idea was not for courts to review individual benefit decisions (or to remake the agency’s individual process in the image of courtroom process), but instead for courts to order the reorganization of benefit-granting agencies into more rational bureaucracies, much as courts were then seeking to do with prisons.¹⁸ By 1980, after leading a research project on SSDI for the American Bar Association’s National Center for Administrative Justice,¹⁹ Mashaw became “less convinced” that this kind of structural litigation was “the most appropriate vehicle for dealing with quality assurance issues,”²⁰ and by the time *Bureaucratic Justice* appeared, he concluded that such litigation was both untenable as a matter of law and undesirable as a matter of practice.²¹

Probably the biggest critique that one can level at *Bureaucratic Justice* is to question whether the success of internal law documented therein is replicable beyond SSA. One might argue that internal law’s flourishing at SSA was the result of an unusually hospitable environment. Mashaw himself seems to admit as much in the book’s final chapter, when he briefly catalogues all the favorable circumstances SSA enjoys: wide acceptance of its program, little politicization, little fear of high-salience disasters, a dedicated group of civil servants with esprit de corps, and no debilitating split in culture among its employees.²²

Mashaw’s most important response to this critique appears in his most recent book, *Creating the Administrative Constitution* (2012), which is a history of the federal bureaucracy, viewed through the lens of law, from the founding through the end of the nineteenth century.²³ One of the main reasons Mashaw opts to study pre-1900 federal administration is that it constitutes a kind of natural experiment to test the viability of internal law in American political culture. Judicial review of agency action, as we know it, came into existence

¹⁸ Jerry L. Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974).

¹⁹ JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM* (1978)

²⁰ Jerry L. Mashaw, *How Much and of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823, 834 (1980).

²¹ MASHAW, *supra* note 4, at 185–90, esp. 187 n. 12. ²² *Id.* at 216–17.

²³ JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

only around 1900.²⁴ Yet as Mashaw finds, federal agency officials prior to 1900 – even without the judiciary looking over their shoulder – tended frequently and almost inexorably to channel their organizations' decisions through procedures that we associate with the rule of law. In many of the federal departments and offices that made the largest number of decisions affecting individuals – including the settlement of accounts with the federal government, claims to western land, applications for veterans' pensions, and prohibitions on using the mail for fraud or obscenity – Mashaw documents a steady accretion of internal law. On an ever-increasing basis, agency managers wrote rules to control the masses of decision-makers; kept records and deployed inspectors to enforce those rules; made sure that the most consequential decisions were made (or at least reviewed) at national headquarters; used informal means (prior to civil service reform) to insulate decision-makers in individual proceedings from patronage politics and from the agency's other personnel; published their rules and eventually their individual decisions; and allowed individuals whose interests were affected by agency decisions to have hearings with notice, access to counsel, and appeals to higher officials.

Mashaw, by his own admission, gives relatively little attention to what *caused* nineteenth-century administrators to adopt all these norms; what matters to him is *that they did so*,²⁵ and did so in many disparate areas without prompting from courts, nor, for that matter, from Congress, which prior to 1887 almost never specified internal agency adjudicatory procedures in statutes.²⁶ “Our administrative constitution,” concludes Mashaw, “has always relied on the internal law of administration for the effective implementation of its governing principles – and for their generation as well. That truth was simply easier to see in a nineteenth-century America where external legal constraints on

²⁴ Up till about the turn of the twentieth century, the opportunity for an aggrieved person to sue a federal agency was largely confined to: (a) seeking a writ of mandamus to compel official action, which was only available if the officer's duty was nondiscretionary; or (b) bringing a common-law tort action (often in state court) against a federal official for damages arising from acts already taken. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946–53 (2011) (reviewing literature). In the tort actions, the federal official could raise, as a defense, the fact that his conduct had been authorized by a federal statute. If the official were held liable, Congress or the agency often indemnified. These tort actions were confined to areas where official action approximated a common-law injury (e.g., seizures of property, as distinct from claims for pensions, patents, use of the mail, etc.), and even in those areas, there is little known evidence of their systemic effect on administrative behavior. By contrast, modern judicial review of agency action (originating in judge-made equity and piecemeal statutes around 1900 and codified in the Administrative Procedure Act of 1946) is far more comprehensive and forward-looking.

²⁵ MASHAW, *supra* note 23, at 16–17. ²⁶ *Id.* at 251.

administration seem, if anything, weaker than they are today.”²⁷ These findings implicitly respond to the criticism of *Bureaucratic Justice* that SSDI is too singular a case study on which to base a theory of law and administration that ranges broadly across government.²⁸

Besides providing wider-ranging evidence for agencies’ tendency to self-generate law internally, *Creating the Administrative Constitution* affords Mashaw an opportunity to elaborate on the concept of internal law at the theoretical level. Two of his points are especially worth noting. First, in answer to the possible objection that self-generation of law by unelected bureaucrats is undemocratic, Mashaw insists that such law is actually a precondition for administrators to have any kind of accountability to elected officials (and, for that matter, to courts). The notion that the government will obey a statutory directive (or a judicial judgment) is premised on the idea that the higher-level officials at whom the statute or judgment is directed can actually shape the behavior of operators on the ground. “The litigant and Congress assume, in effect, that there is an internal law of administration by which higher-level officials instruct subordinates and through which they can call them to account for their actions.”²⁹ Second, in answer to the possible objection that an agency’s web of internal rules and practices is not “really” law in the sense of (say) criminal law or private law, Mashaw responds that such internal rules and practices deserve the moniker “law” at least as much as any other variety of domestic public law, such as constitutional law or external administrative law. *None* of these forms of public law rely upon hard enforcement or sanctions in the sense that criminal law is often thought to rely upon imprisonment, or private law upon the sheriff’s power to seize property. The “lawness” of constitutional law or external administrative law consists in the fact that these bodies of norms are routinely recognized and followed by the relevant legislative, judicial, and executive officials. Routine recognition and obedience among the officialdom likewise characterize an agency’s internal norms. So these, too, are law.³⁰

Part I of this volume assembles five essays engaging with Mashaw’s conceptualization and defense of internal administrative law. In the first, Thomas Merrill (Chapter 1) focuses on what he considers a tension between *Bureaucratic Justice* and another of Mashaw’s books, *Due Process in the Administrative State* (1985), which also focuses on welfare benefits but from the point of view of constitutional jurisprudence. *Due Process in the Administrative State*, says

²⁷ *Id.* at 314.

²⁸ See particularly *id.* at 266–67 (noting that not all persons to whom pre-1900 agencies afforded internal-law protections were politically popular, such as mail users accused of fraud).

²⁹ *Id.* at 7. See also *id.* at 9, 179. ³⁰ *Id.* at 280–82.

Merrill, belongs to a genre of “constitutional scholarship of the 1970s and 1980s” that “has largely passed from the scene” – one that offered interpretations of the constitution (here, of the Due Process Clauses) on the basis of philosophy to the near exclusion of text, history, and structure. Soon after the Supreme Court tried imposing court-like procedures on agencies in *Goldberg*, the justices retreated in *Matthews v. Eldridge* (1976)³¹ to hold that an agency procedure would satisfy due process so long as it passed a vague utilitarian cost–benefit test. *Due Process in the Administrative State* mounts a fierce critique of this utilitarian doctrine, arguing instead that courts should formulate due process in a manner that aims to preserve individual dignity, albeit in a modest way, bound by precedential and analogical reasoning whenever possible. Merrill sees an inconsistency between the anti-utilitarian, pro-dignity argument of *Due Process in the Administrative State*, on the one hand, and *Bureaucratic Justice*'s defense of SSA's essentially utilitarian quest to rationally administer disability benefits, on the other. But Merrill suggests the two may be reconciled partly by recognizing that the correct answer to the question “What process is due?” depends on the identity of the actor responsible for answering it. That is, utilitarianism may well be the highest consideration in how to devise an administrative process, but it is the agency, not the judiciary, that has the information and capacity to decide whether utilitarianism has been properly implemented. When *courts* are called upon to decide whether an agency proceeding provides due process, they should confine themselves to ensuring that the agency has done the requisite minimum for the value (individual dignity) that courts are institutionally suited to vindicate. Ultimately, Merrill enlists Mashaw's findings on the robustness of internal law to argue that the entire *Goldberg–Eldridge* line of cases, which set up judges as evaluators of agencies' benefit-granting processes, is misguided – and that we should be glad it has “fizzled out” since the 1980s.

Charles Sabel and William Simon evaluate *Bureaucratic Justice*'s concept of internal law against the background of changes in welfare policy since the book's publication three decades ago (Chapter 2). Due to changes in the labor market, fiscal pressures, and political ideology, many welfare agencies have shifted away from handing out money to people meeting certain qualifications (the model of SSDI in 1983) and toward providing educational, rehabilitation, and other services to people in need so they can fend for themselves. This new approach is not suited to the kind of highly objective rules and tight hierarchical control that Mashaw documented at SSA in the 1980s, and those arrangements accordingly play less of a role in the world of welfare than they

³¹ 424 US 319 (1976).

once did. Increasingly, agencies seek to provide each benefit applicant with a more individualized package of services aimed at meeting his or her particular needs. This individual tailoring means high-level managers must adopt a flexible approach that encourages initiative and creativity on the part of the low-level bureaucrats who actually work face-to-face with the applicants. This shift toward individualized responsiveness mitigates the tension, noted by Merrill, between the rational management Mashaw praised in *Bureaucratic Justice* and the values of individual applicant dignity and participation that he worried about in *Due Process in the Administrative State*. Sabel and Simon agree with Mashaw that a rational, meliorable, and legitimate approach to social welfare can be achieved only if it is built into the internal structure of the agency. However, Sabel and Simon reject the view of *Bureaucratic Justice* that broad judicial injunctions are ineffective in getting agencies to develop such internal law. Indeed they argue that structural reform litigation has undergone a similar shift to that in welfare administration, from top-down micro-management to the salutary fostering of frontline experimentation. Courts are demanding that agencies figure out how to vindicate a “right to responsible administration,” in effect if not in name. In Sabel and Simon’s view, Mashaw had it right back in the early 1970s, in “his initial conviction that ‘external,’ judicial intervention can be crucial to fostering due process from within.”

If internal law is so important and, in some ways, attractive, why does external law continue to dominate administrative law as an academic field? Possibly this has something to do with the pedagogical approach of American law schools, particularly the focus in most courses on appellate judicial opinions to the near exclusion of other primary materials (the “case method” that originated at Harvard nearly 150 years ago and spread nationwide). Thus, today’s typical student in an administrative law course will learn about agencies *solely* by seeing how appellate courts summarize those agencies’ actions and evaluate their legality – a wholly external perspective in which administrators are never heard to speak for themselves. Peter Strauss’s essay (Chapter 3) traces how, from the early 1900s to the present, the external perspective has dominated administrative law textbooks, with very few exceptions, one being Mashaw’s textbook with Richard Merrill, which, in its first edition of 1975, engaged with legislative and administrative materials unmediated by courts,³² until the authors conformed more to convention in subsequent editions. Strauss further considers whether the recent advent of first-year courses on legislation and regulation (overlapping with, but not identical to, the familiar upper-level

³² JERRY L. MASHAW AND RICHARD A. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS (1975).

courses in administrative law) might provide the opportunity to break free of the case method and shift attention to internal law. Such a shift, Strauss believes, would better prepare students for modern practice, in which they must deal with statutes, agency rules, agency guidance, and agency decisions without the aid of a judicial opinion digesting all these materials. In a survey of the new textbooks that have appeared for use in the new legislation and regulation courses, Strauss finds that most do not fulfill his hope for non-judicially filtered materials. He identifies one prominent exception, however: Lisa Bressman, Edward Rubin, and Kevin Stack's *The Regulatory State*, which Strauss considers the model for a reorientation of administrative law along Mashaw's lines.

Sophia Lee's essay (Chapter 4) discerns and defends agency self-generation of law on constitutional matters. As she and other historians have recently documented, certain agencies, in certain instances, have taken action directly on the basis of the constitution, rather than relying on the statutes delegating power to the agency. Further, administrators taking such action sometimes rely on their own interpretation of the constitution, rather than the courts'. This phenomenon was arguably anticipated by Mashaw, at least indirectly: one might read *Bureaucratic Justice* to mean that federal administrators are legitimate (indeed the best) interpreters and implementers of the Due Process Clause. But Lee and her fellow historians identify constitution-based agency actions springing from other sources, notably the Equal Protection Clause and the First Amendment, and they find such actions often to be in tension with the agencies' enabling acts, which is something Mashaw never found. That said, in an article published long after *Bureaucratic Justice* but before the recent findings of Lee and her colleagues, Mashaw did briefly speculate on whether agency officials should use the so-called "avoidance canon" to bend their enabling acts to accord with their view of the constitution, and he warned against the practice, fearing that if officials did this, they would be unfaithful to their principals in Congress and would effectively preempt the judiciary's opportunity to weigh in.³³ Lee defends agency implementation of the constitution against a variety of critiques, including this one by Mashaw. In her view, the widely accepted principle that *courts* should avoid interpretations of statutes that strike them as constitutionally questionable goes double for agencies, since agencies are better than courts at doing the things that this interpretive principle aims to accomplish, that is, induce Congress to be explicit about constitutionally risky choices and accurately discern the views of

³³ Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 507–08 (2005).

members of Congress on what to do in constitutionally risky territory. Plus, if an agency adopts an erroneous reading of the constitution, the agency's jurisdiction is narrow enough that the damage from the error is confined, whereas if a court adopts a wrong reading, it quickly spreads to all areas of law.

In the final contribution to Part I, Mariano-Florentino Cuéllar (Chapter 5) considers just who makes an agency's internal law and how. In *Bureaucratic Justice*, even as Mashaw praises SSA for its commitment to bureaucratic rationality, he expresses anxiety that the balance may tip too far in that direction. That is, SSA's objective and impersonal decision-making (manifested in remorseless paint-by-number formulas for deciding cases) may perversely become an end in itself, weakening the agency's legitimacy and even the accuracy of its decisions. Mashaw urges moderate reforms to humanize the process: providing applicants with lay representatives and letting them meet face-to-face with decision-makers at an earlier stage of the proceeding.³⁴ This need for some element of personal human judgment in administration is Cuéllar's subject, and he examines it in light of the future opportunities that agencies will have, and the pressure they will feel, to do more of their decision-making through computer programs. Given the direction in which technology is tending, argues Cuéllar, this is not a matter of simply taking the paint-by-number formulas described in *Bureaucratic Justice* and enabling them to crunch more data at higher speed. Something more novel is happening. Computer programs are becoming capable of processing large amounts of data, discerning patterns, and using these to make recommendations that turn out to be efficacious – for example, analyzing millions of financial transactions to identify those with high probability of money laundering – but without any reasoning process that a human is capable of following. These technologies hold great promise for making administration more effective, yet they confront us with difficult questions, including whether these kinds of decisions will be explicable to policymakers and to the public, and how that may affect deliberation. These questions are all the more portentous because, as Cuéllar notes, investments in these technologies, once made, may be self-reinforcing.

II INTERNAL LAW AND THE PRESIDENT

In Mashaw's telling, the goal of subjecting government to law is carried out by administrative officials generating norms on their own. Congress can be effective in setting broad goals and providing information, but statutory specificity is of dubious value. Courts, for their part, are impertinent or irrelevant. But what

³⁴ MASHAW, *supra* note 4, at 198–202.

about the President? One might argue that the President can be integrated into a salutary process for making internal law to a much greater degree than Congress or courts can. Congress is hobbled by the rigid and sticky means of authorizing and appropriations legislation, and when its members act less formally to engage in oversight or jawboning, their sheer number and their organization into separate chambers and rivalrous committees undermine their capacity for anything approaching management. Courts are hobbled by their lack of expertise and by the randomness, narrowness, and informational poverty of lawsuits. By contrast, Presidents – at least when it comes to executive agencies – can hire and fire the agency's top managers and have asserted the power to give those managers orders on a direct, ongoing, flexible basis. In the Office of Management and Budget (OMB), the President enjoys his/her own mini-bureaucracy designed to monitor and coordinate the agencies. If management is the lifeblood of internal law, the President looks more like a manager than any other constitutional actor.

Still, in *Bureaucratic Justice's* story of SSA, the President plays no role. He is not a promoter of internal law: the protagonists are SSA managers, never the White House. But neither is he an obstacle: Mashaw's critical discussion of external actors' failure to develop or encourage the production of law refers only to Congress and the courts.³⁵ The President is simply unmentioned.³⁶ Given SSA's success at developing internal law, it is clear that the President is not necessary to such development. Further, it is clear that the President could never be sufficient – that is, the White House could never develop internal law on its own and simply impose it on the agency. The production of such law is so intermeshed with frontline agency operations – and with the long time horizons that no elected official has – that agency personnel must play a role.³⁷

But if the President is neither necessary nor sufficient for internal law, could he/she be a facilitator? Perhaps a very powerful facilitator? Mashaw's treatment of this question is brief and only suggestive. In *Bureaucratic Justice's* final pages, he confronts the US constitutional system's "troubling lack of a positive symbol of bureaucracy" to inspire the production and improvement of internal law. He tersely dismisses the idea that the President could fill this role: "the President . . . symbolizes not bureaucratic competence, in fact, not bureaucracy at all but its opposite – the charisma of

³⁵ *Id.* at 11, 181–93.

³⁶ The book's only references to the President are in a passing discussion of the Nixon wage and price freeze (*id.* at 9–10) and at the end of the final chapter (*id.* at 225–27), which I discuss immediately below.

³⁷ *Id.* at 15–16.

leadership.”³⁸ Yet, a page later, Mashaw speculates that the problem might be solved by establishing a “superbureau” that would perform crucial functions for all the *other* agencies: “supervise the drafting of administrative legislation, review the competence of agency policy analysis, audit administrative performance in the field, provide binding counsel on managerial technique, and hear in the final instance complaints of maladministration.” Such a superbureau would supersede the current OMB, plus other existing offices. It could, posits Mashaw, become “the aspiration of the *crème de la crème* of the public managerial class,” reorient other agencies “toward an analysis of the internal structure of administration,” and thereby develop “unifying normative ideals” yielding a general internal law superior to anything Congress or courts can give us.³⁹

For today’s students of administrative law, the obvious question is whether the increase in White House efforts to assert power over agencies over the last several decades – most notably the power vested in OMB since 1981 to review agencies’ cost–benefit analysis of their rules – is the fulfillment of Mashaw’s dream. That is, does the presidentialism of the last several administrations, most notably Reagan’s, mitigate or even reverse the prior weakness of constitutional actors in bringing government truly under law?⁴⁰ OMB certainly purports to “review the competence of [at least some] agency policy analysis,” and it provides plenty of “counsel on managerial technique,” though often not practically binding. That said, today’s OMB is hardly identical to what Mashaw imagines at the end of *Bureaucratic Justice*. His “superbureau” sounds more like a technocratic and apolitical Conseil d’État than the highly politicized presidential henchman that is OMB. But, yet again, Mashaw has suggested elsewhere that electorally motivated presidential pressure on agencies is a good means of vesting their actions with democratic legitimacy, surely better than pressing Congress to write more specific statutes.⁴¹

Questions about the presidential role in fostering internal law also loom over *Creating the Administrative Constitution*. Here again, Mashaw makes clear that when agencies produce internal law, they often do so without presidential help. Nearly all the case studies in the book center on agency managers, with the President (a weak officer for most of the nineteenth century) offstage.

³⁸ *Id.* at 225. ³⁹ *Id.* at 226–27.

⁴⁰ Mashaw makes a fleeting, though positive allusion to this then-nascent presidentialism on the book’s final page: “there is some evidence that the executive branch is tending in the direction of integrated, if not unified, oversight and toward hierarchical coordination, if not control. For the president to take seriously the constitutional command to ‘see that the laws are faithfully executed’ virtually demands such a movement.” *Id.* at 227.

⁴¹ Mashaw, *supra* note 13.

Further, the book notes that the outpouring of legal scholarship over the last generation on OMB review of rulemaking is not sufficient to redress the imbalance that Mashaw thinks plagues the field: more is needed on what happens inside the agencies.⁴² Yet if the book's case studies of internal law are mostly nonpresidential, there is one striking exception: the remarkable embargo of 1807–09, in which Congress sought to leverage American economic power against the European empires by cutting off international trade with them, by way of a scheme giving sweeping powers to the President. There Thomas Jefferson, often working hand in glove with Treasury Secretary Albert Gallatin, played a major role in holding field officers accountable for the exercise of the extraordinary power over international trade with which the embargo vested them.⁴³ For the President to foster internal law in this era was unusual, but apparently possible.

The President's capacity to help produce internal law is discussed in the three essays comprising Part II of this volume. The first, by Gillian Metzger and Kevin Stack (Chapter 6), concerns the latitude that external law generally allows (or doesn't allow) for agencies to make law within themselves. For seventy years now, the greatest source of external law has been the Administrative Procedure Act of 1946 (APA), a congressional statute empowering courts to hear lawsuits to review agency action. Metzger and Stack examine the Roosevelt Administration studies leading up to the APA (the Brownlow Committee report of 1937 and the Attorney General's Committee report of 1941), plus the legislative history of the APA itself, and they conclude that the APA's enactors recognized the importance and vitality of agencies' internal law and intended to leave space for that law to flourish. Since 1946, however, courts have departed from that intent and discouraged agencies from producing internal law by construing the APA to require that any guidance agency managers give their subordinates cannot be clear or binding, lest it trigger the Act's onerous procedural requirements. But if courts have perversely undermined agencies' production of internal law, Presidents have done better: the Brownlow studies explained how the President could encourage agencies to make their rulemaking processes more regular and transparent; since 1981 OMB has reviewed agency rules in ways that have pushed agencies to engage in more robust, rational, and routinized policy analysis; and since 2007 OMB has officially announced that there are good reasons for managers to issue guidance, and it has provided relatively streamlined procedures for them to do so. To Metzger and Stack, the President does valuable work in fostering governmental legality. Though the White House's internal law is more centralized and has "a more obviously

⁴² MASHAW, *supra* note 23, at 10. ⁴³ *Id.* at 98–99, 115–18, 141.

political complexion” than agency-specific internal law of the kind Mashaw discovered at SSA, it also may have a firmer constitutional foundation, in the President’s duty to “take care” that the laws are faithfully executed.

Peter Shane’s essay (Chapter 7) is more skeptical that the President can further the goal of inducing agencies to self-generate law. Shane situates this question within the broader debate on the “unitary executive” – that is, on whether the President’s power to fire top agency officials is absolute or can be constrained by statute, and also whether statutes delegating power to agency managers should be understood to let the President give orders to those managers. The essay proceeds on two avenues. First, Shane argues that the unitary vision is inconsistent with the original public meaning of Article II of the constitution, drawing upon new primary evidence about the use of the word “executive” in state constitutions from the early republic. Second, Shane sets forth a functional argument against the unitary theory. Suggesting that internal law can and does flourish across many agencies today, Shane posits that absolute presidential power to fire and direct agency managers will likely undermine, rather than foster, those managers’ generation of such law. For agencies to self-generate law that serves the purposes outlined by Mashaw (particularly the legitimation of agency action), it is best for them to act in a spirit of experimentation, attuned to the peculiar mission and peculiar choices that characterize their one agency. When norms are truly generated within the agency, the operatives who carry out the program are more likely to take ownership of those norms – an important step for winning legitimacy for agency action among the governed – than if the norms originated from the White House, which inevitably stands at a remove and has a strong interest in political accountability that may not mesh with the agency’s mission.

In Richard Revesz’s essay (Chapter 8), we observe how presidential power interacts with agencies’ internal practices in the important context of cost-benefit analysis (CBA) of rulemaking. Despite the unitary executive theory, the practice has been that Congress, for some agencies, limits the President’s power to fire the agency’s top managers. Agencies with such limitations are “independent,” those without are “executive.” When it comes to independent agencies, the White House has been extremely reticent to try to give orders to the agency heads (more due to political fears than perceived legal constraints). Most notably, OMB’s practice since 1981 of ensuring that agencies employ CBA to vet major rules covers only executive agencies. The result, Revesz finds, is that CBA of rulemaking has become robust and routine at executive agencies, while independent agencies’ capacity for such analysis is weak. One may arguably view CBA of rules, as institutionalized within executive agencies, as a species of internal law: to use Mashaw’s markers, CBA constrains agency

decision-makers, provides a focal point for normative argumentation, and (for some audiences, though not others) lends legitimacy to the rules. If one accepts this characterization, then the stark difference that Revesz identifies in CBA's institutionalization between executive and independent agencies may be evidence that White House efforts can be decisive in fostering forms of internal law that agencies would not pursue if left to themselves. In any event, Revesz warns us that the independent agencies' weakness at CBA is ominous because many of those agencies are in the financial arena, where recent statutes and court decisions are demanding more cost-benefit thinking. Revesz argues that we can build up the analytic apparatus that these agencies need through a combination of OMB review, internally acquired capacity, and coordination via the new interagency Financial Stability Oversight Council.

III ADJUDICATION AND DIVERGENT MODELS OF JUSTICE

Mashaw's depiction of adjudication at SSA recognizes different varieties of internal law that may govern that activity. Bureaucratic rationality is the dominant form, embodied in SSA's rule-writing managers and quality assurance analysts, but another form is professionalism, characterized by case-specific, client-oriented judgments and embodied in the physicians and vocational counselors who advise on SSDI applications. Mashaw also notes a third model of adjudication on which SSA sometimes relies – what he calls the model of moral judgment. This is the approach to adjudication followed by courts. Archetypally, it calls for an independent, neutral, and passive judge to decide which party to a dispute is more worthy under a relatively vague standard that entails value judgments about desert and culpability (e.g., negligence, reasonableness, etc.).⁴⁴ Moral judgment differs widely from bureaucratic rationality, in which the decision-maker is under top-down management (not independent) and must follow objective rules that seek to squeeze any value judgment out of the decision. The moral judgment model plays a role at SSA at two levels, both mandated by the Social Security Act. First, applicants who are denied benefits by the bureaucratically controlled examiners may appeal to officers within SSA known as administrative law judges (ALJs), who enjoy judge-like tenure and follow court-like processes. Second, applicants who lose before the ALJs may seek review in an actual federal court. As already noted, Mashaw thinks court review does little to nothing to promote the values of legality in SSA adjudication, and his view of ALJ proceedings is similarly negative. Both ALJs and federal judges are too decentralized, too ad hoc in their

⁴⁴ MASHAW, *supra* note 4, at 29–31.

decision-making, and too removed from agency management to set workable or legitimate norms controlling the mine run of agency decisions.

A long-standing goal of the SSA leadership has been to keep the agency's quasi-judges, the ALJs, from overwhelming the impersonal consistency that otherwise largely characterizes SSDI adjudication. The rates at which ALJs grant benefits have long been alarmingly various in ways that cannot be explained by variation in ALJs' respective caseloads; the implication is that an applicant's chances depend, more than they should, on whether he/she happens to get an indulgent or a stingy ALJ. Paul Verkuil's essay (Chapter 9) discusses the long-standing efforts of SSA managers and their allies outside the agency to stamp out this arbitrary tendency in the system. He looks back particularly on a study that he and Mashaw conducted with co-authors in the mid-1970s, under the auspices of the ABA's Center for Administrative Justice, from which only a few of the recommendations for monitoring and controlling ALJs were implemented, allowing the variation among ALJs to continue. More recently, explains Verkuil, a fortuitous confluence of circumstances gave him a second crack at the problem: official Washington's deficit-induced anxiety about SSDI's dramatic growth; new SSA disclosures of ALJs' grant rates in 2010; and Congress's decision that same year to resurrect the Administrative Conference of the United States. As the first Chair of the revived Conference, Verkuil commissioned a study of ALJ proceedings, published in 2013, that echoed many of the findings and recommendations of his earlier report with Mashaw. SSA is now working to implement several of these, such as targeting review of an ALJ's decisions based on how well that ALJ conforms to SSA policy.

While Verkuil zeroes in on an actual struggle about which of two particular models of mass adjudication (bureaucratic rationality or moral judgment) should prevail in a particular program, Robert Kagan (Chapter 10) pulls the camera back to offer a more comprehensive assessment of the different approaches that an agency can adopt when its mission is to resolve individual matters by the thousands. Kagan's essay sets forth a typology for how agencies can structure their adjudicatory processes, with attention to: (a) how much the process is controlled top-down by officials or instead can be influenced from outside by the parties; and (b) whether the decisions are subject to loose directives leaving space for judgment or instead to rigid rules. But Kagan recognizes that these structural matters are not the whole story. Even when there are relatively clear rules, there will inevitably be situations in which the clarity runs out, or in which the rule's literal application clashes with the agency's more general mission. How an official reacts to these hard cases depends on the agency's culture. Kagan devises a second typology to capture the different

possible cultures. Depending on the agency, one may find a culture that cares about rules more than mission (legalistic), mission more than rules (discretionary judgment), or one that cares deeply about both mission and rules (thus prizing creativity and nimbleness in reinterpreting the rules or manufacturing official exceptions), or one that lacks any commitment to rules or mission or any inkling of creativity to reconcile the two (resulting in Kafka-esque delay to avoid facing the rule/mission conflict). In exploring these typologies, Kagan is less engaged than Mashaw or Verkuil in the normative arguments for or against a particular approach to mass adjudication, but more focused on the sociological question of what causes an agency to adopt one approach (or mix of approaches) versus another. The causal factor that most interests him is mistrust of officials by their political principals, which leads the principals to saddle the bureaucrats with tighter rules and to confer more power on outside parties to control the process, often via court-like processes such as ALJ proceedings or judicial review.

In David Zaring's essay (Chapter 11), we confront the divergence of adjudicatory models from a different angle. The Securities and Exchange Commission (SEC) has long used federal district courts as the venue in which to pursue persons accused of high-profile securities violations. But recently, in a move that has sparked fiery controversy, the SEC has shifted to its own in-house tribunals (presided over by ALJs) as the venue for deciding these accusations. In contrast to the Mashaw–Verkuil complaint about SSA that its ALJs are too independent of management for their work to be rational, the corporate bar has stirred up the national media by arguing that the SEC's ALJs are *not independent enough* of the SEC leadership to resolve disputes in a neutral manner. This is essentially a debate on how far to depart from a pure judicial (moral judgment) model of adjudication. (To be sure, ALJs are more judge-like than just about any other agency officers, but independence is a relative matter; they are less independent than federal judges.) The SEC controversy underscores the variety of adjudication in another way, as well. This is not *mass* adjudication: SEC ALJ proceedings per year number in the hundreds (compared to the hundreds of thousands at SSA). This comparatively small number makes it possible for the SEC leadership to use case-by-case appellate review as a means of policymaking – something SSA could never do. Zaring evaluates the corporate bar's warnings about SEC ALJs' independence and neutrality with a quantitative study of SEC enforcement actions both in-house and in federal court, comparing the agency win rates and the length and thoroughness of opinions across the two venues. He finds little to support the bar's alarm. Ultimately, he suggests that the bar's peculiar devotion to federal court stems less from a divergence in systemic behavior between ALJs and federal

judges across regular cases and more from the fact that federal judges will occasionally launch sweeping and public attacks on SEC enforcement practices – a special kind of disruptive behavior that alters the dialogue between industry and regulator (and something ALJs will never engage in).

IV THE AGENCY AND ITS EXTERNAL ENVIRONMENT

Bureaucratic Justice and *Creating the Administrative Constitution* show it is possible for agencies to generate law internally and to achieve programmatic success more broadly. But this does not necessarily mean they will do so. The success of SSA in *Bureaucratic Justice* was helped by a hospitable external environment, and while *Creating the Administrative Constitution* shows that the causes of agency success are hardly unique to SSA, it is quite possible that an agency's external environment may be so inhospitable as to preclude the production of internal law or other unique goods that agencies might otherwise provide. Mashaw's critique of external law is not simply that it distracts scholars from the importance of internal law; a more serious problem than the misallocation of scholarly attention is the real-world fact that external actors can seriously compromise an agency's internal capacity to carry out its statutory mission.

This is confirmed by Mashaw and his co-author David Harfst in *The Struggle for Auto Safety* (1990), a case study of the National Highway Traffic Safety Administration (NHTSA). Established by the Traffic and Motor Vehicle Safety Act of 1966, NHTSA's mission is to make driving safer through changes in car design, particularly to make crashes less likely and, when they do occur, less likely to cause death or injury. Initially, the agency pursued this goal through technology-forcing rules, that is, the agency set standards for a car's performance on a crash test, and the automakers had to devise the technology necessary to meet them. But by the mid-1970s, argue Mashaw and Harfst, NHTSA almost completely abandoned technology-forcing regulation and shifted toward the strategy it mainly relies on to this day: identifying defects in auto design and ordering or pressing automakers to recall defective vehicles and fix them for free. To Mashaw and Harfst, the shift from technology-forcing rules to recalls is a serious deviation from NHTSA's core mission. The former strategy, they contend, has enormous life-saving potential, while the latter has none that is proven.

Mashaw and Harfst attribute this transformation to NHTSA's external environment. However, the external actors most responsible are not the automakers; this is not a familiar public choice story of industry capture. If it were, recalls would be hard to explain, since recalls do burden industry;

and besides there are powerful interest groups in favor of life-saving regulation (insurance companies) and not much of a revolving door between agency and industry.⁴⁵ The external cause of the change, argue Mashaw and Harfst, is something more subtle: the “legal culture,” instantiated most of all in courts and Congress. (Presidents initially had little influence, and party ideology little role: the shift was as evident under Carter as under Nixon and Ford.⁴⁶)

How did the legal culture hobble NHTSA? To answer this, we must appreciate the novelty of NHTSA's mission. Prior to 1966, agency rulemaking to cover private conduct had been a relatively marginal phenomenon in American government. The agency actions that courts were accustomed to review were adjudications, which looked a good deal like lower-court proceedings. The Safety Act broke new ground by calling for an extraordinary amount of agency rulemaking that would affect private firms. Congress sought to legitimate this unusual approach by providing that courts would review NHTSA's rules before they were ever applied. Reviewing rules in the abstract was something quite new for judges. It was nothing like reviewing lower-court proceedings or agency adjudications. The courts, even as they proclaimed that NHTSA could lawfully make rules that necessitated technological innovation, ended up demanding of NHTSA a superrational process for formulating rules. The agency had to answer every material industry objection, achieve perfect replicability in crash tests, and demonstrate real world feasibility. These demands were unrealistic for technology-forcing regulation, which by its nature involves uncertainty, engineering judgment, learning-by-doing, and value choices. By contrast, when reviewing NHTSA's recalls, judges were much friendlier, for recalls were in the judicial comfort zone: they shared many conceptual features with product-liability litigation, with its deference to existing industry standards.

For its part, Congress – in its post-1966 amendments and its oversight activity – proved hyperresponsive to an American public whose support of safety regulation was widespread but thin. When citizens became outraged over annoying new safety features, Congress slapped down NHTSA in spectacular ways. But recalls were a hit with voters and with Congress; they looked like free warranty extensions.

Battered by lawsuits and lawmakers, NHTSA changed internally. The agency's safety engineers, initially dominant, lost authority to the agency's

⁴⁵ JERRY L. MASHAW AND DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY 202–04* (1990).

⁴⁶ *Id.* at 14. Reagan was a different matter, but his administration's policies largely reinforced internal practices that were already in place.

lawyers and economists, who could promise to fend off future trouble from the outside, that is, from courts and OMB cost–benefit analysts.

In *The Struggle for Auto Safety*, Mashaw and Harfst do not speak in terms of “internal law,” but they do make a broader argument about how courts and Congress (the sources of “external law” in *Bureaucratic Justice*) can profoundly alter the internal operations and culture of an agency, to the point of disabling it from carrying out the mission of its enabling act. *The Struggle for Auto Safety* served as a major example in Thomas McGarity’s famous 1992 article announcing and lamenting that agency rulemaking was “ossified” – that is, the process cost of rulemaking had risen so high, due in large part to overly intrusive judicial review, as to prevent agencies from using rulemaking at an optimal level.⁴⁷ Ever since, the book has been probably the leading citation for the several scholars who embrace McGarity’s view, which has become known as the “ossification thesis.”

While influential, *The Struggle for Auto Safety* has been subject to at least two major critiques. First, one may agree that NHTSA shifted from technology-forcing rulemaking to recalls but question whether the shift should be attributed to the legal culture (and especially to judicial review, which is the usual target of scholars invoking Mashaw and Harfst). After all, Mashaw and Harfst’s definition of “legal culture” is broad, encompassing not only judicial review but also congressional amendments and oversight. An alternative interpretation of NHTSA’s history is to say that: (a) its shift away from rulemaking was caused ultimately by congressional rather than judicial pressure; and (b) such congressional pressure is best understood as a decline in *mass political* support for auto safety regulation, not as something distinctly *legal*.⁴⁸

The second critique questions whether NHTSA actually experienced such a profound and permanent shift away from rulemaking at all. If one looks to aggregate statistical metrics, it turns out that NHTSA has continued to issue a substantial number of rules, and reports from the agency and OMB cite costs and benefits from recently promulgated NHTSA rules in the many billions of

⁴⁷ Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992). McGarity draws the term “ossification” from an unpublished 1990 talk by E. Donald Elliott. *Id.* at 1386 n.4. In addition to judicial review, McGarity also attributes rulemaking ossification to OMB review and to certain congressional choices about agency structure and process.

⁴⁸ Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO STATE L.J. 251, 315–20 (2009). Cary Coglianese’s work, discussed immediately below, likewise argues that congressional attacks on the agency in 1974, prompted by shifts in public opinion, were the most immediate cause of the rulemaking decline that occurred at that time. Coglianese also argues that the decline of rulemaking was partly caused by budgetary factors and by the agency’s reaching a later point in its “regulatory life cycle.”

dollars. Moreover, the agency, which is now seldom sued, has a respectable win-loss record in court.⁴⁹

Mashaw and Harfst have not directly engaged the first critique,⁵⁰ but they have engaged the second, in a new paper analyzing NHTSA's behavior from 1990 to the present.⁵¹ In his Conclusion to this volume, Mashaw summarizes some of the findings of that work. While acknowledging that NHTSA has been making rules in substantial numbers, Mashaw and Harfst contend that the agency has continued to refrain from *technology-forcing* rules – that is, rules that actually cause automakers to devise and adopt safety features that they otherwise would not have. There is now market demand for safety, much more so than in 1966, and automakers are therefore constantly making *some* improvements, though not as many as they could if pressed by more stringent performance standards. Costs and benefits attributed to NHTSA rules in official reports, argue Mashaw and Harfst, largely pertain to rules adopted before the mid-1970s or to rules mandating technologies that were already available in the majority of new cars at the time of promulgation, and that likely would have spread to all cars even without rulemaking, due to tort law's reliance on industry standards. The argument, in other words, is that NHTSA's post-1990 rules have largely required automakers to do what they were already doing. In Mashaw's view, counting rules does not describe the

⁴⁹ *Justice Denied: Rules Delayed on Auto Safety and Mental Health: Hearing Before the Subcomm. on Oversight, Fed. Rights, & Agency Action of the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Cary Coglianese, Edward B. Shills Professor of Law, Director, Penn Program on Regulation, University of Pennsylvania), available at <http://publicpolicy.wharton.upenn.edu/live/files/203-committee-on-the-judiciary>.

⁵⁰ They might argue that the critique overreads the book's causal claim about judicial review and the shift from rules to recalls. In the book, they write:

If the redeployment of personnel from rulemaking to enforcement, the restructuring of lines of authority in favor of the recall effort, and increased procedural complexity that emphasized the cautionary propensity of lawyers and economists were the hallmarks of internal development at NHTSA in the 1970s, those developments were also undeniably shaped by other factors, in addition to the external legal culture. Public demand for recalls provided the moving force for the recall effort. Professional biases, bureaucratic ambitions, fiscal constraints, personality conflicts, and simple chance were also at work in shaping the agency's structure, processes, and behavior.

Yet we are struck by the degree to which the legitimation or delegitimation of NHTSA's efforts by the judiciary channeled the currents and cross-currents set up by other influences into the stream of ideas, arguments, and, ultimately, internal processes and personnel decisions that shifted NHTSA away from the vision of [the Safety Act of] 1966.

MASHAW & HARFST, *supra* note 45, at 200.

⁵¹ Jerry L. Mashaw and David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 *Yale J. on Reg.* (forthcoming 2017).

agency's regulatory posture, and its litigation record can only be evaluated by assessing whether the agency engaged in the kind of rulemaking about which we would expect industry to sue.

Robert Rabin's contribution to this volume (Chapter 12) broadly evaluates the current state of auto safety, placing NHTSA car design rules in a broader context and offering a mixed assessment of Mashaw and Harfst. The overriding fact is that US auto injury and death rates have declined dramatically since the 1960s. But, consistent with Mashaw and Harfst, Rabin does not think this necessarily indicates that NHTSA has been a success. The decline can be attributed to many potential causes whose effects are difficult to isolate. Some of these are distinct from car design, such as increased seatbelt use and reduced drunk driving due to state law enforcement and new social norms, as well as improvements in road and traffic design and road maintenance. Others possible causes affect car design separately from NHTSA, such as tort litigation (though Rabin thinks tort is at best a supplement to agency regulation). As for NHTSA itself, Rabin remains convinced by Mashaw and Harfst's view that the agency has fallen far short of its potential in technology-forcing rulemaking; to bolster this, he notes that US progress on auto deaths lags behind that of other rich countries. But he disagrees with Mashaw and Harfst's view of recalls as inherently worthless. Though not a substitute for technology-forcing rules, recalls have an essential role to play because the nature of auto safety is that information about certain important issues is unknowable *ex ante* and arises only in the course of the vehicles' use. That said, Rabin contends that recalls as currently administered are woefully inadequate. NHTSA fails to extract necessary information from industry and lacks the statistical expertise to judge the information it has. Rabin lays the blame mainly on external factors, particularly Congress's underfunding and spotty oversight.

The next essay, by Richard Pierce (Chapter 13), pulls the camera back from the realm of auto safety to consider the state of agency rulemaking across government. Long a major voice in the literature criticizing judicial review for ossifying agency rulemaking, Pierce here offers a synthesis and extension of that critique. He begins by pairing Mashaw and Harfst's case study of NHTSA with another of Mashaw's case studies, this one from *Creating the Administrative Constitution*, of the Board of Supervising Inspectors that regulated steamboat safety in the mid-1800s. In Mashaw's tellings, NHTSA failed at its mission while the steamboat board succeeded. Pierce argues that the difference can be attributed in large part to the fact that NHTSA's rules were subject to judicial review and those of the steamboat board were not. He

emphasizes that the idea of subjecting agency rulemaking to review by generalist courts is emphatically unnecessary to modernity (the European Union has no equivalent of judicial review for rulemaking) and was avoidable and late in coming even in the United States (judicial review of US agency rules did not become practically common until the Supreme Court unnecessarily decided in 1967 that regulated businesses could sue to review a rule without having to violate it first). Hence a great increase in rulemaking process costs, and consequent reluctance by agencies to make rules, since the 1970s. The result is not merely that agencies fail to create new rules when they should (as with NHTSA). It is also that agencies fail to update existing rules even when they become outdated, and agencies become so preoccupied with surviving judicial review that they convert the process for hearing stakeholder comments on proposed rules into an exercise in attack-and-defense, meaning that actual decision-making is pushed into an earlier stage of the process, prior to the official receipt of stakeholder comments – a stage at which the set of stakeholders with access to the agency is more exclusive and biased toward highly concentrated and motivated interests (mainly industry). Pierce concludes that these pathologies could be largely redressed if the Supreme Court would overturn the decisions of the 1960s-70s that established the present, intrusive style of judicial review.

V REMAPPING THE ADMINISTRATIVE STATE'S DEVELOPMENT

Mashaw's history of federal administration in 1789–1900 in *Creating the Administrative Constitution* has several purposes. One purpose, as noted in Section I of this Introduction, is to use the nineteenth century as a natural experiment for gauging the capacity of agencies to self-generate law when relatively untouched by judicial review or congressionally mandated procedures. Another purpose, to be discussed now, is to show that Congress's penchant for delegating discretionary power to administrators has existed from the founding of the republic through to the present. That is, Mashaw aims to refute the casual assumption in administrative law discourse, propagated by Theodore Lowi and others,⁵² that federal legislation before the late nineteenth century was generally self-executing. In marshaling evidence against this assumption, *Creating the Administrative Constitution* provides ammunition for the pro-delegation side in any future debate on the original meaning of the constitution,⁵³ but it

⁵² Cited in MASHAW, *supra* note 23, at 4.

⁵³ Cf. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

also contributes to a broader literature – located mainly in political science and history departments rather than law schools – revising the once-common view that nineteenth-century America was “stateless,” a “weak state,” “laissez-faire,” or the like.⁵⁴

The effect of this revisionist literature, Mashaw’s work included, has been to refute the notion that the American state went from being absent in the nineteenth century to being present in the twentieth. But if the narrative of radical discontinuity (absence to presence) is wrong, what is the right narrative? What aspects of governance were continuous? What changed? These have been important questions in the revisionist literature, and they are the focus of the essays in Part V of this volume.

Daniel Carpenter (Chapter 14) identifies evolutionary continuities between the early republic and the present when it comes to one major institution: the administrative petition. “Administrative petition” can designate a formal submission from a stakeholder to an agency for which a specific procedural channel is created by the agency’s enabling legislation. But Carpenter defines the term more broadly to encompass a wide range of means by which stakeholders entreat and lobby agency officials. These avenues of influence are numerous and pervasive today, but, as Carpenter shows, they were also common and important in the early republic, confirming that officials at that time wielded substantial discretion whose exercise stakeholders sought to influence. Nor was this discretion confined to the allocation of small-time government favors like pensions or homesteads; it could also encompass decisions of general policy. Congressional delegation of general policymaking was perhaps broadest in the field of Indian affairs, where power was vested in the President, the War Department (later the Interior Department), and the Department’s Bureau of Indian Affairs. Despite being officially excluded from the US political nation and thus from voting and elections, Native Americans forced their way into US policymaking in substantial part through the means of petitions to these agencies and their officials. Indeed, Native Americans were preeminent among the numerous petitioners entreating agency officials in the early United States. Though it is difficult to measure the efficacy of such petitioning in the aggregate, it did have documented effects on some agency policy choices, and it further served as a means for Native Americans to coordinate with each other (and with white allies) politically. Native American petitioning

⁵⁴ For reviews of the revisionists, see, e.g., Desmond King & Robert C. Lieberman, *Ironies of State Building: A Comparative Perspective on the American State*, 61 *WORLD POLITICS* 547 (2009); William J. Novak, *The Myth of the “Weak” American State*, 113 *AM. HIST. REV.* 752 (2008).

presaged certain patterns that would characterize lobbying of agencies in later periods through the present, including the use of legal argumentation and the strategy of simultaneously lobbying agencies and legislators. And while it has long been known that petitioning served as a major avenue for women's participation in politics prior to women's suffrage (most famously in the anti-slavery movement), it appears that Native American petitions were the first to involve women's participation in large numbers on general policy questions, anticipating antislavery.

The next two essays shift from the history of administrative practice to the history of jurisprudential thinking on what kind of regulatory state is legitimate and constitutional. William Novak's contribution (Chapter 15) traces the evolution of the legal and intellectual discourse that American jurists employed to justify government regulation of the market. Rejecting the old stereotype of a shift from a stateless or laissez-faire nineteenth century to a regulated twentieth century, he finds instead that American legal discourse shifted from one set of justifications for regulation to another. For much of the nineteenth century (and indeed earlier), there were three main bodies of law in play. First was the common law of public callings, which obligated those who labored in certain occupations to provide quality service to all comers at a uniform and reasonable price; these doctrines governed ferries, wharves, inns, mills, and many other businesses. Second was the legislature's general police power, which at first might have been understood as a means to codify rules of quality, price, etc., for the expanding universe of callings designated public, and also to protect certain values like public health. Third was the legislative practice of creating business corporations through private acts, each embodying a bargain whereby the investors in a bridge, turnpike, canal, railroad, or other enterprise received the privilege to pool their capital (and often other privileges like monopoly rights or eminent domain) in exchange for agreeing to abide by the legislature's prescription of public obligations affecting prices, quality and availability of service, health, and safety. From these three antecedents, argues Novak, emerged a unified notion, circa 1900, that a whole industry could fall within the category of "public utility" and thus be legitimately subject to regulation by general, prospective legislation. Once conceived, the category of "public utility" was continually expanded to cover more industries. Public utility theory, Novak finds, did even more to legitimate regulation than did anti-monopolism (which is more familiar in the historiography).

Whereas Novak interprets the transition from nineteenth- to twentieth-century regulation as more evolution than revolution, Edward Rubin (Chapter 16) focuses on one aspect of the history that might suggest a more radical discontinuity: the heightened incidence in the period circa 1880–1937

of courts striking down economic-regulatory statutes as unconstitutional. The currently dominant view in the literature is that these constitutional rulings reflect a collision between: (a) a new kind of progressive legislation reflecting the explosion in industrial class conflict; and (b) a long-standing American jurisprudence, dating to well before 1880, that condemned legislation favoring one “class” over another. Rubin does not find the “class legislation” thesis satisfying; he argues that it attributes too much intellectual coherence to the constitutional rulings, which begged the question of whether the common-law baseline from which progressive legislation departed did itself favor the property-owning class. To be sure, Rubin does not think that the judges of the period were being intellectually dishonest or consciously acting on bias favoring their own class. Rather he views their decisions as an improvisational and somewhat flailing response to the fact that, even as new progressive legislation challenged the common-law property rights that American business owners were historically accustomed to exercise, the US Constitution had in fact *never* contained any direct, general protection for property rights. Given the historic importance of property in Anglo-American political theory and economic life, judges facing new progressive statutes thought there *must* be some protection for property in the constitution, and they adopted stretched readings of the Due Process Clauses and the commerce clause in a jury-rigged attempt to locate the property protection they thought *must* be there, in an ultimately failed campaign. That the framers of the US Constitution did not think to include any direct and general protection for property in the document, argues Rubin, stems from the peculiar and almost incidental origin of property in English law, as the residuum of rights left over after the feudal fief was divested of its public-governmental aspect, and also from the fact that the English Revolution of 1689 and the American Revolution of 1776 mainly concerned the relative legitimacy and power of rival governing institutions (Crown, Parliament, colonial assemblies), not the power of a legitimate governing institution vis-à-vis private persons.

VI “THE AGENCY” AS MORE THAN A BLACK BOX

As noted, administrative law as an academic discipline tends to focus on how external institutions (especially courts) act on the agency. As a corollary, it tends to reify “the agency” as a single, unified, federal entity whose internal operations are hidden in the proverbial black box. This tendency to reify the agency is problematic even when the delegated congressional power is vested in a formally unitary federal agency, since such an agency inevitably has its own internal politics, as Mashaw’s rendering of NHTSA (safety engineers

versus lawyers) confirms. But the tendency is even more problematic when, as is often the case, the delegated congressional power is not vested exclusively in a formally unitary federal agency, but instead involves subdelegations to state government agencies, local government agencies, private contractors, private standard-setting bodies, or outside advisory boards, to say nothing of multinational organizations. This variety in implementational agents is only growing in importance, as evidenced by the continued robustness of cooperative federalism and the increasing role of private actors and multinational governance.

Mashaw is no stranger to this phenomenon, given his work on SSDI. The low-level examiners who make all SSDI decisions in the first instance are not employees of SSA; they instead work for state disability determination services (DDSs) that operate under contract with SSA. Thus, while Mashaw regards bureaucratic rationality as the dominant and largely necessary mode of justice in SSDI, SSA's managers enjoy only a subset of the powers that Weberian bureaucratic superiors typically wield over their subordinates. SSA managers can and do make detailed rules for DDS examiners and subject them to quality assurance review (in this sense treating the DDS personnel as if they were direct SSA employees) but do not have the power to hire, train, promote, or fire them. This shortfall in managerial power permits variation among states in the examiners' average grant rates, apparently due to variation in DDS cultures, despite the uniformity of the rules and review systems. Nor is this the only way that SSDI's implementation is fragmented; others include the examiners' and ALJs' reliance on opinions from private medical professionals who contract to examine the applicant or evaluate evidence.

In "Accountability and Institutional Design" (2006), Mashaw provides a taxonomy of "accountability regimes" and considers how a policymaker seeking to achieve a goal should choose between (or combine) those regimes.⁵⁵ The regimes are public governance (in which politicians are accountable to voters, agency officials to politicians, low-level officials to high-level ones, and agencies to courts); markets (in which there is reciprocal accountability between firms and customers, between employees and employers, and between investors and firms); and social networks (a residual category encompassing all accountability relations that are neither government nor market, such as the bonds of mutual accountability within a profession or religious congregation). Mashaw uses these categories to frame a discussion of fragmented governance, which he loosely refers to as "contracted-out governance." We

⁵⁵ Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, AND EXPERIENCES* (Michael W. Dowdle, ed., 2006).

may worry about contracting out if the constraints operating on the implementer of the policy (say, the constraints on a contractor aiming to make profit within the terms of a competitively awarded contract) seem inappropriate to the policy (say, a welfare program that aims to exercise social control by setting norms and imposing sanctions, which may be difficult to specify in a contract). Another source of worry is the lack of transparency that may characterize profit-seeking firms, nonprofits, or professions to whom authority is subdelegated, in comparison to public agencies that are subject to reason-giving and freedom of information mandates. We may also fear that divesting public agencies of implementational tasks may, in the long run, erode the state's capacities, not only to implement policy but even to formulate it.

With these considerations in mind, Mashaw counsels close attention to the nature of each particular institutional choice and, in contrast to the synthetic theorizing that characterizes his work on internal law or legal culture, cautions against general conclusions. He follows up with an "audit" of mixed accountability regimes in SSDI, finding that each regime has pluses and minuses, which may flip depending on one's point of view. For instance, SSA's reliance on state DDSs makes the program less uniform but increases localized political accountability. Meanwhile, the SSA management's reliance on outside consultants for program evaluation provides the agency with more expertise and spreads information about the program to a broader public, though it risks weakening the internal capacity that SSA needs in order to deal effectively with the consultants. Mashaw himself is open to introducing market mechanisms depending on the circumstances. A panel he chaired recommended that contractors provide return-to-work services to SSDI recipients in exchange for a share of the benefits that would've been paid had the recipient not gone back to work.⁵⁶

Despite Mashaw's circumspection, one hopes it is possible to make conclusions about fragmented implementation at a higher level of generality than an individual program. Nina Mendelson's essay (Chapter 17) warns about a relatively general blind spot in how federal agencies rely on private actors. She begins with the foundational point that, contra the principle of institutional economics that an organization should rely on contractors only when it can closely specify the service it seeks, federal agencies today frequently rely upon outside actors for services that entail subjective judgments and even policy determinations. In particular, she has in mind the use of private firms or trade associations to assess regulated firms' compliance with law and, especially, to

⁵⁶ BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY 101–20 (Jerry L. Mashaw & Virginia P. Reno, eds., 1996).

formulate regulatory standards. Though many leading scholars think agencies, if given the necessary financial resources, can nonetheless hold outside implementers accountable via continuing supervision, Mendelson argues that even an agency well-funded for supervision has various incentives not to supervise as closely as it should. Funding may not translate into usable expertise; the agency may rely upon the private actor's work because doing so is an easy means to claim credit for addressing a problem; and regulatory standards formulated by private actors may track industry's already-existing behavior, making those standards more attractive to the agency because compliance will be less onerous to achieve. Nor can we expect external actors to press agencies to engage in serious oversight. Even if an agency fails to oversee the private actors on which it relies, this may not result in the injury to a particular person that is requisite for obtaining judicial review. And when OMB reviews agency rules, it assigns very low compliance costs to privately formulated regulatory standards, effectively encouraging agencies to adopt them. If agencies are unfortunately not in a position to evaluate the substance of the work that private actors perform in their name, says Mendelson, the agency may need to fall back on evaluating private implementers' processes, rather than directly judging their product.

Jon Michaels likewise argues for a relatively general principle to govern our thinking about one major area in which accountability regimes are mixed: agency engagement in commercial activity (Chapter 18). When the Treasury Department bails out a bank or automaker and thereby takes control of it, should Treasury vote its shares to maximize shareholder value? If public pension funds invest in capital markets, should they simply maximize fund value? If NASA produces new technologies, should it get them patented and commercially exploit them? When Amtrak provides train services, should it maximize profits? More generally, when governments contract for services or employ individuals, should they simply seek the service they immediately need for the lowest possible price or wage? Obviously, all these commercial activities could aim toward political, rather than strictly commercial, ends. Amtrak could subsidize travel to rural areas and to more congressional districts, public employers could pay above-market wages to maintain middle-class living standards, etc. To be sure, agencies routinely balance competing values, but Michaels argues that normally these are trade-offs among various political values (e.g., pollution versus economic growth), not between a political value and a commercial one – a trade-off that Michaels views as different in kind and more fraught. The fundamental structure of a public agency entails a kind of internal pluralism (politically appointed leadership, civil service rank-and-file, and outside stakeholder participation) that is incompatible with a narrow and rationalized focus on profit. And because agencies are vested with distinctly

coercive powers, their pursuit of commercial profit may signal that public means are being exploited for private ends, sapping state legitimacy. Further, because an agency's commercial activities are less likely to be subject to APA procedures or judicial review than its sovereign activities, the agency that uses commercial activities to pursue political ends (e.g., Treasury voting its shares in bailed-out firms to make them do things that it would be unable to make them do through regulation) is making an end-run around limits on governmental power. In Michaels's view, mixing the commercial and the sovereign poses fundamental threats to the state's integrity and legitimacy and to salutary limits on its power – threats of similar gravity to those we associate with mixing executive, legislative, and judicial functions. Michaels recommends a kind of separation of powers for commercial and sovereign acts, at least as a matter of internal agency organization: agencies should confine their own commercial activities to particular offices, and give those offices the insulation and latitude necessary to pursue simply commercial ends.

Richard Stewart's essay (Chapter 19) explores policy implementation in a context far removed from the stylized unitary federal agency: international agreements to which the United States is a party, each implemented via a multinational regulatory body, albeit with the expectation that internationally developed measures for implementing the agreement must be promulgated through ordinary channels of domestic US federal law (that is, congressional statutes or congressionally authorized agency action). Such agreements have historically been most prominent on the subject of tariff reduction, but they have now expanded well beyond that area to foster the coordination of domestic regulation across nations and its liberalization, as evidenced in current negotiations over the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). How is the multinational regulatory body established by such an agreement to make decisions about regulatory harmonization and get those decisions implemented? The first task is to reach consensus among the member countries. The multinational regulatory body will be helped by the very scale of the agreements, which encompass so many countries that many opportunities for horse-trading and bargaining will be open. Further, the proposals for TPP and TTIP provide for each member nation to set up its own process for assessing costs and benefits of national regulations (roughly on the model of OMB review in the United States). Such assessment can tighten the relationship between national policy goals and regulatory means, leaving less space for protectionism and rent-seeking. And despite the understandable pressures in favor of keeping the multinational regulatory body's deliberations secret (given that decision-making requires information that only industry can provide but that it does not want made

public), multinational regulatory bodies are likely to voluntarily impose on themselves some norms of transparency, participation, and reason-giving. Such norms can improve the quality of their decisions and win the cooperation of national officials (who must be relied on to implement the decisions) and national publics. These norms are analogous to Mashaw's internal law, in that the multinational regulatory body self-generates them without any external actor coercively obligating it to do so. National bodies of administrative law may, in turn, constrain how each nation's delegation to the multinational regulatory body behaves, and how national officials carry out the body's mandate.

A Final Note: Mashaw's Intellectual Approach

I have focused mainly on the substance of Mashaw's ideas, paying only incidental attention to his methodological assumptions about how scholars should discern, model, and understand human behavior. In fact, much of Mashaw's work fits into a qualitative tradition in political science and organizational sociology associated with scholars like James Q. Wilson, Michael Lipsky, Robert Kagan, Robert Katzmann, and Shep Melnick. This tradition operates on an understanding of human behavior that includes, but is emphatically not limited to, rationally maximizing one's personal economic interest. It prefers intensive case studies to statistical analysis. It therefore has an uncomfortable relationship with the ascendant paradigm in political science over the last generation, which models politicians, administrators, and voters as rational actors maximizing their own utility under constraint (positive political theory) and prefers to test its predictions, whenever possible, through econometric analysis of mass quantitative data, demoting case studies to the status of anecdote.

Positive political theory is especially fraught for a scholar such as Mashaw. Books like *Bureaucratic Justice* and *The Struggle for Auto Safety* reflect a belief that administrative law can aspire to democratic legitimacy and serve as a means for public-regarding reform. In the view of some positive political theorists, however, democratic legitimacy has little meaning, since the outcomes of electoral or legislative votes are the arbitrary product of agenda-setting rules; and legislative and administrative policymaking has an inherent tendency to favor organized minorities at the expense of diffuse majorities, diminishing social welfare compared to what the market would do.

Mashaw's skepticism of this paradigm is evident in much of his work. At the outset of *Bureaucratic Justice*, he criticizes what he considers the excessive parsimony and "cynicism" of contemporaneous rational choice treatments of

agency behavior.⁵⁷ In *The Struggle for Auto Safety*, the attribution of NHTSA's failure to the nation's "legal culture" is an alternative to a more familiar explanation, industry capture. Mashaw's recent turn to the nineteenth century in *Creating the Administrative Constitution* fits into a pattern in political science whereby a minority of scholars unwilling to commit themselves to rational choice theory and econometrics have adopted history as a basis for theorizing about governance.⁵⁸ And in his Conclusion to this volume, Mashaw uses the micro-evidence characteristic of the case study approach to defend his view of NHTSA as a failed agency against a critique that is mainly premised on statistical metrics of NHTSA's rulemaking activity.

Mashaw is skeptical – but not dismissive. Particularly when it comes to positive political theory, he tempers his criticism with a high level of engagement. Indeed he has devoted several of his works (mostly works not discussed by the contributors to this volume) to positive political theory – critiquing it, yes, but also grappling with its implications and sometimes embracing and extending them. The culmination of this line of Mashaw's scholarship is *Greed, Chaos, and Governance* (1997), which examines what positive political theory says about administrative law. The book is critical of several claims that other scholars have made in that vein, but it takes the claims seriously and seeks to answer them on their own terms. For example, Mashaw rejects the idea that democracy's need for agenda-setting rules renders meaningfully democratic choice impossible. There is indeed some arbitrariness in choosing any agenda-setting regime, but regimes differ in their probability of producing outcomes preferred by more of the population, and that probability means that some constitutional structures have a claim to democratic legitimacy, at least relative to other actual possibilities. Further, Mashaw finds many ways of affirmatively employing positive political theory to figure out how institutions may better serve democratic mandates or social welfare. Consider just one example: contra the view of many positive political theorists that Congress's rampant delegation of power to agencies diminishes social welfare, Mashaw points out that: (a) broad delegations empower agencies and often, by extension, the President; (b) Presidents are less inclined to distribute "pork" than are members of Congress; and (c) logrolling, which promotes pork, is more difficult for agencies to do than Congress, since each agency has a confined jurisdiction. Hence, broad delegations may well increase social welfare.⁵⁹

⁵⁷ MASHAW, *supra* note 4, at 12–13.

⁵⁸ E.g., KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

⁵⁹ JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 152–53 (1997).

The book is characteristic of Mashaw's temperament. No major intellectual approach to administrative behavior is alien to him. For a mind always seeking alternatives, always seeking to view the familiar in a new light, and always subjecting even the most established understandings to the most searching tests, it could hardly be otherwise.