Greve asserts that an overarching theory of competitive federalism is essential for breaking this disastrous system of government overreach. The Supreme Court's conservatives are bogged down by ineffective, narrow efforts to discover original intent and balance state and federal power. Instead, they need to articulate "what federalism is supposed to do" (p. 14). A conservative judicial strategy should inject more competition into federalism by reconstructing the dormant commerce clause, reenergizing federal common law, and preempting state interference with commerce (p. 355). But, the author cautions, the competitive American federalism that operated in the nineteenth century cannot be a model, because the conditions that stabilized it could not endure (p. 89).

The *Upside-Down Constitution* is learned, perceptive, and innovative. Greve insists that the question "Federalism to what end?" (p. 314) is central to the clash of politics and markets. His extraordinary scholarship synthesizes a vast literature that includes historians, legal professionals, and political scientists (who will recognize arguments of Theodore Lowi, Richard Bensel, Keith Whittington, and others). He challenges readers—especially conservatives, and most especially conservative jurists—to understand how government centralization and interstate relationships together expand government and undermine the checks on governments' pursuit of self-interest at both the state and federal levels.

The book's limitations will also frustrate readers, however. Many of them will grow impatient with the ambiguity of important concepts and relationships. Although state governments' exploitation of citizens in other states is a cornerstone of the book's analysis, it does not explain how to distinguish state exploitation from legitimate state efforts to protect state citizens. The book also fails to help us distinguish legitimate from abusive public goods, or legitimate from illegitimate externalities, although the latter distinction seems easy enough to Greve, since "Every econ. freshman can invent 'externalities' that render local projects of general importance" (p. 164). The book's causal explanations are loose and inconsistent. At some moments, important outcomes are inevitable, as when "[t]he political economy that had sustained the Commerce Clause collapsed, and the demise of the old understanding was a foregone conclusion well before the New Deal" (pp. 204–5). At others, actors seem to have considerable influence over outcomes, as when New Deal judges chose to abandon the policing of horizontal federalism.

Another limitation is that the book shifts back and forth between ideal types and empirical reality, leaving readers wondering whether an assertion is driven by theory or evidence (or perhaps evidence selected to illustrate the theory). The three ideal types—competitive, New Deal, and contemporary federalism—significantly overlap in actual American history. It is easy to show that the Constitution's Framers built a foundation for state policy cartels under national gov-

ernment auspices. Neither New Deal nor "Our" federalism has wiped out interstate competition for business investment, at huge costs for state governments and without a clear payoff for the national economy.

Many readers will criticize the book for emphasizing market-driven economic growth at the expense of more important values, such as individual economic security and equality of opportunity. Reasonable people have different opinions about what should be marketable and what should not, and Americans have settled these issues through the political process. After World War I, the people—not just bootleggers or greedy elites—supported a constitutional amendment that devastated large and perfectly legal American alcohol industries. But the democratic process plays little role in this public choice analysis. Here, the most important vote that American "citizen-consumers" cast is with their wallets and their feet, not with their ballots, hearts, and hands. Perhaps the plundering elites of the political class have hoodwinked some of the people some of the time, but broad and deep popular support sustains many government intrusions into markets.

Greve's analysis of federalism will be influential for years to come. The author strengthens the theoretical tools of conservative judges and lawyers. But although he himself emphasizes that politics shape constitutional interpretation, his strongest admirers will regret that he does not suggest how a conservative politics can be constructed that will restore and sustain this competitive federalism.

Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law.

By Jerry L. Mashaw. New Haven: Yale University Press, 2012. 432p.

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— Daniel Sledge, *University of Texas Arlington*

Jerry Mashaw has written an important book that will be of substantial interest to scholars of administrative law, bureaucracy, and American political development. Its central concern is the development of administrative law from the founding of the republic through the Gilded Age. Its central argument is that administrative discretion and administrative law, rather than being late and potentially problematic innovations in American national government, were central features of the early American republic.

As Mashaw writes, "there is a hole in the text of the U.S. Constitution" (p. 10). The Constitution creates a national legislature, a presidency and vice presidency, and a Supreme Court. It does not, however, outline processes through which the nation's laws will be administered or through which administrators will be monitored or held accountable.

The hole in the Constitution identified by Mashaw has long loomed large for scholars concerned with the development of governing institutions in the United States. In Theodore Lowi's seminal account, the Constitution's

silence on the topic of administration was of little consequence until the creation of the Interstate Commerce Commission (ICC) in 1887. Before 1887, the national government was dominated by a Congress that wrote “virtually self-executing laws” (Theodore J. Lowi, *The End of Liberalism*, 1979, p. 94).

In creating the ICC, however, Congress delegated its legislative authority to a regulatory agency in a novel way. During the New Deal, the extent of congressional delegation of lawmaking authority to the executive branch and administrative agencies assumed massive and transformative proportions. Ultimately, Lowi argued, “[a] whole new jurisprudence was developed in order to justify it, and the federal judiciary adjusted itself accordingly” (*End of Liberalism*, p. 274).

Stephen Skowronek’s analysis in *Building a New American State* (1982), meanwhile, emphasizes the unique nature of the nineteenth-century state. Rather than being “stateless,” as Tocqueville and Hegel would have it, the United States possessed a state of “courts and parties.” In lieu of an administrative state, Skowronek argued, the nation was bound together by the decisions of federal judges and the unifying effects of party.

These accounts of the nineteenth-century state point toward a new and disturbing democratic deficit at the heart of the modern administrative state. Particularly from the perspective of Lowi, reforms such as the 1946 Administrative Practice Act can be viewed both as an attempt to recreate political accountability for an administrative state that has acquired too much discretion and as an implicit admission that federal agencies and jurisdictions have proliferated to the point that the modern American state borders on being ungovernable.

Mashaw offers a sustained critique of the highly influential image of the nineteenth-century state that emerges from these works, which he views as both incomplete and misleading. Although he acknowledges that “[t]hese conventional characterizations capture some essential truths about national administrative organization and administrative law in nineteenth-century America” (p. 5), he argues that the true nature of federal administration and of administrative law in the nineteenth century has yet to be fully appreciated. Rather than constituting “a tragic fall from constitutional grace” (p. 233) that occurred only after 1887, Mashaw finds that congressional delegation and administrative discretion have characterized the American state from the beginning.

Mashaw’s arguments are grounded in a careful and thorough excavation of the discretionary authority possessed by federal administrators during the first century of the republic, as well as in the distinct methods through which the administration of federal law was monitored and through which elected leaders attempted to render it accountable.

The book is structured chronologically, with sections on the Federalist period, the Jeffersonian era and its after-

math, the Jacksonian period, and the Gilded Age. The scope of Mashaw’s research is impressive. He offers discussions of the early development of executive departments, the distribution of military pensions (both in the antebellum era and after the Civil War), enforcement of the Embargo of 1807–9, the adjudication of disputes over land claims in the expanding republic, conflicts over the First and Second Banks, the regulation of steamships, disputes between presidents and the Congress over the control of administration and removal of officials, and the procedures of the Post Office.

Given the Constitution’s lack of detailed guidance, the period under study was by necessity one of experimentation. It was understood, Mashaw finds, that attempts should be made for administration to embody principles such as political responsiveness, procedural fairness, and respect for the rights of individuals. In practice, however, effective political control was often difficult to establish. Distant and understaffed, Congress had little ability to routinely monitor administrative actions. From the beginning, the president had less than total control over an administrative arm that included independent or quasi-independent officers, such as those who ran the First and Second Banks as well as the Post Office.

As a general rule, Mashaw finds that administrative law did a surprisingly effective job of creating frameworks that embodied procedural fairness and respect for individual rights. Crucially, he identifies internal rules and procedures as the primary site of these safeguards and of administrative law more broadly during the period under study. Overly focused on the role of external checks and in particular on judicial review as the most important component of administrative law, the author argues, contemporary scholars are in effect blind to the administrative law of the eighteenth and nineteenth centuries. As a result, he suggests, meaningful and instructive continuities in the aims and commitments of administrative law from the early republic through the present day have been overlooked. The United States has struggled to combine effective administration with democratic accountability and political oversight since the beginning, he writes, and can be expected to continue to do so into the future.

In calling into question and adding nuance to some of the assumptions—whether implicit or explicit—that have long underpinned the study of the development of the modern American state, Mashaw’s work makes an important contribution to a line of revisionist scholarship that includes the work of Richard John, Brian Balogh, and William Novak. In his focus on the discretion of administrators, meanwhile, Mashaw adds also to the discussion of bureaucratic autonomy associated with the work of Dan Carpenter.

Given the extent of the evidence marshaled, Mashaw’s argument that a great deal of congressional delegation and administrative discretion existed from the first days of the

republic is persuasive. Scholars interested in American political development, whether fully persuaded by Mashaw's broader critique or not, will find this book a rich source of ideas and potential avenues of inquiry. As the author suggests, the stakes here are potentially quite high: Our understandings of administrative law during the Constitution's first one hundred years inform our interpretations of the modern state and indeed our evaluations of its legitimacy.

After Evil: A Politics of Human Rights. By Robert Meister. New York: Columbia University Press, 2010. 544p. \$85.00 cloth, \$28.00 paper.
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— Claudio Corradetti, *University of Oslo*

Rarely is a philosophy book able to keep its readers moving through chapters, as is the case of Robert Meister's *After Evil*. It is no wonder, then, that this work was conceived all at once, as the author confesses, with the ambition to answer the most basic question on the philosophical relevance of post-war justice: How can there be convergence on a shared notion of evil and on its temporal contextualization? Meister's very effective answer argues "that the past is evil is to agree, also, that the evil is past" (69). He further asks readers to consider that political transitions be conceived as "survivor stories," reflecting "a non-neutral judgment on the history that preceded them" in order to "instantiate a temporal reconstitution of the 'we'" (vii–viii).

To think of justice in transitional terms is not simply to propose yet another paradigm of justice, but rather to answer "the question of who does what *to* whom *for* whom and at *whose expense*" and to introduce a temporal dimension to traditional ways of conceiving normativity (84). As Meister writes, "Justice is an intertemporal problem," and its claims arise from a history of struggles and neglected rights. How, then, can we think to a time for justice as an intertemporal period that is "as a time between times"? Here an analogy is made to Giorgio Agamben's interpretation of St. Paul and the time we live in: "the time it takes for time to come to an end" after Christ's rescue, but before God's justice (10). Such a reign of intertemporality is also, for Meister, the privileged locus for inter-messianic (and even anti-messianic) Human Rights Discourse—the grounding paradigm of the post-1989 policy on human rights. The temporal entrapment between a past-wrong (which is never completely past) and a future redemption (that is always yet to come), where former victims and beneficiaries wait to receive final judgment, shows "that now is never the time for justice" (12).

For Meister, while the post-1789 doctrine of the Rights of Man had an innovative power in revolutionary France, the post-1989 Human Rights Discourse represents a counter-revolutionary force deprived of a critical stand. In other words, it is the "war cry of a self-described 'International Community' led by the victors in the cold war" (7). The

author gives an example of such "normalizing" policy for contemporary human rights discourse in the Responsibility to Protect strategy. One can certainly find in contemporary refugee camps a transfiguration, if not a complete possession akin to the body-control employed in the Nazi death camps. Indeed, even though in the former physical suppression or torture is abolished, the "rescuing" purposes of the Responsibility to Protect strategy legitimize a general disempowerment of "the rescued" and the idea of "bombs that rescue" (5). In addition, it claims a monopoly over the notion of "humanity" which is a new way to replicate a friend-enemy policy, or as Carl Schmitt (quoted by Meister) says, "whoever invokes humanity wants to cheat" (33).

The underlying general critique of human rights discourse as a permanent transitional role for justice is not new. In fact, as the author reminds us, it is found in Marx's critique of liberal societies and their reproduction of inequalities. There human rights discourses are employed to confine wrongs and victims as events of the past. The Human Rights Discourse, therefore, does not simply address the structural relations of victim and beneficiary. Rather, it defends the "general exoneration of *all* nonperpetrators" (26), blurring relevant moral distinctions between passively supporting subjects of past regimes and the current beneficiaries and supporters of reconstituted societies. To counteract injustices, it is claimed, is always more costly than to passively assist them as a spectator; therefore, in order to proceed further into social reconciliation, a radical shift must be made in becoming witnesses (and not just bystanders) of a past injustice. To shift from bystander to witness is not merely to place victims into a remembered past; it is rather, and more importantly, to (re-)construct a *hypothetical other* bystander as a counterfactual enemy had it been possible to achieve justice *on time* (212ff, 308). There are different strategies as well as descriptions by which processes of the interiorization of the other are realized. One interesting way, which places this book among the most advanced works of critical theory, conceives of the psychic analysis of social groups and socialization of individuals that Meister aptly refers to through Melanie Klein's theory of "projective identification" (35).

From a more historical perspective, the author uses great conceptual accuracy and documental sources to deal with some of the most significant key-stories of the contemporary crisis of civilization such as the recurrent problem of the Jewish question, the discussion of the Fourteenth Amendment in post-Civil War America, and finally (again) the "normalizing" effects of Truth and Reconciliation Commissions, particularly in the South African transitional process.

As for the Jewish question, the discussion is still about how it is possible in today's world to conceive the uniqueness of "Jewishness" given the universality of human rights from which this issue has been regenerated in contemporary times. Meister also courageously addresses the