Every institution seems to have a creation myth of some kind. Many people think that the federal bureaucracy was a creation of the New Deal, which deviated from the Framers' vision of small government. More sophisticated people realize that the administrative state began in the late 19th century with the creation of the Interstate Commerce Commission.

In a recent book, Jerry Mashaw shows that both views are wrong. Bureaucracy and administrative procedure are almost as old as the Republic. For instance, the oldest federal safety regulation predates the Civil War. It related to steamboat boilers. Large numbers of clerks toiled away to issue land claims or veterans' pensions. Civil War pension at one point accounted for a startling share of the federal budget, like Social Security today.

As these institutions developed, they also developed administrative processes that became seen as internally binding within agencies and might also be copied by other agencies. The courts had little involvement in administrative issues, which is why legal scholars haven't noticed. But many of these processes were to be transmuted into statutory form and incorporated into modern administrative law.

Mashaw reaches two major conclusions from this fascinating history. First, the administrative state is not a modern liberal departure from the constitutional order. It has been a vital part of our government all along. And second, a review of the history shows that we have struggled with the same problem all along: trying to combine democratic accountability and the virtues of efficient, expert administrators. Today, we favor heavy use of judicial review to help solve these problems, combined with Presidential oversight. That may be the best we can do, but ultimately the tension between these goals may simply be inherent to democratic government.